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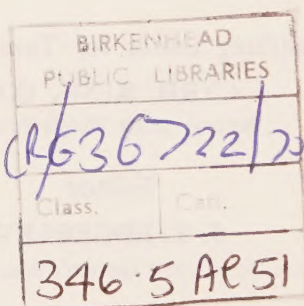
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## REFERENCES

These reports contain references, which follow after the headnotes, to the following major works of legal reference described in the manner indicated below—

### HALSBURY'S LAWS OF ENGLAND, SIMONDS EDITION

The reference 2 HALSBURY'S LAWS (3rd Edn.) 20, para. 48, refers to paragraph 48 on page 20 of Volume 2 of the third edition of Halsbury's Laws of England, of which Viscount Simonds is Editor-in-Chief.

### HALSBURY'S STATUTES OF ENGLAND, SECOND EDITION

The reference 26 HALSBURY'S STATUTES (2nd Edn.) 138, refers to page 138 of Volume 26 of the second edition of Halsbury's Statutes.

### ENGLISH AND EMPIRE DIGEST

References are to the "Blue-Band" volumes of the Digest, and to the Continuation Volumes of the "Blue-Band" or replacement volumes.

The reference 31 DIGEST (Repl.) 244, 3794, refers to case No. 3794 on page 244 of Digest Replacement Volume 31.

The reference DIGEST (Cont. Vol. B) 287, 7540b, refers to case No. 7540b on page 287 of Digest Continuation Volume B.

### HALSBURY'S STATUTORY INSTRUMENTS

The reference 12 HALSBURY'S STATUTORY INSTRUMENTS 124, refers to page 124 of Volume 12 of Halsbury's Statutory Instruments, first edition.

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### ENCYCLOPAEDIA OF FORMS AND PRECEDENTS

The reference 15 ENCY. FORMS & PRECEDENTS (3rd Edn.) 938, Form 231, refers to Form 231 on page 938 of Volume 15 of the third edition, and the reference 7 ENCY. FORMS & PRECEDENTS (4th Edn.) 247, Form 12, refers to Form 12 on page 247 of Volume 7 of the fourth edition, of the Encyclopaedia of Forms and Precedents.





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## CORRIGENDA

[1968] 1 All E.R.

- p. 1025. *WHITE v. TAYLOR* (No. 2). Line F.1: for “plaintiffs’ predecessor” read “defendants’ predecessor”; p. 1027, lines A.3 and 4: from the sentence “It was held that he could not,” delete the word “not”; p. 1036, line E.4: for “of any other necessary access to the Down” read “of any other means of access to the down”.
- pp. 1137, 1138. *MEGGS v. LIVERPOOL CORPORATION*. Lines C.2 and F.2: for “a quarter” read “three-quarters”.

[1968] 2 All E.R.

- p. 1. *Re STAINES URBAN DISTRICT COUNCIL’S AGREEMENT*. Line G.5: for “of a period” read “or a period”. Line G.6: for “or the issue” read “of the issue”.
- pp. 36, 38. *ASTLEY INDUSTRIAL TRUST, LTD. v. MILLER*. Lines H.5 and G.2, 3 respectively: for “The plaintiffs ... for the car” substitute “The plaintiffs’ cheque for the car was received.”
- p. 90. *R. v. BOW ROAD DOMESTIC PROCEEDINGS COURT, Ex parte ADEDIGBA*. Counsel for mother: for “*Zwi Vardi*” read “*Zvi Vardy*”.
- p. 164. *DAILY MIRROR NEWSPAPERS, LTD. v. GARDNER*. Line A.1: delete the word “either”.
- p. 472. *HENRY KENDALL & SONS v. WILLIAM LILICO & SONS, LTD.* Line G.5: for “I do consider” read “I do not consider”; p. 492, line E.5: for “remuneration” read “examination”.
- p. 665. *BAMFORD v. BAMFORD*. Line D.5: for “so much power” read “no such power”.
- p. 1019. *COVELL v. SWEETLAND*. Line A.6: for “was a deed” read “was a separation deed”.



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## Re STAINES URBAN DISTRICT COUNCIL'S AGREEMENT. TRIGGS v. STAINES URBAN DISTRICT COUNCIL.

[CHANCERY DIVISION (Cross, J.), January 24, February 12, 1968.]

*Public Authority—Statutory powers—Contract not to exercise—Option to purchase property—Consideration for option included covenant by local planning authority not to exercise statutory power of compulsory acquisition—Cricket field—Covenant ineffective in law—Contract granting option not reasonable bargain without effective covenant—Option unenforceable by local authority—Land charge in respect of option vacated.*

In 1935 T. leased ten acres of land to a company, for the purposes of a cricket club, at a rent of £2 per annum for a term of ninety-seven years from Jan. 9, 1935, or a term commencing on that date and ending on the company as signing, underletting, etc., the demised property or any part thereof or entering into liquidation, whichever term should be the shorter. The company covenanted to use the property only as a cricket ground or for such other games as T. should approve. Some years later, with a view to resolving differences consequent on the defendant council, the planning authority, having proposed the reservation of the land as a "proposed public open space", T., the company and the defendant council entered into an agreement under seal dated June 27, 1939. By this agreement T. granted the defendant council the option to purchase the property for £3,140 on certain terms. The period during which the option should be exercisable was a period commencing on the date of the agreement and ending six weeks after the determination of the lease of a period not exceeding twenty-one years after the death of the survivor or the issue now living of His late Majesty King George V, whichever period should be the shorter. Clause 3 provided that if the council did not exercise the option to purchase by notice in writing within the time specified the land should be for ever released from reservation as a proposed open space, and should be available for immediate development for residential purposes in accordance with the defendant council's planning scheme. By cl. 5 the defendant council covenanted that so long as the land was occupied by the company as tenants thereof, the defendant council would not exercise the option to purchase or compulsorily acquire the land or any part thereof under statutory powers. By cl. 6 (a) T. agreed not to make any claim for compensation and by cl. 6 (b) the defendant council agreed not to make any claim for betterment. T. died in May, 1960. In September, 1965, the defendant council registered the agreement as a land charge. In April, 1967, the cricket field became vested beneficially in the plaintiff subject to the lease. On application by the plaintiff for a declaration that the agreement was unenforceable and



for vacation of the land charge, it was conceded that cl. 3, the second half of cl. 5 and cl. 6 (b) of the agreement were, from the first, unenforceable by T. and the company against the defendant council, which could not validly contract not to exercise the relevant statutory powers.

**Held:** the enforceability of the agreement of 1939 depended on whether the bargain which it comprised would be one into which a reasonable man in T.'s position might have entered if he had appreciated that the ineffective covenants by the defendant council were unenforceable; in the present case the covenant not to exercise powers of compulsory acquisition was among those that were unenforceable, and in law the defendant council were free to exercise such power, so that they had not given and could not give the consideration that they purported to give, and, accordingly, the option was unenforceable by the defendant council and the land charge should be vacated (see p. 6, letters C, F and H, and p. 7, letter C, post).

*Bennett v. Bennett* ([1952] 1 All E.R. 413) followed.

Dictum of SALMON, L.J., in *Bell Houses, Ltd. v. City Wall Properties, Ltd.* ([1966] 2 All E.R. at p. 690) distinguished.

[As to the inability of a public authority to bind itself not to exercise its statutory powers, see 24 HALSBURY'S LAWS (3rd Edn.) 602, para. 1108; as to the inability to assign or delegate statutory powers, see 30 *ibid.*, 689 para. 1328 and p. 699, para. 1341; and for cases concerning the granting of compulsory or permissive statutory powers for public purposes, see 11 DIGEST (Repl.) 103, 2-5.

As to the vacation of a registration of a land charge, see 23 HALSBURY'S LAWS (3rd Edn.) pp. 77, 78, para. 161.]

#### Cases referred to:

*Bell Houses, Ltd. v. City Wall Properties, Ltd.*, [1966] 2 All E.R. 674; [1966] 2 Q.B. 656; [1966] 2 W.L.R. 1323; Digest (Cont. Vol. B) 104, 4475a.

*Bennett v. Bennett*, [1952] 1 All E.R. 413; [1952] 1 K.B. 249; Digest (Cont. Vol. A) 807, 6344.

*Goodinson v. Goodinson*, [1954] 2 All E.R. 255; [1954] 2 Q.B. 118; [1954] 2 W.L.R. 1121; Digest (Cont. Vol. A) 672, 622a.

#### Adjourned Summons.

This was an application under s. 10 of the Land Charges Act, 1925, by originating summons dated May 24, 1967, by Arthur Edmund Triggs, the plaintiff, against the Urban District Council of Staines, the defendants, whereby the plaintiff claimed (i) a declaration that an agreement dated June 27, 1939, and made between the defendant council and others was ultra vires the defendants and was void ab initio; (ii) alternatively, a declaration that the said agreement was unenforceable ab initio; (iii) alternatively, a declaration that the said agreement was not then enforceable in equity, and (iv) an order that the registration of the land charge class C (iv) alleged to have been created by one Walter Triggs in favour of the defendant council on June 27, 1939, which was registered on behalf of the defendant council against the plaintiff in the register of Land Charges at H.M. Land Registry on Sept. 30, 1965, under reference LC 135838/65 be vacated.

By a cross-summons dated July 25, 1967, the defendant council sought (A) a declaration that on the true construction of the agreement dated June 27, 1939, and as between the plaintiff both in his personal capacity and as the executor of Walter Triggs, deceased, on the one hand and the defendant council on the other hand, the option to purchase granted by cl. 1 of the said agreement and the ancillary provisions of cl. 2, 4, 6(a) and 7 thereof were subsisting and binding on the plaintiff; and (B) a declaration that on the true construction of the said agreement and as between the plaintiff and the defendant council the provisions of cl. 3, 5 and 6 (b) of the said agreement were ultra vires the defendant council and void ab initio. The facts are set out in the judgment.

A The case noted below\* was cited during the argument in addition to the cases referred to in the judgment.

*George Newsom, Q.C., and J. M. Henty for the plaintiff.*

*S. W. Templeman, Q.C., and P. A. Goodall for the defendant council.*

*Cur. adv. vult.*

B Feb. 12. **CROSS, J.**, read the following judgment: On Jan. 17, 1935, the late Walter Triggs leased ten acres of land at Laleham (which was then in Middlesex) to the Laleham Cricket and Sports Club, Ltd., of which he was the moving spirit. The lease, after reciting that the lessor had recently bought the land and erected a pavilion on it, demised it to the company at a rent of £2 per annum for a term

C “commencing on Jan. 9, 1935, and ending on the company assigning underletting charging or parting with the possession of the demised property or any part or parts thereof or attempting so to do (except as hereinafter authorised) or declaring itself to be a trustee of the same or entering into liquidation whether voluntary or otherwise (not being merely a voluntary liquidation for the purpose of reconstruction) or for the term of ninety-seven years from Jan. 9, 1935, whichever term shall be the shorter.”

D By the lease the company covenanted (inter alia) to use the demised property only as a cricket ground, or for such other games as might be approved by the landlord.

E Some years later the Staines Urban District Council, which under the Town and Country Planning Act, 1932, was the planning authority for the district, reserved the demised property in their provisional town planning scheme as a “proposed public open space”. Mr. Triggs and the company lodged objections to the proposed reservation and, with a view to resolving their differences, the three parties entered into an agreement under seal on June 27, 1939, most of which I must read. In it the Staines Urban District Council is called “the council” Mr. Triggs is called “the freeholder”, and the company is called “the tenant”. After reciting the proposed reservation of the land as a public open space and the objections which had been lodged to it, the agreement continued:

G “Now in consideration of the premises this deed witnesseth and it is hereby agreed and declared as follows:—

“1. The freeholder hereby grants unto the council the option to purchase the property hereinafter mentioned upon the following terms that is to say:—

H “(a) The period during which the option shall be exercised shall be either a period commencing on the date hereof and ending six weeks after the determination of the lease or a period not exceeding twenty-one years after the death of the survivor of the issue now living of His Late Majesty King George V whichever period shall be the shorter.

I “(b) The council to purchase for the sum of £3,140 all that piece or parcel of land in the parish of Laleham in the county of Middlesex having a frontage to the Ashford Road Laleham and known as the Laleham Cricket field which said piece or parcel of land is more particularly described on the plan annexed hereto and thereon edged pink.

“(c) The day for the completion of the purchase to be one month after the date upon which the council shall serve notice in writing upon the freeholder of its intention to exercise the said option or upon such earlier day as may be agreed between the freeholder and the council and subject always to the interest of the tenants in the said land.

“(d) The freeholder or the estate owner in fee simple for the time being of the said land to provide a root of title at least thirty years old.

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\* *Attwood v. Lamont*, [1920] All E.R. Rep. 55; [1920] 3 K.B. 571.

"(e) Vacant possession to be given on completion and any action which it shall be found necessary to take in order to secure vacant possession of the said land for the council to be taken at the expense of the freeholder or the estate owner in fee simple for the time being. The freeholder and the tenant shall have the right to remove all buildings and erections on the said land prior to completion, they making good all damage caused by such removal subject nevertheless to the right of the council to purchase such buildings and erections at a sum to be agreed by the surveyor to the freeholder and the district valuer.

"(f) Except as varied by the terms hereof these presents incorporate the National Conditions of Sale (13th Edn.) Provided nevertheless that cl. 20 of such conditions shall not apply.

"2. The freeholder so as to bind his successors in title and assigns and the tenants jointly and severally hereby covenant with the council that when he or they have been given notice (whether verbally or in writing) by any other of them to determine the lease or if the lease shall be determined otherwise than by notice he or they will forthwith inform the council in writing that he or they have received such notice or that the lease has been determined as the case may be.

"3. Provided nevertheless that if the council shall not exercise the option to purchase by notice in writing to the freeholder or his successors in title within the time specified in cl. 1 (a) hereof the said land shall be forever released from reservation as a proposed public open space and shall be available for immediate development for residential purposes in accordance with the planning scheme of the council (which shall be or be deemed to be amended or varied accordingly) at densities indicated on the said plan annexed hereto.

"4. Provided also that in the event of the council exercising the option to purchase hereby granted and taking a conveyance of the said property from the freeholder or his successors in title and paying the freeholder the said purchase price the freeholder hereby covenants for himself and his successors in title as aforesaid that he will not make any claim for compensation in connexion with the acquisition of the said land by the council and it is hereby agreed and declared that the freeholder and his successors in title shall not be entitled to any compensation in connexion with the said acquisition if the council shall exercise their option.

"5. The council hereby covenants that so long as the said land is occupied by the tenants as tenants thereof that they the council will not exercise the option to purchase or compulsorily acquire the said land or any part thereof under their statutory powers or any of them.

"6. In consideration of the covenants and agreements upon the part of the council and the freeholder herein contained:—

"(a) The freeholder for himself his successors in title and assigns hereby covenants not to make any claim for compensation from the council under the Town and Country Planning Act, 1932 and it is hereby agreed and declared that the freeholder his successors in title and assigns are not and shall not be entitled to any compensation in respect of the said property under the provisions contained in the said Act.

"(b) The council for itself and its successors in title hereby covenants not to make any claim for betterment or otherwise under the said Act from the freeholder and/or the tenants."

Mr. Triggs died on May 17, 1960, having by his will dated June 7, 1959, appointed the plaintiff, Arthur Edmund Triggs, his executor, and probate of Mr. Triggs' will was granted to the plaintiff on Dec. 6, 1962. On Apr. 11, 1967, the plaintiff assented to the vesting of the cricket field in himself beneficially, subject to and with the benefit of the lease. The land is still being used by the company as a sports ground and the lease is still on foot.



A On Sept. 30, 1965, the council registered the agreement as a land charge. The plaintiff has recently taken the point that the agreement of June 27, 1939, is void or unenforceable against him because the council was incapable of giving the consideration for it which it purported to give, and on May 24, 1967, he issued a summons against the council for a declaration to that effect and for the vacation of the registration of the land charge.

B Since the date of the agreement certain changes have taken place in what I may call the town planning position. On July 1, 1948, when the Town and Country Planning Act, 1947, came into force, the Middlesex County Council became the town planning authority in place of the defendant council, and on May 19, 1960, the cricket field which had hitherto been reserved as a public open space was included in the proposed development plan of the Middlesex County Council as

C a private sports ground. Then on Apr. 1, 1965, by virtue of the London Government Act 1963, the Surrey County Council became the planning authority for the district. The Acts of 1947 and 1963 contained provisions transferring the benefit and burden of certain contracts entered into by the previous town planning authorities and it may be that the benefit of the agreement of June 27, 1939, is now vested in the Surrey County Council. That body has, however, stated

D that it does not wish to be added as a defendant and, as it is certainly not clear that the defendants, the Staines Urban District Council, have no longer any rights in the matter, I agreed at the request of counsel on both sides to decide the point at issue between the parties. If I decide that the agreement is enforceable, the question whether the benefit of it is vested in the Staines Urban District Council or the Surrey County Council can probably be settled by agreement

E between those bodies.

Before I come to the main point at issue, there is a question of the construction and effect of cl. 5 of the agreement to which I should refer. I think that the opening words of that clause govern both the covenants contained in it, that is to say, that the council only covenants not to exercise its statutory powers to acquire the land compulsorily (which was presumably a reference to s. 25 (1) of the Act

F of 1932), so long as the land is occupied by the company as tenants under the lease. I did not understand counsel for the plaintiff to dispute this; but he argued that if cl. 1 (a) was read together with cl. 5 the option granted by the agreement was void for perpetuity. The basis of the argument, as I understood it, was that cl. 5 showed that the option was intended to be exercisable after the determination of the lease and that the lease might well be still on foot after the expiry

G of the perpetuity period. The latter point is, of course, true. All the royal lives may determine more than twenty-one years before the expiry of the lease; but under cl. 1 (a) the council is bound to exercise the option, if it exercises it at all, within whichever of the two periods therein named is the shorter. Clause 5 merely says that the council cannot exercise the option while the lease is still on foot, with the result that if the perpetuity period runs out while the lease is still

H on foot, the option ceases to be exercisable.

I turn now to the main question. The general purpose of the agreement is clear enough. On the one hand, the council was ready to abandon any idea of acquiring the land as a public open space so long as it should be used by the company as a private sports ground. On the other hand, it wished to have the opportunity of buying the land for use as a public open space whenever the company ceased

I to use it as a private sports ground. If it did not then wish to buy the land, it was willing that the owner should be able to develop it as he chose. As the option had to be confined to the perpetuity period, there remained a remote possibility that the land would still be being used as a private sports ground under the lease after the end of the perpetuity period. In that event, although the option would no longer be exercisable, the council would have its powers under the town planning legislation. The difficulty which was overlooked by those who prepared the agreement was that the council could not effectively contract not to exercise its statutory powers or to abdicate its statutory duties. It is conceded by the

council that cl. 3, the second half of cl. 5 and cl. 6 (b) were from the first provisions which were unenforceable by Mr. Triggs and the company against the council (1). A

What is the consequence of this? A similar problem was considered by the Court of Appeal in *Bennett v. Bennett* (2), and *Goodinson v. Goodinson* (3), in relation to covenants by a wife not to apply to the court for maintenance. The question, as I understand, is one of degree. If the void covenants form the whole or substantially the whole consideration for the promise which the plaintiff is seeking to enforce, then the plaintiff will be unable to enforce the defendants' promise. If, on the other hand, the void covenants form only a subordinate part of the consideration for the defendants' promise, so that their elimination will leave the bargain a reasonable one, the plaintiff will be able to enforce the defendants' promise, despite the fact that part of the consideration which the plaintiff gave is unenforceable. It is to be observed that the question is not whether the defendant would in fact have executed the document in question if he had appreciated that he would not be able to enforce the void covenants entered into by the plaintiff, but simply whether the bargain without these covenants would be one which a reasonable man in the position of the defendant might have entered into. B C

If one applies this principle to the present case it appears to me that cl. 3 and cl. 6 (b) of the agreement form a merely subordinate part of the consideration for which Mr. Triggs was giving the option. What was, one would suppose, of most interest to him was that the council should not go on with its scheme so long as the company wished to use the land as a sports ground. Clause 3 and cl. 6 (b) deal simply with the contingency of the option becoming exercisable because the lease had determined but the council not wishing to exercise it. Presumably it would exercise the option if the land was then worth more than £3,140 and the value of land is more likely to rise than to fall. So cl. 3 and cl. 6 (b) related to a situation which was not very likely ever to arise and in any case would probably not arise for a long time. If, therefore, the council could have effectively bound itself not to put its scheme into operation and not to take any steps to acquire the land compulsorily so long as the lease was in force, I would have thought that the grant of the option would be valid, notwithstanding that cl. 3 and cl. 6 (b) were unenforceable. The difficulty in the way of the council, however, is that the second half of cl. 5 is unenforceable too. No doubt as a practical matter, once the council had executed the agreement, there was no real risk that it would take any steps to put this part of the scheme into operation so long as the lease was on foot and the land was being used by the company as a sports ground, and if the parties had realised that the council could not bind itself legally in the matter Mr. Triggs might well have been prepared to grant the option for a nominal consideration in return for an honourable assurance by the council. In fact, however, he granted the option in consideration of a number of promises by the council which purported to be legally binding, but all of which were void and unenforceable against it. No doubt the council in fact stayed its hand and did so because it believed that it had bound itself to stay its hand as consideration for the grant of the option, but as a matter of law it was free to go on with its scheme notwithstanding the execution of the agreement. In these circumstances I think that the case is governed by *Bennett v. Bennett* (2) and that the option can never be exercised by the council. D E F G H

In conclusion I should refer to two subsidiary arguments advanced by counsel for the defendants. First, he pointed out that Mr. Triggs granted the option by a document under seal, which itself imports consideration. That, of course, is true and, had no other consideration been expressed, the grant might have been enforceable by reason of the seal; but I cannot think that the fact that the grant of the option was by deed can save it when all the expressed consideration is I

(1) Compare, e.g., *Ayr Harbour Trustees v. Oswald*, (1883), 8 App. Cas. 623.

(2) [1952] 1 All E.R. 413; [1952] 1 K.B. 249.

(3) [1954] 2 All E.R. 255; [1954] 2 Q.B. 118.

A void. Indeed, the document which the court had to consider in *Bennett v. Bennett* (5) was a deed.

Secondly, counsel referred to the doubt expressed by SALMON, L.J., in *Bell Houses, Ltd. v. City Wall Properties, Ltd.* (6), whether a defendant can take the point that the plaintiff had no power to enter into the contract which he is seeking to enforce. In that case, however, the plaintiff had already performed his part of the contract and the defendant was invoking the doctrine of ultra vires in order to avoid paying for what he had received. In this case, on the other hand, the plaintiff, if sued by the council on the agreement, would simply be saying that, by reason of the doctrine of ultra vires, the council had not given and could not give the consideration which they had purported to give. I do not think that SALMON, L.J.'s observations were directed to such a case at all.

C Therefore I will vacate the land charge.

*On both summonses it was declared that the grant of the option contained in the agreement was not enforceable by the defendants, and it was ordered that the land charge which the defendants registered be vacated.*

Solicitors: Shirley Turner & Harrison (for the plaintiff); Lees & Co., agents for Frank Entwistle, Staines (for the defendants).

D [Reported by JACQUELINE METCALFE, Barrister-at-Law.]

### MILLARD v. TURVEY.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Winn, L.J., and Ashworth, J.), February 23, 26, 1968.]

E Road Traffic—Motor tractor—Chassis—Chassis capable of being used for various types of vehicle but destined to be fitted with fire engine body—Whether chassis a motor tractor—Road Traffic Act, 1960 (8 & 9 Eliz. 2 c. 16), s. 253 (1), (6).

F The respondent drove a motor vehicle, a Bedford chassis, on a main road at speeds exceeding those permitted by law for a motor tractor as defined in s. 253 (6)\* of the Road Traffic Act, 1960. The chassis had no cab, no rear to the cab, no doors, no roof, no windscreen and no seats for the accommodation of passengers. Its unladen weight was 3½ tons; it was capable of becoming a tipper, a tanker, or a goods carrying vehicle, though in fact it was being delivered for the purpose of having a fire engine body fitted to it. On appeal from dismissal of a charge of driving a motor tractor on a road at a speed greater than the maximum permitted speed,

G Held: the chassis was a motor vehicle but was not in the ordinary sense of the term a "motor tractor", since it was not designed to draw anything, and, as it was not clear that the classes of vehicles specified in s. 253 of the Road Traffic Act, 1960, were exhaustive nor, if they were intended to be exhaustive, that there was not a casus omissus (per WINN, L.J., particularly as the word "constructed" in s. 253 showed that reference was being made to articles that were completely constructed), the offence had not been proved (see p. 9, letters C, F and H, and p. 10, letter H, post).

H Appeal dismissed.

[As to meaning of "motor tractor", see 33 HALSBURY'S LAWS (3rd Edn.) 419, para. 648; and for cases on motor tractors, see 45 DIGEST (Repl.) 75, I 226-229.

For the Road Traffic Act, 1960, s. 253, see 40 HALSBURY'S STATUTES (2nd Edn.) 922.]

Case referred to:

*Keeble v. Miller*, [1950] 1 All E.R. 261; [1950] 1 K.B. 601; 113 J.P. 143; 45 Digest (Repl.) 72, 217.

(5) [1952] 1 All E.R. 413; [1952] 1 K.B. 249.

(6) [1966] 2 All E.R. 674 at p. 690; [1966] 2 Q.B. 656 at p.p. 693, 694.

\* Section 253 (6) is set out at p. 8, letter I, to p. 9, letter A, post.



**Case Stated.**

This was a Case Stated by justices for Hampshire acting in and for the petty sessional division of Winchester county in respect of their adjudication as a magistrates' court sitting at Winchester on June 27, 1967. On Apr. 4, 1967, an information was preferred by the appellant, Frederick Neville Millard, against the respondent, Lionel Charles Turvey, charging that he on Feb. 8, 1967, at Compton in Hampshire unlawfully did drive a motor vehicle of a certain class or description, to wit, a motor tractor on a road called A.33, Winchester by-pass, at a speed greater than thirty miles per hour, the speed specified in Sch. 1 to the Road Traffic Act, 1960, as varied by the Motor Vehicles (Variation of Speed Limit) Regulations, 1962\* as the maximum speed in relation to a vehicle of that class or description, contrary to s. 24† of the Road Traffic Act, 1960. The facts are summarised at letter E, *infra*. The justices were of the opinion that at the material time, viz., Feb. 8, 1967, (a) the chassis was a motor vehicle as defined in s. 253 (1) of the Act of 1960; and (b) that the chassis was a motor vehicle in the course of construction, that the purpose for which it was ultimately to be used was relevant in defining the class or description into which the motor vehicle would fall, and that the motor vehicle, in the condition in which it was at the material time, was not within the definition of "motor tractor" in s. 253 (6) of the Act of 1960. Accordingly the justices found the respondent not guilty of the offence alleged and dismissed the information.

The cases noted below‡ were cited during the argument in addition to the case referred to in the judgment.

*M. C. B. West* for the appellant.

*R. K. Bain* for the respondent.

**LORD PARKER, C.J.:** The short facts were that on Feb. 8, 1967, the respondent was driving a Bedford chassis on the A33 road on the way from the Vauxhall Works at Luton to Southampton. He admittedly while on that road drove at speeds varying between fifty and fifty-five miles an hour. This was a typical chassis that he was driving, with no cab, no rear to the cab, no doors, no roof, no windscreen, and no seats for the accommodation of passengers. Its unladen weight was three tons ten cwt., and the chassis was capable of becoming a tipper, a tanker, or a goods carrying vehicle, though in fact it was being delivered to a firm in Southampton where a fire engine body was going to be fitted.

The prosecution case here was that this chassis was a motor vehicle within the Road Traffic Act, 1960, and that by reason of the fact that it was not a motor car as defined in that Act or a heavy motor car, or a motor cycle, or an invalid carriage, or a light locomotive, or a heavy locomotive, it was a motor tractor, and a motor tractor is a vehicle which cannot be driven on the roads at more than thirty miles an hour. The justices found in the first place that this was a motor vehicle, "motor vehicle" being defined in s. 253 (1) of the Act of 1960 as a mechanically propelled vehicle intended or adapted for use on roads. For my part, despite the fact that we have heard argument in this court to the contrary, I am quite satisfied that the justices were right in holding that this chassis was intended or adapted for use on roads. The more difficult question is whether it was a motor tractor, because only if it was a motor tractor was the driver committing an offence in going more than thirty miles an hour. The definition of "motor tractor" is to be found in s. 253 (6), and it is in these terms:

"In this Act 'motor tractor' means a mechanically propelled vehicle which is not constructed itself to carry a load, other than the following

\* S.I. 1963 No. 204.

† For s. 24, see 40 HALSBURY'S STATUTES (2nd Edn.) 731.

‡ *Hubbard v. Messenger*, [1937] 4 All E.R. 48; [1938] 1 K.B. 300; *Daley v. Hargreaves*, [1961] 1 All E.R. 552; *Burns v. Currell*, [1963] 2 All E.R. 297; [1963] 2 Q.B. 433; *Childs v. Coghan*, (1968), 112 Sol. Jo. 175.

A articles, that is to say, water, fuel, accumulators and other equipment  
used for the purpose of propulsion, loose tools, and loose equipment, and  
the weight of which unladen does not exceed seven tons and a quarter.”

The prosecution case is that this was a mechanically propelled vehicle, and that  
it was not constructed itself in the state it then was to carry a load. The justices  
held that it was not a motor tractor, feeling that they were entitled to take  
B the view that the chassis was a motor vehicle in the course of construction,  
and that the purpose for which it was ultimately to be used was relevant in  
defining the class or description. In my judgment they were wrong in approaching  
the matter in that way having regard to the decision of this court in *Keeble v.*  
*Miller* (1), because it was there held that in construing the meaning of the word  
“constructed”, one ought to apply one’s mind to the question whether at the  
C time when the offence was alleged to be committed, the vehicle was constructed  
for the purpose of carrying loads.

In my judgment however it would be quite wrong, unless compelled so to do,  
to hold that this motor vehicle was a “motor tractor”. It may well be that the  
words that follow, namely, that it was not in its then state constructed to carry  
a load, are words apt to define a motor tractor; but this was not a motor  
D tractor in the ordinary sense of the word at all; nobody looking at this chassis  
could conceivably say: “There is a motor tractor.” It was not designed to  
draw anything, and the very words of definition which follow, namely that it  
“is not constructed itself to carry a load” show that the motor tractor under  
consideration was a motor vehicle which would in turn draw something which  
was constructed to carry a load. Accordingly, unless forced to do so I would not  
E hold that this vehicle was a motor tractor within the definition in the Act.

It is said and argued forcibly that I am bound so to hold because the classes  
of vehicles set out and defined in s. 253 of the Road Traffic Act, 1960, are exhaus-  
tive of motor vehicles, and accordingly this being a motor vehicle, it must fall  
within one of the categories, and the only category within which it could fall  
would be the category of “motor tractor”. Looking at the section itself, it is by  
F no means clear that the classes there referred to are exhaustive, but it is to be  
observed that much the same categories, if not wholly the same, were set out in  
the Road Traffic Act, 1930 in s. 2 (1), which used these words:

“Motor vehicles, shall for the purposes of this Act and the regulations,  
be divided into the following classes . . .”

G No such words, it is true, appear in s. 253 of the Act of 1960, but it may well  
be that the legislature did have in mind that the classes there set out were  
intended to be exhaustive of the different classes of motor vehicles. Even if  
there was that intention, it does not follow that there is a *casus omissus*,  
and in my judgment a motor chassis is just such a case and does not come  
within any of the categories there set out, albeit it is a motor vehicle. In those  
H circumstances the prosecution have not in my judgment proved the offence,  
and I would agree with the justices, though for different reasons; accordingly  
this appeal should be dismissed.

WINN, L.J.: I agree and feel glad that it is not necessary, though at one  
time one was faced with the possible need, to hold, that this article, which quite  
clearly in everybody’s common understanding was a chassis, was a motor tractor  
I for the relevant purposes. It was not drawing anything; it was not designed to  
draw anything, but it is nevertheless said that it was a motor tractor within  
s. 253 (6) of the Road Traffic Act, 1960. For my own part, I attach importance  
to the use of the word in all these definitions in the section, or most of them,  
“constructed”; I think myself that it is right to give that word “constructed”  
the meaning of “completely constructed”, an article the construction of which  
has been finished, at any rate for the practical purpose for which it is at the  
material time being used. When one looks at some of these other subsections, that

(1) [1950] 1 All E.R. 261; [1950] K.B. 601.

connotation of the past participle "constructed" is quite acceptable; in sub-s. (2) a motor car means

"a mechanically propelled vehicle not being a motor vehicle or an invalid carriage, which is constructed itself to carry a load or passengers and the weight of which unladen—(a) if it is constructed solely for the carriage of passengers and their effects, is adapted to carry not more than seven . . ."

I wonder myself what would be the impact, if any, of those words on a motor vehicle which was intended to be a motor car to carry a load or passengers, and on which, though some rudimentary body had been placed, there was as yet no seat or any place where a passenger could conveniently or safely place himself. In sub-s. (5) an invalid carriage is a mechanically propelled vehicle with certain weight limitations, specially designed and constructed, not merely adapted, for the use of a person who is physically disabled—again emphasis on the completion of construction as being the moment at which the criterion is to be applied. Again in sub-s. (9), a special case dealt with by a process of deeming, in a case where a motor vehicle is so constructed that a trailer might by partial superimposition be attached to the vehicle and so on, that vehicle shall be deemed to be a vehicle itself constructed to carry a load. I venture to think that, if this be not a *casus omissus*, then the proper meaning of what has been enacted is that one must look at the end of the process of construction of the article, and say: as constructed as it stands, or in some cases, it may be, as adapted, for what use is it convenient, or of what is it capable? Fundamentally it is a matter to my own mind of the proper use of language in a section which is an offence creating section, and therefore should not have its meaning strained so as to impose criminal liability on members of the public otherwise than by straightforward intelligible language.

I have asked myself this question: supposing one saw a house in the course of construction of which only the first floor was complete, but it was known or indeed indicated by the nature of what had been built, that an upper storey would be added, would it be right to say: that is a bungalow because it is a dwelling-house not constructed to consist of more than one single ground floor? Or would an ordinary man say: that is a partly constructed two storey or three storey house?

I think that the ordinary man looking at this article on the road would say: "This is a mechanically propelled vehicle which is to be completed by placing on it a body of one or other of several kinds to make it a vehicle constructed for use as a fire engine, a goods vehicle, or what have you." I agree that this appeal should be dismissed.

**ASHWORTH, J.:** I also agree. I view it in the same way as **LORD PARKER, C.J.**, that this vehicle, when one looks at it, does not come physically within what one normally conceives to be a motor tractor. For my part I see no difficulty in construing s. 253 of the Road Traffic Act, 1960 so as to provide first that there can be a motor vehicle within sub-s. (1), which is clearly one meaning, but that the vehicle is not brought within one of the following subsections defining specific classes. In other words this was a motor vehicle but not a tractor. I agree that the appeal fails.

*Appeal dismissed. The court certified under s. 1 of the Administration of Justice Act, 1960, that a point of law of general public importance was involved, viz., whether the chassis in the present case was a motor tractor within the meaning of s. 253 (6) of the Road Traffic Act, 1960; but the court refused leave to appeal to the House of Lords.*

Solicitors: *Theodore Goddard & Co.*, agents for *P. K. L. Danks*, Winchester (for the appellant); *Haxby-Jarvis & Malcolm-Brown*, Coventry (for the respondent).

[Reported by **N. P. METCALFE, ESQ.**, *Barrister-at-Law.*]



A

## BROWN v. BROWN.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Cumming-Bruce, J.), January 22, 1968.]

B

*Divorce—Foreign decree—Decree granted to wife in Sweden—Ground of divorce that parties had lived apart for a year and had not resumed cohabitation after grant of decree of judicial separation to wife in Sweden—Wife Swedish national resident in Sweden for past three years—Substantial connexion of wife with Sweden—Whether decree recognised by English court.*

C

The parties were married in Sweden in 1957, the husband having an English domicile of origin, and the wife being a Swedish national. After the marriage they lived in Holland and Switzerland. In March, 1963, the wife went back to Sweden where, in 1964, she obtained a decree of judicial separation on the ground of what was called long and irreconcilable incompatibility. In June, 1966, cohabitation not having been resumed, the wife petitioned and obtained a decree of divorce in Sweden by virtue of the law of Sweden that, where a decree of judicial separation had been granted, after a year the court had jurisdiction to pronounce a decree of divorce on the ground that the parties had lived apart for a period of at least a year and had not resumed cohabitation since the date of the decree of judicial separation. On petition by the husband,

D

**Held:** the Swedish decree of divorce was valid and entitled to recognition in England, because—

E

(i) the wife had been resident in Sweden for at least three years before applying for the decree, which period would have entitled the English court, if her residence had been in England, to exercise jurisdiction, and accordingly, recognition should be extended to the Swedish decree notwithstanding that the Swedish court exercised a jurisdiction in divorce that did not exist in English law (see p. 13, letter A, post; *Robinson-Scott v. Robinson-Scott* [1957] 3 All E.R. 473, applied); and

F

(ii) the wife had a real and substantial connexion with Sweden at the date of her petition for divorce, and that connexion had persisted ever since (see p. 13, letter B, post).

*Indyka v. Indyka* ([1967] 2 All E.R. 689) applied.

G

[As to recognition by English courts of foreign decrees of divorce, see 7 HALSBURY'S LAWS (3rd Edn.) 112, 113, para. 200; and for cases on the subject, see 11 DIGEST (Repl.) 481-483, 1079-1097.]

Cases referred to:

H

*Angelo v. Angelo*, [1967] 3 All E.R. 314.

*Indyka v. Indyka*, [1967] 2 All E.R. 689; [1967] 3 W.L.R. 510.

*Robinson-Scott v. Robinson-Scott*, [1957] 3 All E.R. 473; [1958] P. 71; [1957] 3 W.L.R. 842; Digest (Cont. Vol. A) 246, 1097c.

*Travers v. Holley and Holley*, [1953] 2 All E.R. 794; [1953] P. 246; [1953] 3 W.L.R. 507; Digest (Cont. Vol. A) 240, 1023a.

### Petition.

I

This was a petition by the husband seeking a declaration that the marriage of the husband and the wife was validly dissolved by a decree of divorce pronounced in a civil court at Stockholm in Sweden on June 30, 1966. The facts are set out in the judgment.

*A. A. R. Thompson* for the husband.

The wife did not appear and was not represented.

**CUMMING-BRUCE, J.:** This is a petition seeking a declaration that the marriage of the husband to the wife was validly dissolved by a decree of divorce pronounced in a civil court in Sweden on June 30, 1966. The facts may be briefly stated as follows. The husband is a British national with an



English domicile of origin; he is and has always been employed as an interpreter and translator. He lived in the United Kingdom from birth until 1957, when he went to work and live in The Hague with Royal Dutch Shell Co. Thereafter he went to live and work in the Bank of International Settlements in Basle, in Switzerland, and he is now still there working and living. He has never acquired a domicile of choice; his domicile of origin continues. On July 29, 1957, he married the respondent, a Swedish national, in Stockholm, Sweden. They went after the celebration of the marriage to live in Holland and then, as I have stated, in Basle. In 1959 their first child, a daughter was born; in 1962 a son was born. The children were born in Holland. The marriage broke down in Switzerland. It is clear from the correspondence that what happened was that, on Mar. 31, 1963, the wife went back to Sweden, her own country, with the children, and after a period of indecision, she wrote to her husband, on June 6, 1963, and said that she was not going to return to him, because she thought that she did not get on with him. She lived in Sweden until Sept. 9, 1964, on which date she obtained from the Swedish civil court a decree of judicial separation on the ground of what was called long and irreconcilable incompatibility. The law in Sweden, which has been proved by the evidence of a person qualified therein, is that, where a civil court in Sweden has granted a decree of judicial separation, after a year the court has jurisdiction to pronounce a decree of divorce on the ground that the parties have lived apart for a period of at least a year and have not resumed cohabitation since the date of the decree of judicial separation. On June 16, 1966, the wife petitioned for a decree of divorce, not having returned to her husband since the decree of judicial separation. On June 30, 1966, the Swedish civil court pronounced a decree of divorce; there was no appeal, and, on July 18, 1966, that decree became absolute.

In those circumstances, counsel for the husband has submitted that, the wife having been resident in Sweden for three years before she applied for a decree of divorce in Sweden, the case comes four-square within the ambit of the principle stated by KARMINSKI, J., in *Robinson-Scott v. Robinson-Scott* (1), and I agree and accept that submission. But he also submitted that, having regard to the development of the law consequent on the speeches and decision in *Indyka v. Indyka* (2) here the wife had a real and substantial connexion with Sweden where she has been living ever since she went there in March, 1963; and he submitted that the ratio decidendi of *Indyka v. Indyka* (2) was that the test that the court should now apply is to recognise a foreign decree where there is a real and substantial connexion between a resident wife and the country in which she is resident, even though the conditions of *Travers v. Holley and Holley* (3) cannot be applied. He reminded me of the decision of ORMEROD, J., in *Angelo v. Angelo* (4) and invited me to apply that principle in this case. The only matter that gave me any occasion for real consideration is whether, having regard to the speeches in *Indyka v. Indyka* (2), the rule in *Travers v. Holley and Holley* (3) applied in *Robinson-Scott v. Robinson-Scott* (1) was still an appropriate test of recognition in cases to which it would apply. Having looked at the speeches in *Indyka v. Indyka* (2), I take the view that a majority of their lordships approved the decision in *Robinson-Scott v. Robinson-Scott* (1), so that the principle there stated by KARMINSKI, J., remains one on which petitioners may rely in appropriate cases, though it is no longer the only test of recognition where domicile will not avail the petitioner. The second test which clearly emerges from the speeches of their lordships is that, where a wife can show a real and substantial connexion between herself and the country exercising jurisdiction thereto, this court will recognise the validity of the decree.

In the case before me, I therefore, make a declaration that the decree of the

(1) [1957] 3 All E.R. 473; [1958] P. 71.

(2) [1967] 2 All E.R. 689.

(3) [1953] 2 All E.R. 794; [1953] P. 246.

(4) [1967] 3 All E.R. 314.

A civil court of Stockholm, Third Division, whereby that court granted a divorce to the wife, is recognised as valid by the courts of this country, and had efficacy to dissolve the marriage of the husband petitioning this court. The grounds of my decision are that I am satisfied (a) that recognition should be granted on the principle of *Robinson-Scott v. Robinson-Scott* (5), which is still a valid test; and (b) that it has been shown that the wife, by the date of her petition for divorce in Sweden, had a real and substantial connexion between herself and that country, and that that connexion has persisted ever since.

*Declaration accordingly.*

Solicitors: *Champion & Co.*, agents for *Bonnett, Son & Turner*, Hounslow (for the husband).

[Reported by ALICE BLOOMFIELD, Barrister-at-Law.]

## F. AUSTIN (LEYTON), LTD. v. COMMISSIONERS OF CUSTOMS AND EXCISE.

[CHANCERY DIVISION (Stamp, J.), February 27, 28, 29, 1968.]

*Purchase Tax—Chargeable goods—“Furniture”—Built-in dressing table units which were unstable unless fixed between other units of furniture and to walls—Units easily removable—Whether chargeable to tax as furniture—Purchase Tax Act 1963 (c. 9) Sch. 1, Pt. 1, Group 11.*

The plaintiffs manufactured and sold by wholesale a built-in dressing table unit. It was constructed of timber and comprised a dressing table with two drawers inset between, and resting on, the timber sides which stood on the floor. A mirror was attached at the back. The two side timbers were also joined by a shelf above the mirror. The timbers extended above the shelf to form a topless compartment which was opened and closed by a flap door. The side timbers were joined by timber at the back of the mirror. The unit would stand on its own but lacked complete rigidity, having a small degree of instability. It was not designed for use as a free-standing dressing table, but was purposely designed to be fitted between other units manufactured by the plaintiffs, namely, built-in wardrobes. These would fit along the whole side of a room, the walls of the room constituting the back and sides of the wardrobe. The dressing table unit was secured to the wall by four plug brackets, to the wardrobe units on each side by screws, and sometimes to a batten on the ceiling. It was not necessary in order to preserve the stability of the fitments that they should be secured to the ceiling. The units could not easily be erected by an unskilled amateur, but were easily removable without appreciably damaging either the units or the fabric of the room. The plaintiffs sought a declaration that a dressing table unit was not “furniture” within Group 11\* of Pt. 1 of Sch. 1 to the Purchase Tax Act 1963; or, if it was, that it was an article of a kind “ordinarily installed by builders as a fixture” within the description of goods specified in Group 11 as not being chargeable under that group.

**Held:** the dressing table units were chargeable to purchase tax as furniture within Group 11 because—

(5) [1957] 3 All E.R. 473; [1958] P. 71.

\* Group 11 provides: “Comprising furniture, hardware, ironmongery, turnery, tableware, kitchen-ware and toilet-ware, being articles of a kind used for domestic or office purposes (a) articles not comprised below in this group . . . ten per cent.; (b) mirrors, whether framed or not . . . twenty-five per cent. Not chargeable under this group—Builders’ hardware, sanitary ware and other articles of kinds ordinarily installed by builders as fixtures.”

(i) the word "furniture" in Group 11 should be given its popular meaning, and the dressing table units, being easily removable and detachable without damage to the fabric of the house or themselves, had not become so attached to the house as to cease to be furniture in the ordinary sense of that word (see p. 16, letter H, p. 18, letters F and G, and p. 18, letter I, to p. 19, letter A, post).

Dicta of MACKINNON, L.J. in *Gray v. Fidler* ([1943] 2 All E.R. at pp. 296, 297) applied.

Dictum of VISCOUNT SIMON in *Palser v. Grinling* ([1948] 1 All E.R. at p. 9) explained.

(ii) the dressing table units did not fall within the description in Group 11 of articles excepted from the charge to tax, for they were not, at the present time "articles of kinds ordinarily installed by builders as fixtures" (see p. 19, letter H, post).

[As to chargeable goods for purchase tax, see 33 HALSBURY'S LAWS (3rd Edn.) 223-225, para. 383. For the Purchase Tax Act 1963 s. 2, Sch. 1, Pt. 1, Group 11, see 43 HALSBURY'S STATUTES (2nd Edn.) 1016, 1061.]

#### Cases referred to:

*Customs and Excise Comrs. v. H. G. Kewley, Ltd.*, [1965] 1 All E.R. 929; [1965] 1 W.L.R. 786; Digest (Cont. Vol. B) 625, 830b.

*Gray v. Fidler*, [1943] 2 All E.R. 289; [1943] K.B. 694; 112 L.J.K.B. 627; 169 L.T. 193; 31 Digest (Repl.) 653, 7564.

*Palser v. Grinling, Property Holdings Co., Ltd. v. Mischeff*, [1948] 1 All E.R. 1; [1948] A.C. 291; [1948] L.J.R. 600; 31 Digest (Repl.) 651, 7541.

*Wilkes v. Goodwin*, [1923] All E.R. Rep. 61; [1923] 2 K.B. 86; 92 L.J.K.B. 580; 129 L.T. 44; 31 Digest (Repl.) 652, 7560.

#### Action.

This was an action begun by writ dated July 15, 1966, by the plaintiffs, F. Austin (Leyton), Ltd., wherein the plaintiffs, by their amended statement of claim claimed a declaration that the "Multiglide" built-in dressing table unit as manufactured and sold by the plaintiffs was not an article of furniture within Group 11 of Pt. 1 of Sch. 1 to the Purchase Tax Act 1963, or that it was an article of a kind ordinarily installed by builders as a fixture within the description in Group 11 of articles not chargeable under that group; and that the unit was not chargeable with purchase tax under that or any other group of the said Pt. 1 of Sch. 1. The defendants were the Commissioners of Customs and Excise. The facts are set out in the judgment.

*H. Major Allen, Q.C.*, and *Peter Rees* for the plaintiff.

*H. E. Francis, Q.C.*, and *J. P. Warner* for the Commissioners.

**STAMP, J.:** The plaintiffs in this case manufacture and sell by wholesale, inter alia, a built-in dressing table unit known as the Multiglide dressing unit. The question which I have to decide is whether a sale of this article attracts liability to purchase tax in respect of the article. The question turns on whether the article falls within the description in Group 11 of Sch. 1 to the Purchase Tax Act 1963. The description comprises "furniture, hardware, ironmongery, turnery, table-ware, kitchen-ware and toilet-ware, being articles of a kind used for domestic or office purposes. If the article is within that description, there is a further question whether it is excepted from the charge to tax by the effect of the direction under the heading in Group 11 "Not chargeable under this group". Under that heading are specified "Builders' hardware, sanitary ware and other articles of kinds ordinarily installed by builders as fixtures". The plaintiffs contend that the article is not within the description "furniture", or, if it is, that it is excepted from the charge under Group 11 because it is an article of a kind ordinarily installed by builders as fixtures.

The article when sold is in a sense a complete unit and will stand on its own. It is constructed of timber and comprises a dressing table with two



A dressing table drawers inset between, and resting on, the timber sides which stand on the floor. A mirror is attached to the back but is delivered as a separate parcel. There is a light above the mirror. The two side timbers are joined together as well by a shelf or top above the mirror as by the table piece and drawers. The side timbers extend above the shelf to form a compartment without a top, which is opened and closed by a flap door. The side timbers are also joined by timber at the back of the mirror. The design of the unit is illustrated by a drawing, exhibit "P.3". The unit stands solidly on its own, but lacks complete rigidity. It is not designed for use as a free-standing dressing table. It has a small degree of instability when standing free—an instability which would no doubt be increased if heavy articles were placed in the compartment over the dressing table part of the unit. No one would, in my judgment, use it as a free-standing piece of furniture. It could, perhaps, be fitted into a recess into which it happened to fit, but the evidence is that it has not been so fitted. It is designed to be fitted into other units manufactured by the plaintiffs, and not to serve any other purpose.

The plaintiffs also manufacture what are called built-in wardrobes. These wardrobes are made in a considerable number of different widths to be fitted along the whole side of a room, the two return walls of the room constituting the sides of the wardrobe, and the wall of the room to which they are fitted constituting the back of the wardrobe. They may also be fitted into a recess. The wardrobes also have a top shelf with flaps. The dressing table unit is designed to be fitted between two of these wardrobes, each unit deriving rigidity and support from the others. When fitted, the units form a continuous line of (without prejudice at the moment to whether this is a correct description) furniture, consisting of two wardrobes with a dressing table between them. If they are fitted properly, the gap between the top of the units and the ceiling will be scribed. The dressing table unit is secured to the wardrobe units on each side, and sometimes to a batten in the ceiling, although as far as I can see the installation instructions do not so direct. I find as a fact that it is not necessary, in order to preserve the stability of the fitments, that they should be secured to the ceiling. Although normally the units are arranged in the way that I have indicated, they may be arranged so that one or even both of the ends of the run, instead of being against a wall of the room, is fitted with an outside end. The dressing table unit can be at the end instead of in the middle of the run. A run comprising wardrobes with a dressing table unit between is well illustrated in the exhibit "P.5". The dressing table unit is secured to the wall at the back at four fixing points by plug brackets, and to the adjoining units by one and a quarter inch screws.

In the publicity the plaintiffs claim that the fitting of the Multiglide built-in wardrobes is not difficult, and that if one is handy with a screw driver one can do it oneself. The plaintiffs called evidence (which I accept) that the latter claim is untrue. Contrary to the plaintiffs' advertising claims, I find as a fact that the units cannot be easily erected by one unskilled person; it would have to be quite a skilled amateur to be able to do the job properly, and the evidence from a retailer was that one of their fitters would take two days or more to complete the job. Floors are not level, nor walls true, and the units must be fitted true and spaces filled in with packing of one sort or another. Scribing will be required from the top of the unit to the ceiling, both to close the other compartment and for clearance. The side members of the dressing unit project above the top of the unit for the purpose of this scribing. A batten is, as I have indicated, sometimes, but not always, affixed to the ceiling to give additional stability.

I find as a fact that the units are easily removable without doing more than insignificant damage to the units and without appreciable damage to, or alteration of, the fabric of the room or building. The only damage which there might be otherwise than minimal damage (in the minimal class I place the removal of the plugs in the wall) is that which might be caused by the removal of the ceiling batten, if such there be, which might involve some slight damage to the plaster of



the ceiling. It was said that the removal would leave a wall of a different colour from the rest of the room, perhaps unfinished, and no doubt it would be a dirty and discoloured wall. This is, of course, equally true of the old fashioned, massive wardrobes often standing unmoved for decades. Though easily removable (the plaintiffs have advertised them as such, although they ceased to do so after the issue of the writ in this action), they would be unlikely to be of use in another room because they are made to fit the room in which they are installed. Their secondhand value would, I apprehend, be less than that of any conventional furniture which might happen not to fit into one's new house or flat when one moved.

The plaintiffs' built-in furniture is supplied through retail furnishers, and the plaintiffs also supply quantities of it on contract to persons building blocks of flats, so that the tenant or purchaser viewing the flat finds the built-in furniture in situ. They are hoping to develop this side of their business, but although there have been valuable contracts, there have not, as I understand it, been at present, many such contracts. Builders building houses, as distinct from flats, have similarly ordered the plaintiffs' built-in units to be installed in the course of the building. The plaintiffs have also supplied their built-in furniture where hotel improvements have been carried out. The figures are, in the view I take of the matter, of little importance, and I am, I think, asked not to mention them; they are however available if required. I have no evidence that today (it might differ in future) builders building flats or houses ordinarily do fit the plaintiffs' built-in furniture or the plaintiffs' dressing units to such flats or houses. Nor is there evidence that it is the ordinary thing to find built-in wardrobes or dressing table units, whether the plaintiffs' or not and whether as fixtures or otherwise.

The work of installation of the plaintiffs' built-in furniture, where the article is bought from a retail furnisher, may be done by a fitter employed by the retailer or may be put out to be sub-contracted by a building contractor specialising in this sort of work. The evidence on this part of the case is somewhat sketchy, being derived from two or three retailers. I am not persuaded that builders properly so called are normally employed in installing articles of this kind when they are supplied retail.

The question then is whether the units which I have endeavoured to describe—more particularly the dressing table unit—are articles of furniture within the description in Group 11 in Sch. 1 to the Purchase Tax Act 1963. If several articles commonly described as furniture are so constructed that they can be fastened together, and so matched that they run flush with each other and have the appearance of a single unit, they are of course nonetheless articles of furniture (or a single article of furniture) and it can, in my judgment, make no difference that they are placed along the whole length of a wall or fill a recess in the wall of the room which is furnished by them. Nor is their character as furniture affected by the fact the whole unit is embellished by the filling up of gaps and spaces between the unit and the ceiling or elsewhere; the unit still has all the characteristics of furniture in whatever sense that term is used, and the only question which, in my judgment, really has to be determined is whether this dressing table unit or dressing unit becomes so attached to the walls and ceiling of the room that it ceases to be furniture.

The matter is not untouched by authority; in *Commissioners of Customs & Excise v. H. G. Kewley, Ltd.* (1) it was admitted that free-standing units in a domestic house would properly be classed as furniture, and both HARMAN, L.J., and RUSSELL, L.J., thought the admission inevitable, HARMAN, L.J., adding the words (2) "furniture must be mobile" and RUSSELL, L.J., saying (3) "furniture is of its nature movable". These remarks, which are relied on by the plaintiffs in this case, are however in fact obiter, and they leave open the question, what degree

(1) [1965] 1 All E.R. 929.

(2) [1965] 1 All E.R. at p. 932, letter G.

(3) [1965] 1 All E.R. at p. 933, letter C.

A of immobility is necessary to deny the article the characteristic of furniture. The Court of Appeal in that case did not discuss that question and did not have the advantage of being referred either to the speech of VISCOUNT SIMON in *Pulser v. Grinling, Property Holdings, Ltd. v. Mischeff* (4) or the judgment of MACKINNON and DU PARCQ, L.JJ., in the Court of Appeal in *Gray v. Fidler* (5). Both these cases were cases under the Rent Acts where special considerations apply, but I do derive some guidance from what was said in those cases. Both MACKINNON and DU PARCQ, L.JJ., in the last-mentioned case took the view that the word "furniture" in the section there under review was to be construed as a common English word, and neither accepted the view that fixtures cannot be furniture. I borrow the language of MACKINNON, L.J., in that case and found my judgment in this part of the case on it. What he said was this (6):

C "It is not denied, of course, that beds and wardrobes are pieces of 'furniture'; but it is said that, to be 'furniture' within the section, a bed or a wardrobe must be a movable article, whereas these beds and wardrobes, and most of the articles specified in Sch. 2, are affixed by screws or other connexions to the walls or floors of the building. And being so fixed, and not movable in their normal user, they cannot be 'furniture' within the section.

D It was first said that 'furniture' must be 'movable', and the definition of the NEW OXFORD ENGLISH DICTIONARY was invoked. This is as follows: Movable articles in a dwellinghouse, place of business, or a public building (now the prevailing sense) dating from 1573. I cannot agree that to constitute furniture the articles notoriously within that description must be movable. It seems to me that it would be absurd to say that members of the Bar have the use of no furniture in this court, and that my brethren and I have the use of no furniture except the chairs on which we are now sitting. Of course, articles of furniture are usually movable, and the definition of the NEW OXFORD ENGLISH DICTIONARY is amply justified; but if a pedant had said to the late Dr. Murray: 'Barristers in the law courts sit on very uncomfortable wooden seats with very inconvenient desks in front of them. Those seats and desks are fixed to the floor. Do you say those seats and desks are not furniture?'. I feel sure he would have replied that he did not. I, personally, have no doubt that it is no part of the proper definition of 'furniture', in its ordinary meaning, that it must consist of movable articles. The briefest mental survey of my own house recalls many things that are fixed to the wall—mirrors, a bracket-clock, corner cupboards, many book-shelves, a medicine cupboard—

E which everyone would describe as articles of furniture. In houses I know in my earlier days there were many articles of Victorian mahogany which were certainly not movable (except by a powerful crane), and to screw them to floor or wall would have been a superfluity. But they were certainly 'furniture' though not movable by unaided human effort. A billiard table is only movable after it has been taken to pieces."

H Then a little later on he said (7):

I "Then it was said that, because these articles are fixed to the walls or floor they pass to the tenant under the demise of the flat, and the tenant does not enjoy their use under a contract for the use of chattels. Most of us have had experience of taking furnished houses for a term. But I have never known such an agreement to specify separately payment for the demised house, and payment for the use of the furniture. Indeed, the section now under consideration obviously contemplates a single amount payable to the landlord, and the judge has to inquire how much, if any, of that single payment by way of 'rent' is for the use of 'furniture'. I think the word 'furniture'

(4) [1948] 1 All E.R. 1; [1948] A.C. 291.

(5) [1943] 2 All E.R. 289; [1943] K.B. 694.

(6) [1943] 2 All E.R. at pp. 296, 297; [1943] K.B. at pp. 708, 709.

(7) [1943] 2 All E.R. at pp. 297, 298; [1943] K.B. at p. 710.

in this section is to be construed as a common English word, or, as BANKES, L.J., said in *Wilkes v. Goodwin* (8), 'the popular meaning of the word'. For articles to be 'furniture' within that meaning I do not think it is essential that they shall be movable, and though, of course, articles of furniture are commonly movable, I do not think they pass out of the popular meaning of furniture because they are fixed by a nail or a screw to wall or floor, I think that the judge was right in treating these beds and wardrobes as articles which come within the ordinary and popular meaning of furniture. In strictness, perhaps, one should add 'the ordinary or popular meaning of furniture at the present day'. For no doubt the ambit of the word has changed. The close-stool of our ancestors is as obsolete as the triclinium: the round bath and its accompanying can of my undergraduate days is gone. No one would speak of their substitutes, the apparatus of the water closet, or the bath in the bathroom as furniture. But, that would not be because they are fixed to floor or wall, but merely because they are not within the common or popular meaning of the word. A contrasted change may be that, whereas no one would include a fireplace within furniture, the electric fire which can stand anywhere, with a wire to a wall plug, probably would be called a piece of furniture. But there again that is not because it is movable, but because it is within the common or popular meaning."

DU PARCQ, L.J., gave a judgment which was to the same effect. VISCOUNT SIMON in *Palser v. Grinling* (9), in a speech with which the other lords of appeal agreed, did not accept the view expressed by the majority of the court in *Gray v. Fidler* (10) that for the purposes of the Rent Acts furniture must be given its ordinary, popular meaning, but I do not understand him to have disagreed with the judgments of MACKINNON and DU PARCQ, L.J.J., as to that popular meaning; on the contrary he, I think, recognised (although not for the purpose of the section which he was considering) that fixtures might be furniture in the popular sense. In my judgment, ordinary English words such as "furniture", where found in the Purchase Tax Act, 1963—which affects millions of Her Majesty's subjects and I know not how many tens of thousands of traders unfamiliar with legal language—ought to be given their popular meaning.

With the guidance given to me by the two lords justices in *Gray v. Fidler* (10), I conclude that these dressing units, easily removable as I find them to be, are furniture within the meaning of the head of charge.

If I am wrong in applying the popular test, then I apply the language of VISCOUNT SIMON in *Palser v. Grinling* (11), where he said:

"On the other hand, however, it is no less difficult, having regard to the obvious intendment of the section, to suppose that the legislature in speaking of the 'use of furniture' meant to recognise the law of real property to the extent of excluding from 'furniture' each and every fixture whatever the nature and degree of its attachment. In my opinion, the true view is that articles belonging to the landlord otherwise entitled to rank as 'furniture' for the purposes of s. 10 [of the Rent and Mortgage Interest Restrictions Act, 1923] should, if affixed to the fabric, be regarded as part thereof if they cannot be detached without appreciable damage to or alteration of the fabric or themselves. Otherwise they should be regarded as furniture."

As I have already said, I think that these dressing units with the wardrobes can be detached without appreciable damage to, or alteration of, the fabric, or themselves. Like the suit which has been made to measure for the owner, they may have little value in the market when separated, and it may be better, when

(8) [1923] All E.R. Rep. 61; [1923] 2 K.B. 86.

(9) [1948] 1 All E.R. 1; [1948] A.C. 291.

(10) [1943] 2 All E.R. 289; [1943] K.B. 694.

(11) [1948] 1 All E.R. at p. 9; [1948] A.C. at p. 314.



A one moves, to leave them where they are and hope to sell them on the spot, but this cannot, in my judgment, affect the question whether, while installed, they are furniture. That does not affect their mobility.

I turn to consider whether the unit in question falls within the section "builders' hardware, sanitary ware and other articles of kinds ordinarily installed by builders as fixtures" (12). As a matter of the ordinary meaning of the English language,

B the word "ordinarily", in my view, governs the whole of the rest of the phrase "installed by builders as fixtures" and does not serve to distinguish articles installed ordinarily as fixtures from those which are installed by builders, but not as fixtures. To fall within the category described, the articles must be both of a kind ordinarily installed by builders and of a kind ordinarily installed by builders as fixtures. Nor, in my judgment, does the word "ordinarily" serve to distinguish articles ordinarily installed by builders as fixtures from articles ordinarily installed as fixtures by persons who are not builders. The word "ordinarily" when read in conjunction with the opening words "builders' hardware, sanitary ware and other articles of kinds" and the concluding words "as fixtures" indicate, in my judgment, that what is meant by the words "ordinarily installed by builders" is that they are ordinarily installed in the course of building—articles

D which one would expect a builder to install as fixtures in the ordinary way and without any special instruction. The articles which are specifically spoken of are clearly articles which one would expect a builder to install as fixtures as a matter of course, because a builder when performing his function of building ordinarily installs them. A prospective purchaser viewing a house and finding no pipes, basins, baths, cisterns or w.c.s would, I venture to think, express surprise that

E such articles were not there, and he would do so because these articles are of kinds ordinarily installed by builders as fixtures. If, however, he said to the builder following him round "Why are there no fitted dressing tables?", the surprise would, I venture to think, be on the other side, and the question might appropriately be answered by the builder by some such remark as "builders in this country do not at present ordinarily install articles of that kind as fixtures",

F and, if the impertinent visitor remarked, "But I have been looking at some houses up the road where the builder has installed dressing tables as fixtures" the builder might, I think, patiently and, in my judgment, correctly reply "that is still today exceptional though the time may come when all furniture is ordinarily installed as fixtures". That day is, in my judgment, still before us. As I have indicated, I am assisted to the conclusion to which I have come on this part of

G the case by the consideration that the phrase in question is part of a longer description of articles which comprise articles of a kind which a builder does ordinarily install and does ordinarily install as fixtures—e.g. builders' hardware and sanitary ware—and if the latter part of the phrase is not to be construed as *ejusdem generis* with builders' hardware and sanitary ware, it would at least derive colour from those terms. But the whole description is of a genus,

H namely articles which a builder would install as fixtures. Since, in my view, the article in this case is not of a kind ordinarily installed by builders, I do not have to consider whether it is a fixture within the meaning of that word in the passage. I must dismiss the action.

*Action dismissed.*

I Solicitors: *Brecher & Co.* (for the plaintiffs); *Solicitor, Customs and Excise.*

[*Reported by JENIFER SANDELL, Barrister-at-Law.*]

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(12) These words are those of the exception provided in Group II in Sch. 1 to the Purchase Tax Act 1963.



R. v. LLANDRINDOD WELLS JUSTICES, *Ex parte* GIBSON.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Winn, L.J., and Ashworth, J.),  
February 23, 1968.]

*Magistrates—Procedure—Plea of guilty in accused's absence—Disqualification—Road traffic offence—No adjournment to enable accused to be present and to be heard in mitigation—Circumstances of disqualification within s. 5 (3) of Road Traffic Act, 1962—Whether order for disqualification should be quashed—Magistrates' Courts Act, 1957 (5 & 6 Eliz. 2 c. 29), s. 1 (2), proviso (iii).*

The applicant was prosecuted for using a motor lorry without insurance. He notified the court of his intention to plead guilty, and he sent a statement of mitigating circumstances. The justices fined the applicant, ordered his licence to be endorsed and disqualified him for holding or obtaining a licence for a period of twelve months under s. 5 (3)\* of the Road Traffic Act, 1962, without adjourning the case to enable him to be present. On an application for certiorari to quash the disqualification,

**Held:** the order for disqualification would be quashed, since not only did proviso (iii)† to s. 1 (2) of the Magistrates' Courts Act, 1957, require magistrates to adjourn before ordering disqualification but also the obligation to order disqualification imposed by s. 5 (3) of the Road Traffic Act, 1962, where there were appropriate previous convictions, would not apply if the magistrates were satisfied that there were sufficient grounds of mitigation (see p. 21, letter G, post).

[As to the procedure for pleading guilty, before a magistrates' court without attending the court, see 25 HALSBURY'S LAWS (3rd Edn.) 196-198, paras. 358, 359; and for cases concerning orders made by justices in the absence of the accused, see 33 DIGEST (Repl.) 218, 528-534, and DIGEST (Cont. Vol. B) 510, 640a.

For the Magistrates' Courts Act, 1957, see 37 HALSBURY'S STATUTES (2nd Edn.) 627.

For the Road Traffic Act, 1962, s. 5, see 42 HALSBURY'S STATUTES (2nd Edn.) 891.]

**Motion for certiorari.**

This was a motion by notice dated Feb. 13, 1968, on behalf of Anthony Samuel Gibson for an order of certiorari to remove and quash an order of disqualification made by the justices of the petty sessional division of Llandrindod Wells, in the county of Radnor, on Aug. 15, 1967, whereby they disqualified the applicant for holding or obtaining a licence to drive a motor vehicle for a period of twelve months on his conviction for using a motor lorry without insurance contrary to s. 201 of the Road Traffic Act, 1960. The grounds for the relief sought were that the justices dealt with the charge against the applicant in his absence under the provisions of s. 1 of the Magistrates' Courts Act, 1957, but that, contrary to s. 1 (2) proviso (iii), made the order for disqualification without adjourning the case and without giving the applicant an opportunity of being present.

\* Section 5 (3) provides: "Where a person convicted of an offence specified in . . . Pt. 1 or . . . Pt. 2 [of Sch. 1 to this Act] has within the three years immediately preceding the commission of the offence and since the commencement of this Act been convicted on not less than two occasions of an offence specified in those Parts and particulars of the convictions have been ordered to be endorsed in accordance with s. 7 of this Act, the court shall order him to be disqualified for such period not less than six months as the court thinks fit, unless the court is satisfied, having regard to all the circumstances, that there are grounds for mitigating the normal consequences of the conviction and thinks fit to order him to be disqualified for a shorter period or not to order him to be disqualified."

† Section 1 (2), proviso (iii), so far as material, provides: "if the court proceeds under this section to hear and dispose of the case in the absence of the accused, the court . . . shall not without adjourning under [s. 14 (3) of the Magistrates' Courts Act, 1952] order him to be subject to any disqualification."

A The applicant deposed that on or about July 28, 1967, he was served with a summons charging him with the offence against s. 201 on May 1, 1967, together with a statement of facts pursuant to the Act of 1957; the applicant notified the clerk to the justices that he desired to plead guilty and that the court should dispose of the case in his absence. On Aug. 15, 1967, the applicant was accordingly convicted; he was fined £10 for this offence and his licence was directed  
B to be endorsed, and he was ordered to be disqualified as previously stated. He received no notice of adjournment before the order for disqualification was made, and deposed that the justices did not adjourn before making it. At the hearing before the justices, their clerk, so he stated by letter to the applicant's solicitors dated Jan. 23, 1968, read to the court mitigating circumstances outlined by the applicant; the letter of the justices' clerk further stated that in the circum-  
C stances compulsory disqualification was automatic under the "totting up" rule. The memorandum of conviction entered in the magistrates' court for Aug. 15, 1967, showed four convictions under the new procedure, viz., offences on Feb. 12, 1967 (using lorry without excise licence), Apr. 19 (failing to produce licence), Apr. 19 (using lorry without insurance) and May 1, being the offence of that date previously mentioned. The applicant was fined for the first three  
D offences, his licence being also endorsed for the s. 201 offence of Apr. 19, 1967.

W. A. Macpherson for the applicant.

The respondents did not appear and were not represented.

E LORD PARKER, C.J.: The grounds on which this application is moved are that, since the summary procedure under s. 1 of the Magistrates' Courts Act, 1957, had been invoked and the applicant had pleaded guilty, the justices were not entitled to dispose of the matter in his absence without an adjournment, if they were minded to order him to be disqualified for holding or obtaining a licence to drive a motor vehicle. In a letter which the court has seen from the justices' clerk, it is said that the court did not adjourn to allow the applicant to be present in view of the fact that s. 5 (3) of the Road Traffic Act, 1962, applied:  
F in other words, in view of what are commonly called the "totting" up provisions. The suggestion, I think, must be that if the justices have to disqualify, it is idle for them to adjourn the case for the applicant to be present. Counsel for the applicant has said that on the facts the magistrates were wrong and that s. 5 (3) was not applicable in all the circumstances.

G Assuming, however, facts which brought s. 5 (3) into operation, nevertheless the magistrates must adjourn before making any such disqualification. Not only does s. 1 (2), proviso (iii) of the Act of 1957 say "any disqualification", but it becomes apparent when one looks at s. 5 (3) of the Act of 1962 that the court's obligation to disqualify is subject to there being grounds for mitigating the normal consequences of the conviction. Accordingly the defendant in any  
H case such as this must be given the opportunity of being present and advancing mitigating circumstances. I am quite satisfied that the order of certiorari should go to quash this order of disqualification.

WINN, L.J.: I agree.

ASHWORTH, J.: I agree.

I Order of certiorari granted.  
Solicitors: Ivens, Thompson & Green, Cheltenham (for the applicant).

[Reported by S. A. HATTEEA, Esq., Barrister-at-Law.]

## ROGERS v. DODD.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Winn, L.J., and Ashworth, J.),  
February 27, 1968.]

*Registration—Premises—Coffee bar—Condition requiring premises should not remain open after 1 a.m.—Coffee bar defined as premises “kept open” for public refreshment—Refreshment served to members of public after permitted hour through open window—Door of premises closed—Brighton Corporation Act 1966 s. 7.*

It was a condition of the registration of the appellant's premises in Brighton as a coffee bar that they should “not remain open after 1 a.m.”. This condition was imposed under s. 7 (6)\* of the Brighton Corporation Act 1966. At 1.40 a.m. hot dogs were being served through a window of the premises to members of the public in the street outside. The door of the premises was shut. By s. 7 (1)† of the Act of 1966 “coffee bar” meant any premises which “are kept open for public refreshment” between certain hours. On appeal against conviction of the appellant, the proprietor of the premises, of contravention of the condition imposed under s. 7 of the Act of 1966,

**Held:** “kept open” referred to keeping the premises open to allow the public to resort therein for the purposes of refreshment, and serving people in the street from a window was not a contravention of the condition; accordingly the conviction would be quashed (see p. 23, letters E and H, post).

Appeal allowed.

### Case Stated.

This was a Case Stated by the justices for the county borough of Brighton and for the petty sessional division of Brighton in respect of their adjudication as a magistrates' court sitting at Brighton. On July 28, 1967, an information was laid by the respondent, William Ogilvy Dodd, against the appellant, Harry Rogers, and Baron Louis Kenyon Mendes Da Costa for that they on July 23, 1967, being persons concerned together in the management of premises “Jaconellis” 39, Kings Road, in the county borough of Brighton, did contravene a condition imposed by the council of the county borough of Brighton under s. 7 (6) (a) (v) of the Brighton Corporation Act 1966 on registering the said premises for use as a coffee bar under s. 7 aforesaid, namely that the said premises should not remain open after 1 a.m., contrary to s. 7 (6) (b) of the Act of 1966. The facts are summarised in the judgment. The justices were of the opinion that the premises were open at the time in question. They convicted the appellant and his co-accused.

The appellant appeared in person.

*J. Wood* for the respondent.

**LORD PARKER, C.J.:** The appellant's co-accused Da Costa, was the manager and the appellant was the proprietor of these premises which were registered for use as a coffee bar under the Brighton Corporation Act 1966. On registration, the council imposed a condition which originally read, “the premises shall not remain open after midnight”; but on a renewal of the licence or registration, that was changed to 1 a.m. On July 23 at 1.40 a.m. police officers observed that whereas the doors to the premises were closed and locked, there was a staff inside the premises who were serving through the open window hot dogs to a queue of persons outside. When Mr. Da Costa was approached and cautioned by the police he said: “The door is shut and I am serving through the window. We are not open.” When the appellant, the

\* Section 7 (6), so far as material, is set out at p. 23, letter C, post.

† Section 7 (1), so far as material, is set out at p. 23, letters D and G, post.



A proprietor was approached he said: "I shall be writing to the chief constable tomorrow. The door was shut and I think he is wrong." It was in those circumstances that the justices held, accepting the contention of the respondent, that at the material time the premises were open for use as a coffee bar within the meaning of the Act of 1966, that accordingly the condition had been contravened, and the appellant was guilty of this offence.

B Whether or not he was guilty of this offence clearly depends on the exact wording to be found in s. 7 of the Brighton Corporation Act 1966. A coffee bar has to be registered; and s. 7 (6) (a) provides:

C "The corporation may, on registering or renewing the registration of any premises for use as a coffee bar, impose conditions as to . . . (v) the hours of opening and closing the premises for use as a coffee bar so as to ensure that nuisance is not likely to be caused to residents in the neighbourhood."

Undoubtedly such a condition is one to avoid nuisance to residents in the neighbourhood, but the whole question is whether in the present case the condition had been contravened, in that the premises were not closed for use as a coffee bar. One asks oneself at once: what is meant by "for use as a coffee bar"? D One then goes back to s. 7 (1) where one finds that

" 'coffee bar' means (a) any premises which are kept open for public refreshment at any time between the hours of eleven o'clock in the evening and five o'clock in the morning."

E It is in those circumstances that the respondent submits that these premises were open for public refreshment in the sense that public refreshment was being served therefrom. The sole question is whether that is the true meaning of "kept open" there, or whether the words "kept open" are not referring to the keeping open of the premises to allow the public to resort therein for the purpose of refreshment.

F In my judgment it is the latter. It seems to me that the mischief aimed at by the Act of 1966 is the congregation of the public in premises where no doubt they are served with refreshment, and where abuses are likely to occur in the sense of undue noise to the neighbourhood, peddling of drugs and other such matters. This is not an Act, as it seems to me, and was never intended to be an Act, to deal with the serving of members of the public in the street, and any nuisance that may result therefrom. I think confirmation is given to my view G when one goes on to read s. 7 (1) (b) which says:

" 'Coffee bar' means . . . any premises which are used by a club, organisation or body, and which, if they were kept open to the public, would fall within para. (a) of this definition."

H That as it seems to me clearly shows that when the words "kept open" are referred to, it is meant "kept open" to the public. Finally, I would say if one looks to the matters on which justices must be satisfied and the conditions other than those in s. 7 (6) (a), (v), they all point to matters which have to be considered in connexion with the public resorting to and being on the premises. For those reasons I have come to the conclusion, though somewhat regretfully, that the appeal succeeds and the conviction should be quashed.

I WINN, L.J.: I agree.

ASHWORTH, J.: I agree.

*Appeal allowed. Conviction quashed.*

Solicitors: *Sharpe, Pritchard & Co.*, agents for *W. O. Dodd*, Brighton (for the respondent).

[Reported by OM. P. MIDHA, Barrister-at-Law.]



## R. v. GOSWAMI.

[COURT OF APPEAL, CRIMINAL DIVISION (Salmon, L.J., Phillimore and Blain, JJ.), February 14, 15, 22, 1968.]

*Currency Control—Exchange control—Export—Smuggling money, Bank of England notes, out of the country—Contravention of the prohibition imposed by s. 22 of the Exchange Control Act, 1947—Whether in law an offence under Customs and Excise Act, 1952, s. 56 (2)—Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 38 (1)—Exchange Control Act, 1947 (10 & 11 Geo. 6 c. 14), s. 22, Sch. 5, Pt. 3, para. 1 (1)—Customs and Excise Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 44), s. 56 (2).*

The appellant pleaded guilty to offences charged under s. 56 (2)\* of the Customs and Excise Act, 1952, consisting in being knowingly concerned in the attempted exportation of goods with intent to evade the prohibition on their exportation imposed by s. 22† of the Exchange Control Act, 1947. He subsequently moved in arrest of judgment on the ground that smuggling money (bank notes) out of the country was not an offence against s. 56 (2). On appeal on the question whether such smuggling was such an offence,

**Held:** by providing that the “enactments relating to customs” should apply in relation to the provisions of Part 4 (which included s. 22) of the Exchange Control Act, 1947, para. 1 (1) of Sch. 5 to the Act of 1947 applied to the s. 22 prohibition the offence regarding importation created by s. 186 of the Customs Consolidation Act, 1876, and para. 3 of Pt. 3 of Sch. 5 to the Act of 1947 extended the offence to prohibited exportation (see p. 28, letter B, post); and when the Customs and Excise Act, 1952, replaced the repealed s. 186 of the Act of 1876 (which by then had been amended, as regards punishment by the Finance Act, 1935, s. 15 and s. 12 of the Finance Act, 1943)), the substituted s. 56 (2) offence became applicable by virtue of s. 38 (1) of the Interpretation Act, 1889 and the words “enactments relating to customs” previously mentioned, to the prohibition enacted in s. 22 of the Exchange Control Act, 1947, with the consequence that the smuggling constituted an offence under s. 56 (2) and the appellant’s convictions should stand (see p. 28, letter I, and p. 29, letter D, post).

Per CURIAM: Pt. 3 of Sch. 5 to the Exchange Control Act, 1947, contains a complete code for the enforcement of the three sections (s. 21, s. 22 and s. 23) constituting Part 4 of the Act of 1947; accordingly para. 1 (1)‡ of Pt. 2 of Sch. 5 does not cover a contravention of the provisions of Part 4 of the Act of 1947 (see p. 29, letters G and H, post).

Appeal dismissed.

[As to restrictions on import and export of bank notes, etc., see 27 HALSBURY’S LAWS (3rd Edn.) 125, 126, para. 205; as to the application of Customs Acts to export restrictions, see *ibid.*, 126, 127, para. 206.

As to substitution and re-enactment of statutory provisions, see 36 HALSBURY’S LAWS (3rd Edn.) 474, 475, para. 719, text and note (d); and for cases on the subject, see 44 DIGEST (Repl.) 375, 2133-2139.

For the Interpretation Act, 1889, s. 38, see 24 HALSBURY’S STATUTES (2nd Edn.) 229.

For the Exchange Control Act, 1947, s. 22, Sch. 5, Part III, para. 1, see 16 HALSBURY’S STATUTES (2nd Edn.) 582, 613.

For the Customs and Excise Act, 1952, s. 56, see 32 HALSBURY’S STATUTES (2nd Edn.) 755.]

\* Section 56 (2) is set out at p. 28, letter H, post.

† Section 22 (1), so far as material, reads: “The exportation from the United Kingdom of (a) any notes of a class which are or have at any time been legal tender in the United Kingdom . . . is hereby prohibited except with the permission of the Treasury.”

‡ Paragraph 1 (1) is set out at p. 29, letter E, post.

## A Case referred to:

*Stevens v. General Steam Navigation Co., Ltd.*, [1903] 1 K.B. 890; 72 L.J.K.B. 417; 88 L.T. 542; 67 J.P. 415; 44 Digest (Repl.) 375, 2135.

## Appeal and application.

On Feb. 22, 1967, at the Central Criminal Court, the appellant, Amarendra Goswami, and two other men, Banthia and Cohen, were arraigned on indictment. The appellant pleaded guilty to ten counts, counts 2, 4, 5, 7, 9, 11, 12, 14 and 15 of knowingly being concerned in the exportation and one count (count 1) of attempted exportation of goods, viz., Bank of England notes, with intent to evade the prohibition on the exportation of such goods imposed by s. 22 of the Exchange Control Act, 1947, contrary to s. 56 (2) of the Customs and Excise Act, 1952. Other counts (to which the appellant also pleaded guilty) related to buying foreign currency (counts 3, 8 and 13) and gold (count 6) outside the United Kingdom from a person other than an authorised dealer contrary to s. 1 (1) of the Exchange Control Act, 1947. The Common Serjeant discharged the jury from giving a verdict in respect of Banthia and Cohen and ordered a new trial, sentence on the appellant being left to be passed by the judge at the re-trial. On Apr. 6, 1967, the case came before JUDGE KING-HAMILTON, Q.C., for trial. He decided not to sentence the appellant until the conclusion of the trial of Banthia and Cohen. On Apr. 14 and May 1, 1967, Banthia and Cohen were acquitted. On May 5, 1967, counsel for the appellant moved in arrest of judgment on all counts. JUDGE KING-HAMILTON, Q.C., acceded to the motion in respect of counts 3, 6, 8 and 13 and directed that an acquittal be entered on those counts and that proceedings on those counts be set aside. He rejected the motion in respect of the other counts and sentenced the appellant (a) to such a period of imprisonment as would result in his immediate discharge, and (b) to a fine of £25,000, with six months to pay, or twelve months' imprisonment in default. The appellant appealed against conviction with leave of the trial judge pursuant to a certificate granted under s. 3 (b) of the Criminal Appeal Act, 1907. The ground of appeal was that the offences created by s. 56 (2) of the Act of 1952 related only to the exportation of goods, and that the exportation of money in contravention of s. 22 of the Act of 1947 was not an offence against s. 56 (2) of the Act of 1952. The appellant also applied for leave to appeal against sentence on the ground that it was excessive in all the circumstances, including the fact that he had been in custody from Oct. 6, 1966 (date of arrest) to May 5, 1967 (date of sentence).

The authorities and cases noted below\* were cited in argument in addition to the case referred to in the judgment.

*I. Percival, Q.C.*, and *R. J. Merrett* for the appellant.

*M. J. Morris, Q.C.*, and *W. W. Stabb* for the Crown.

*Cur. adv. vult.*

Feb. 22. SALMON, L.J., read the following judgment of the court: This appeal concerns eleven counts to all of which the appellant originally pleaded not guilty. After having been put in charge of the jury he, however, changed his plea to one of guilty and accordingly, on the learned judge's direction, the

\* OXFORD ENGLISH DICTIONARY, Vol. 2, C-D, p. 1723; ARCHBOLD'S CRIMINAL PLEADING, EVIDENCE AND PRACTICE (36th Edn.), para. 611; 16 HALSBURY'S STATUTES (2nd Edn.) 582, 594, 611, 613; 21 HALSBURY'S STATUTES (2nd Edn.) 327, 1157; 24 HALSBURY'S STATUTES (2nd Edn.) 229; 26 HALSBURY'S STATUTES (2nd Edn.) 219; 32 HALSBURY'S STATUTES (2nd Edn.) 710, 755; *R. v. Bakewell*, (1857), 7 El. & Bl. 848; *Wakefield & District Light Ry. Co. v. Wakefield Corpn.*, [1906] 2 K.B. 140; [1907] 2 K.B. 256; *A.-G. v. Yorkshire (Woollen District) Electric Tramways, Ltd.*, [1907] 2 K.B. 991; *The Noordam* (No. 2), [1920] A.C. 904; *R. v. Dickinson*, [1920] 3 K.B. 552; *Postmaster-General v. Birmingham Corpn.*, [1935] All E.R. Rep. 856; [1936] 1 K.B. 66; *Pickett v. Fesq.*, [1949] 2 All E.R. 705; *Abbott v. London County Council*, [1951] 1 All E.R. 569; [1951] 2 K.B. 127; *Brown v. Allweather Mechanical Grouting Co., Ltd.*, [1953] 1 All E.R. 474; [1954] 2 Q.B. 443.

jury found him guilty on all eleven counts. At a later stage counsel for the appellant moved in arrest of judgment. He contended amongst other things, that each of these counts was bad on the face of it. The learned judge ruled against this contention, and it is from that decision that the appellant now appeals by leave of the learned judge. A

The first count, in so far as it concerns this appellant, reads as follows:

“STATEMENT OF OFFENCE B

“Being knowingly concerned in the attempted exportation of goods with intent to evade the prohibition on the exportation of such goods imposed by s. 22 of the Exchange Control Act, 1947, contrary to s. 56 (2) of the Customs and Excise Act, 1952.

*Particulars of Offence* C

“Amarendra Goswami on Oct. 6, 1966, within the jurisdiction of the Central Criminal Court [was] knowingly concerned in the attempted exportation of certain goods namely 3,000 £10 Bank of England notes with intent to evade the prohibition on the exportation of such notes imposed by s. 22 of the Exchange Control Act, 1947.”

The other ten counts are in the same form save that they each charge actual exportation and not a mere attempt. There is no dispute but that between March, 1964, and Oct. 6, 1966, the appellant smuggled some £120,000 out of the country. On Oct. 6, 1966, he was caught whilst attempting to bring the total up to £150,000. The appellant's main contention is that to smuggle money out of the country is not an offence against s. 56 (2) of the Customs and Excise Act, 1952, and that the indictment is bad, in as much as each of the eleven counts charges an offence against that section. The case for the Crown is that smuggling money out of the country is made an offence against s. 56 (2) by virtue of the provisions of para. 1 (1) of Pt. 3 of Sch. 5 to the Exchange Control Act, 1947. D

In order to resolve this dispute, it is necessary to examine in some detail the Act of 1947. The first three parts of that Act impose certain restrictions and prohibitions which need not be recited. They do not relate to imports or exports. It is important, however, to observe that each of these restrictions and prohibitions is expressly stated to refer only to persons in or resident in the United Kingdom. Then comes Part 4 of the Act which deals with imports and exports. It contains a group of three sections. Section 21 concerns restriction of imports. Section 23 concerns payments for exports. Section 22 (which is the one most relevant to this appeal) concerns restriction of exports. The material words of this section are as follows: E

“(1) The exportation from the United Kingdom of (a) any notes of a class which are . . . legal tender in the United Kingdom . . . is hereby prohibited except with the permission of the Treasury.” G

It will be observed that this section does not make contravention of the prohibition which it imposes an offence. Section 34 (1), however, states that H

“The provisions of Sch. 5 to this Act shall have effect for the purpose of the enforcement of this Act.”

Part 3 of Sch. 5 relates exclusively to Part 4 of the Act and, in the view of this court, contains the code for its enforcement. Paragraph 1 (1) of Pt. 3 before its amendment in 1952 read as follows: I

“The enactments relating to customs shall . . . apply in relation to anything prohibited to be imported or exported by any of the provisions of Part 4 of this Act except with permission of the Treasury (e.g., Bank of England notes) as they apply in relation to goods prohibited to be imported or exported by or under any of the said enactments and any reference in the said enactments to goods shall be construed as including a reference



- A to anything prohibited to be imported or exported by any of the provisions of the said Part 4 except with permission of the Treasury."

Counsel for the appellant has argued that the words "enactments relating to customs" are confined to those statutory provisions which relate to the imposition of customs duties. This court rejects that argument. It involves much

- B too strained and narrow a construction and moreover, one which is plainly contrary to the manifest intention of Pt. 3 of Sch. 5. That part was designed to make, and in the view of this court does make, the importation or exportation of anything of which the importation or exportation is prohibited or restricted in Part 4 of the Act an offence of the same kind and punishable in the same way as the illegal importation or exportation of goods. The opening words of para. 1 (1) apply to any statutory provisions prohibiting the importation or
- C exportation of goods. We have heard an interesting discussion whether the word "enactments" refers to whole statutes such as the Customs Consolidation Act, 1876, or merely to such parts of any statute as relate to customs—whatever that word may mean. Much would depend on the context in which the word "enactments" or the word "customs" is used. It is, however, quite unnecessary for the purpose of this appeal to attempt any definition of the word
- D "customs" or to decide whether or not the word "enactments" in para. 1 (1) of the Pt. 3 of Sch. 5 to the Act of 1947 refers to the whole of the Customs Consolidation Act, 1876, since in the view of this court the word "enactments" clearly refers to any provisions of that Act prohibiting the importation or exportation of goods. One such provision is s. 186. In so far as it is material, it reads as follows:

- E "Every person who shall import . . . any prohibited goods or any goods the importation of which is restricted contrary to such prohibition or restriction . . . shall for each such offence forfeit either treble the value of the goods including the duty payable thereon or one hundred pounds at the election of the Commissioners of Customs; and the offender may either be
- F detained or proceeded against by summons."

- That section was clearly an offence creating section. It is true that it does not expressly state that it creates an offence, but the use of the words "offence" and "offender" make it plain that any contravention of the prohibition it contains amounts to an offence. Any doubt that there might otherwise have been on this score is removed by s. 15 of the Finance Act, 1935, which reads as
- G follows:

"Where a person is convicted of an offence under s. 186 of the Customs Consolidation Act, 1876 . . . the court may, if it thinks fit, in lieu of ordering him to pay a penalty may order him to be imprisoned for a term not exceeding two years."

- H Then, by s. 12 of the Finance Act, 1943, the courts were empowered to impose a prison sentence as well as the penalty for such an offence.

- Section 186 made the illegal importation of goods an offence and provided (as amended by the Finance Acts of 1935 and 1943) penalties for that offence. Paragraph 1 (1) of Pt. 3 of Sch. 5 to the Act of 1947 which applied the provisions of s. 186 to Part 4 of the Act of 1947 clearly made the importation of Bank of England notes without permission of the Treasury (as prohibited by s. 21
- I of the 1947 Act) an offence under s. 186. Unless, however, special provision had been made under Pt. 3 of Sch. 5 to the Act of 1947, s. 186 would not have bitten on the illegal exportation of Bank of England notes because s. 186 did not itself prohibit the exportation of goods or make their illegal exportation an offence. But Pt. 3 of Sch. 5 did make special provision by para. 3, which read:

"If anything prohibited to be exported by any provision of . . . Part 4 is exported in contravention thereof . . . the exporter shall be liable to the

same penalty as that to which a person is liable for an offence to which s. 186 of the Customs Consolidation Act, 1876 (which relates amongst other things to illegally importing prohibited goods) applies.” A

Accordingly, it follows that if the appellant had committed the acts complained of and had been indicted prior to the time when the Customs and Excise Act, 1952, came into force he would have been guilty of an offence by virtue of the combined effect of Pt. 3 of Sch. 5 of the Act of 1947 and s. 186 of the Act of 1876. B

It will be observed that, before the 1952 Act, in order to discover whether contravention of s. 22 of the 1947 Act was made an offence and, if so, what were the penalties for such an offence, you would have to go to s. 34 of Part 6 of that Act which in turn refers you to Sch. 5 to the Act. You would then have had to search through that schedule until you arrived at Pt. 3. You would then have had to read para. 1 (1) and para. 3 of that Part very carefully, which in turn would have sent you to s. 186 of the Act of 1876 the effect of which you would have discovered had been altered by s. 15 of the Finance Act, 1935 and s. 12 of the Finance Act of 1943. Since the Act of 1952 you would have to go still further afield. This is a shockingly circuitous and obscure way of creating an offence—and one for which there is no excuse. It would have been so easy and so simple to have added a section to Part 4 of the Act of 1947 providing that a contravention of any of the prohibitions or restrictions contained in that part of the Act constituted an offence punishable by a penalty not exceeding three times the value of the things illegally imported or exported and imprisonment for two years. The machinery for enforcement, namely compulsory detention, seizure and forfeiture, etc., could have been appropriately dealt with in one of the schedules to the Act. It is a great pity that simplicity and clarity, which ought to be the chief aim of parliamentary draftsmen, is so often sacrificed, as here, to a most pernicious fetish—legislation by reference. C

The Customs and Excise Act, 1952, was an Act D

“to consolidate with amendments certain enactments relating to customs and excise and to extend certain provisions of those enactments in any other matter in relation to which the Commissioners of Customs and Excise are for the time being required in pursuance of any enactment to perform their duties.” E

Schedule 12 to that Act repealed (a) the whole of the Customs Consolidation Act, 1876, with certain immaterial exceptions and (b) certain parts of Pt. 3 of Sch. 5 to the Exchange Control Act, 1947, namely the words in para. 1 (1) from “as they” to “enactments” and para. 3 and para. 5. Section 44 and s. 45 of the 1952 Act deal with offences in relation to importation and s. 56 with offences in relation to exportation of prohibited or restricted goods. Subsection (2) of s. 56, so far as is material, reads: F

“Any person knowingly concerned in the exportation...or in the attempted exportation..., of any goods with intent to evade any such prohibition or restriction as aforesaid [i.e., any prohibition or restriction relating to exportation of goods] shall be liable to a penalty of three times the value of the goods or one hundred pounds, ..., or to imprisonment for a term not exceeding two years, or to both, and may be detained.” G

Returning to para. 1 (1) of Pt. 3 of Sch. 5 to the Exchange Control Act, 1947, the words “the enactments relating to customs” now refer to the provisions relating to the import and export of goods contained in the Customs and Excise Act, 1952. These provisions are in substitution for and in addition to the former provisions contained in the Customs Consolidation Act, 1876. Accordingly, the provisions in the Act of 1952 relating to the import or export of goods should be construed as including a reference to anything prohibited to be imported or exported by the provisions of Part 4 of the Act of 1947. It follows, therefore, H

A that the word "goods" in s. 56 of the Act of 1952 is deemed to include Bank of England notes for this purpose. Paragraph 3 of Pt. 3 of Sch. 5 to the Act of 1947 was repealed (1) because it was no longer necessary in as much as the provisions of the Act of 1952 expressly prohibit export whereas s. 186 of the Act of 1876, which they repealed, did not do so. Why the words in para. 1 (1) of Pt. 3 of Sch. 5 were repealed is, perhaps, not altogether plain. They may have been thought to be redundant. Certainly, in the view of this court, the reason was not to allow persons smuggling Bank of England notes out of the country to escape being prosecuted under s. 56 (2) of the Act of 1952.

Counsel for the appellant has argued that the words "the enactments relating to customs" can refer only to such enactments as were in force in 1947. This court cannot accept that argument. The Act of 1952 repealed and re-enacted with modifications most of the provisions of the Act of 1876 including s. 186. Accordingly, the references in the Act of 1947 to the provisions of the Act of 1876 must be construed, unless the contrary intention appears, as references to the provisions so re-enacted in the Act of 1952—see the Interpretation Act, 1889, s. 38 (1). Certainly no contrary intention appears. The modifications to the Act of 1876 contained in the re-enactment of 1952 no doubt include additions. Modifications by way of addition are, however, within s. 38 (1) of the Interpretation Act, 1889 (*Stevens v. General Steam Navigation Co., Ltd.* (2)).

Finally, this court must deal with an argument based on para. 1 (1) of Pt. 2 of Sch. 5 to the Exchange Control Act, 1947, on which counsel for the appellant strongly relied. That sub-paragraph in so far as it is material, reads as follows:

E "Any person in or resident in the United Kingdom who contravenes any restriction or requirement imposed by or under this Act . . . shall be guilty of an offence punishable under this Part of this schedule. Provided that an offence punishable by virtue of Pt. 3 of this schedule shall not be punishable under this Part of this schedule."

Counsel for the appellant argues that the contravention of any restriction imposed by the Act of 1947, including the restriction contained in s. 22 against exporting Bank of England notes, is made an offence by para. 1 (1) of Pt. 2 of Sch. 5. It may be, he says, that Pt. 3 of Sch. 5 provides for the punishment, but the offence is created by Pt. 2. If this argument is correct, the appeal would succeed because clearly the appellant's smuggling activities could not then have been an offence against s. 56 (2) of the Customs and Excise Act, 1952—and that is the only offence with which he is charged. This court is satisfied for the reasons already indicated that Pt. 3 of Sch. 5 to the Exchange Control Act, 1947, contains a complete code for the enforcement of the three sections (s. 21, s. 22 and s. 23) comprising Part 4 of the Act of 1947. Certainly para. 1 (1) of Pt. 2 of Sch. 5 is somewhat inelegantly and even clumsily drafted. But its meaning is tolerably clear. The proviso shows that an offence punishable by virtue of Pt. 3 is not punishable under Pt. 2. Offences for contravention of Part 4 of the Act of 1947 are clearly punishable under Pt. 3 of Sch. 5. This court is, therefore, of the opinion that para. 1 (1) of Pt. 2 of Sch. 5 does not cover a contravention of the provisions of Part 4 of the Act of 1947. Such a contravention cannot constitute an offence punishable under Pt. 2 since, being punishable under Pt. 3, the proviso to Pt. 2 precludes it from being an offence punishable under Pt. 2, and it is only such contraventions as are not punishable as offences under Pt. 2 that are made offences under Pt. 2. If counsel for the appellant's argument were correct, one would expect to find a full stop after the word "offence" in para. 1 (1) of Pt. 2 and the paragraph to continue "such offences shall be punishable under this part of this schedule unless punishable under Pt. 3 of this schedule".

The view that Pt. 3 of Sch. 5 to the Exchange Control Act, 1947, is concerned with the enforcement of Part 4 of the Act and Pt. 2 of Sch. 5 is concerned only

(1) The repeal was effected by the Customs and Excise Act, 1952, s. 320 and Sch. 12.

(2) [1903] 1 K.B. 890.



with the enforcement of the first three Parts of the Act of 1947 gains supports, if any further support were needed, from the opening words of para. 1 (1) of Pt. 2 "Any person in or resident in the United Kingdom who contravenes ...". As mentioned at the beginning of this judgment, the restrictions imposed by the first three Parts of the Act are expressly stated to relate exclusively to persons in or resident in the United Kingdom. For these reasons this court agrees with the conclusions reached by the learned judge and this appeal is accordingly dismissed. A  
B

[HIS LORDSHIP then considered the application for leave to appeal against sentence and concluded:] This court has paid the greatest attention to all these matters which have been so persuasively urged by counsel on behalf of the applicant. When all is said and done, however, the offences to which this man pleaded guilty are very grave offences carried out on a very large scale. He must have known the risks which he was running when he agreed to smuggle and did smuggle large quantities of currency out of England. He must have known that offences of this kind are particularly grave from the public point of view, because of the injury which they do to this country's economy, affecting every man, woman and child living there. It is said that a large part of the money found its way back. That may be so. £30,000 never left the country, because he was caught. That may well be so. £68,750 of the amount that he did take out has, however, never returned. These offences were carried out over a long period and were all part of a carefully prepared and daringly executed plan. In sentencing the accused, the learned judge, after imposing the fine of £25,000, said: C  
D

"This is done not only to hurt you, but as an example to others who may be attempting to do the same thing and who may well be doing the same thing, in an attempt to dissuade them." E

The learned judge imposed this sentence obviously as a deterrent sentence. It seems to the court that no one can criticise the learned judge for considering that offences of this kind ought to be deterred by the severe sentences which, in the view of this court, they richly merit. Before leaving the application, this court would like to make plain that it fully appreciates that if the learned judge had imposed a sentence of twelve months' imprisonment, it would have meant that with the time he spent in custody awaiting trial, the applicant would have to spend nineteen months in prison. That is a sentence which in the opinion of this court, in all the circumstances, could not properly have been criticised, except possibly on the ground that it was too lenient. There are no grounds for interfering with the sentence and the application for leave to appeal is dismissed. The time for paying the fine will be extended to six months from today. F  
G

*Appeal dismissed. Application refused.*

*The court certified under s. 1 of the Administration of Justice Act, 1960, that a point of law of general public importance was involved, viz., whether the contravention of the prohibition imposed by s. 22 of the Exchange Control Act, 1947, in relation to notes, was an offence contrary to s. 56 (2) of the Customs and Excise Act, 1952; but the court refused leave to appeal to the House of Lords.* H

Solicitors: Registrar of Criminal Appeals (for the appellant); Solicitor, Customs and Excise (for the Crown).

[Reported by N. P. METCALFE, ESQ., Barrister-at-Law.] I

A

## BRANDISH v. POOLE.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Winn, L.J., and Ashworth, J.),  
February 23, 1968.]

B

*Licensing—Offence Sale of intoxicating liquor to person under eighteen years of age—Wife of holder of licence left in charge of licensed premises during his temporary absence—Sale of cider to boy of fourteen—No evidence that wife was contractually servant of, or was being paid by, or under control of licence-holder—Whether wife a servant of holder of licence for the purposes of the Licensing Act 1964 (c. 26) s. 169 (1).*

C

The holder of a justices' licence left his wife in charge of the bar during his temporary absence from the premises. While he was away she sold three bottles of cider to a boy fourteen years old without asking his age. On appeal by the wife against her conviction on a charge that she, being the servant of the holder of the justices' licence, knowingly sold intoxicating liquor to a person aged fourteen contrary to s. 169 (1) of the Licensing Act 1964,

D

**Held:** there being no evidence that the wife was a servant, as distinct from an agent, of the holder of the licence, e.g., by being under his control by reason of any contract, she was not his "servant" within the meaning of that term in s. 169 (1), and the conviction would be quashed (see p. 32, letter H, post).  
Appeal allowed.

E

[As to the offence of selling or delivering intoxicating liquor to young persons, see 22 HALSBURY'S LAWS (3rd Edn.) 676, para. 1435, and SUPPLEMENT; and for cases on this subject, see 30 DIGEST (Repl.) 99, 740-743.

For the Licensing Act 1964 s. 169 (1), see 44 HALSBURY'S STATUTES (2nd Edn.) 623.]

### Case Stated.

F

This was a Case Stated by justices for the petty sessional division of Stratford-upon-Avon in respect of their adjudication as a magistrates' court sitting at Stratford-upon-Avon. On June 8, 1967, an information was laid by the respondent against the appellant that she on May 18, 1967, at Stratford-upon-Avon in the county of Warwick being the servant of the holder of a justices' licence for the Masons Arms, Stratford-upon-Avon, did knowingly sell intoxicating liquor, namely, three quart bottles of cider, to a person, Brian James O'Donnell aged fourteen years, under the age of eighteen years contrary to s. 169 of the Licensing Act 1964. The justices heard the information on June 28, 1967, and found that the appellant was the wife of the holder of a justices' licence for the Masons Arms, Stratford-upon-Avon. There was no evidence before them that the appellant was remunerated by the holder of the licence for any work which she did on the premises or that she was under the control or bound to obey the orders of the holder of the said licence. The justices found that on May 18, 1967,

G

at Stratford-upon-Avon in the county of Warwick the appellant knowingly sold three quart bottles of cider to Brian James O'Donnell who was aged fourteen years, and was under the age of eighteen years. The boy, O'Donnell and Police Sergeant Brian Seaton, who interviewed the appellant on May 19, 1967, gave evidence before the justices. The appellant also gave evidence in the course of which she said that on the evening of May 18, 1967, her husband, who was the licensee of the Masons Arms, had gone to a football match, leaving her in complete charge of the public house. The justices found that the information had been proved and they imposed a fine of £10 on the appellant. They stated the question for the opinion of the High Court as follows: whether, in the circumstances the appellant was in the position of a servant of the licensee of the Masons Arms, Stratford-upon-Avon, within the meaning of s. 169 of the Licensing Act 1964.

I

*J. R. Peppitt* for the appellant.

*I. H. Davies* for the respondent.

**LORD PARKER, C.J.:** On the evening of May 18, 1967, Mr. Brandish, the holder of a justices' licence for the Masons Arms, Stratford-upon-Avon, was away from the premises at a football match, and he left his wife, the present appellant, in the bar. At about 7.30 p.m. a schoolboy called O'Donnell went into the Masons Arms and bought and paid for three quart bottles of cider. If he had been sixteen all would have been well, because it was cider, but he was only fourteen. That resulted in the appellant being charged that she, being the servant of the holder of a justices' licence, did knowingly sell intoxicating liquor to a person Brian O'Donnell, aged fourteen years, contrary to s. 169 of the Licensing Act 1964. I should add on the facts that when Mrs. Brandish was questioned about this she said: "I remember selling it to him. He gave me 10s.". She made no enquiries whatever as to his age. The justices came to the conclusion, and I sympathise with them, that as a matter of common sense Mrs. Brandish, the present appellant, was left in charge of the bar that evening, she was doing all that would be expected of a barmaid, and that she was the servant of the licensee. They accordingly held that she had committed the offence, and fined her £10.

I confess that accords with common sense, but one has to look at the words of the statute. Section 169 (1) provides that:

"Subject to sub-s. (4) of this section, in licensed premises the holder of the licence or his servant shall not knowingly sell intoxicating liquor to a person under eighteen . . ."

Pausing there, it might be said that "servant" is used in the perfectly general sense covering an agent; but s. 169 (1) then continues:

"... nor shall the holder of the licence knowingly allow any person to sell intoxicating liquor to a person under eighteen."

In the first instance, it is an offence by the servant, and in the latter instance it is an offence by the holder of the licence, to allow not merely his servant but any person to sell intoxicating liquor to a person under the specified age. In my judgment one thing is perfectly plain, and that is that the appellant was the agent of the holder of the licence, and it might be said that the word "servant" in s. 169 (1) is used loosely to include "agent". It is clear, however, that when "agent" is intended in this statute, it says so; s. 59, for example, and there may be other illustrations, refers to "servant or agent". Of course the words "any person" in the latter part of s. 169 (1) would cover an agent as well as a servant. Accordingly, counsel for the respondent is really forced to say, and he argued at some length, that the appellant was indeed the servant of her husband. For my part I find it quite impossible to say that there was a shred of evidence that she was in the true sense a servant as opposed to an agent. There is no suggestion that there is any contract, there is no suggestion that there was any payment. Neither of those two matters were essential to create such a relationship, but more important there was no suggestion that she was under his control by reason of any contract or relationship of servant. She was merely lending a hand in her capacity as wife. I cannot see a shred of evidence that she was a servant in the narrower sense of the word, which I think must be given to the word in this subsection. I, with some regret, would allow the appeal.

**WINN, L.J.:** I agree.

**ASHWORTH, L.J.:** I agree.

*Appeal allowed. Conviction quashed.*

Solicitors: *J. E. Baring & Co.*, agents for *Geoffrey Parker & Bourne*, Stratford-upon-Avon (for the appellant); *Vizard, Oldham, Crowder & Cash*, agents for *County Prosecuting Solicitor* Stratford-upon-Avon (for the respondent).

[Reported by S. A. HATTEEA, ESQ., Barrister-at-Law.]



A

## R. v. NIXON. R. v. SAME.

[COURT OF APPEAL, CRIMINAL DIVISION (DAVIES, L.J., ROSKILL AND CUSACK, J.J.),  
March 4, 1968.]

*Criminal Law—Practice—Evidence—Retirement of jury—Further evidence—  
Charge of driving whilst disqualified—Jury, after retirement, inspecting  
car with consent and at wish of defence—No miscarriage of justice.*

B

The appellant Mr. N. was charged with driving whilst disqualified and the appellant Mrs. N., his wife, with aiding and abetting him in driving whilst disqualified. Evidence of police officers was that they had seen Mr. N. driving the car with Mrs. N. as a passenger in the front seat, but that, when the car had stopped and one of the officers walked back to it, he saw a movement going on in the front seat and, when he arrived at the car, Mrs. N. was in the driving seat and Mr. N. was in the passenger seat. The appellants denied that Mr. N. had been driving, saying that the car was quite small, that Mr. N. was heavily built and that Mrs. N. was pregnant at the time. In his closing speech, counsel then appearing for the appellants invited the jury to see the car. Shortly after the jury had retired, they asked if they could see the car, and counsel for the appellants renewed his request that they should do so. The jury inspected the car and, after returning for a short time, found the appellants guilty of the offences charged. On appeal against conviction,

C

D

**Held:** despite the breach of strict rule that no evidence of any kind might be admitted after the jury had retired to consider their verdict, there had been no miscarriage of justice since the irregularity had taken place with the express consent and at the express wish of the defence (see p. 35, letter H, and p. 36, letter A, post).

E

*R. v. Lawrence* ([1968] 1 All E.R. 579) distinguished.

Appeals dismissed.

F

[As to retirement of jury to consider their verdict, see 10 HALSBURY'S LAWS (3rd Edn.) 427, 428, para. 789.]

Cases referred to:

*R. v. Gearing*, [1968] 1 All E.R. 581, n.; [1968] 1 W.L.R. 344, n.; (1965), 50 Cr. App. Rep. 18; Digest (Cont. Vol. B) 169, 3561b.

*R. v. Lawrence*, [1968] 1 All E.R. 579; [1968] 1 W.L.R. 341.

G

*R. v. Sanderson*, [1953] 1 All E.R. 485; [1953] 1 W.L.R. 392; 117 J.P. 173; 37 Cr. App. Rep. 32; 14 Digest (Repl.) 321, 3110.

### Appeals and application.

These were appeals by the appellants, Stanley Leslie Nixon and Anne Nixon, his wife, against their convictions at Worcester quarter sessions on Nov. 23, 1967, before the deputy chairman (J. F. EVANS, Esq.) and a jury, Stanley Nixon of driving whilst disqualified and Anne Nixon of aiding and abetting him in the commission of that offence. Stanley Nixon was sentenced to six months' imprisonment and disqualified for 2½ years and his licence was endorsed. Anne Nixon also applied for extension of time for leave to appeal against her sentence to a fine of £20, disqualification for twelve months and endorsement of her licence. The facts are set out in the judgment of the court.

I

*D. T. Hallchurch* for the appellants.\*

*J. T. C. Lee* for the Crown.\*

DAVIES, L.J., delivered the following judgment of the court: These are appeals by leave of the single judge on a point of law. Leave was not really necessary in our view. It is a curious case and raises a point that has very recently been before this court. The appellant Stanley Leslie Nixon had been

\* Counsel appearing on the appeal did not appear for the appellants or the prosecution at the trial.

disqualified from driving a motor car for six months on Apr. 20, 1967, by the Gloucestershire magistrates. On July 1, 1967, early in the morning, at 3 a.m., two police officers, according to their evidence, saw a Vauxhall Viva motor car being driven by Mr. Nixon with the appellant Anne Nixon as a passenger in the front seat. They followed the car and eventually overtook it and signalled it to stop. One of the police officers walked back to the Vauxhall motor car and, according to him, he saw a movement going on in the front seat. He could not say precisely what movement it was. When he arrived at the motor car Mrs. Nixon was in the driving seat and Mr. Nixon was in the passenger seat. They both denied that Mr. Nixon had been driving; they said that Mrs. Nixon had been driving all the time. That was the question for the jury. The question whether or not they had changed places was put very clearly by the learned deputy chairman. They said that they had not, and the police said that they must have done. The account of the matter given by the appellants was supported by the argument which I will put in the words of the learned deputy chairman at the end of his summing-up:

"The next point on which [counsel for the accused (1)] places considerable reliance is this. He says that, in a Vauxhall Viva, quite a small motor car, with a transmission tunnel on which the gear lever is placed, with a fairly heavily built Mr. Nixon and with Mrs. Nixon, who though today of slight build and appearance was at the time seven or eight months pregnant, it would have been a very difficult manoeuvre to accomplish this change of seat in a few seconds. You have to consider what weight you can give to that. No doubt the prosecution would say to that, if required to put their submissions in a sentence, necessity is the mother of invention."

The jury retired at 2.50 p.m. They came back a quarter of an hour later, and this conversation took place:

"The deputy chairman: 'Members of the jury, have you a foreman?' Foreman of the jury: 'Yes, sir.' The deputy chairman: 'I understand that there is something you would like to see or a question you would like to ask, or something.' Foreman of the jury: 'I understand we were told when we were in here if we wished to see a Vauxhall Viva of the type under discussion we could do this. We would now like to, please, sir.' The deputy chairman [to counsel]: 'I suppose strictly as no application was made to take the jury to see it during the evidence in strictness the opportunity might be said to have passed, but I do not think one ought to be bound by any rule of that kind, do you?' Counsel: 'I do not, sir, as I made the suggestion to the jury.'"

Indeed, counsel for the appellants (1) had invited the jury to see the motor car during the course of his closing speech, as the learned deputy chairman pointed out.

"The deputy chairman: 'Quite. You invited them to do it in your closing speech.' Counsel: 'Indeed.' The deputy chairman: 'I think it is so very soon after the jury's retirement I cannot see any reason why they should not now go and see the car.' Counsel: 'Indeed, sir.' The deputy chairman: 'Would you like them to?' Counsel: 'Indeed, sir.'"

Then there was a discussion as to where the car would be and a decision to move it to the car park of the Shire Hall. The jurors went out, I gather in the presence of the jury bailiffs; then they went back to their room and in another quarter of an hour they came back and found Mr. Nixon guilty of driving while disqualified and Mrs. Nixon guilty of aiding and abetting him. He was then sentenced to six months' imprisonment, having a very bad record for this sort

(1) I.e., counsel appearing for Mr. and Mrs. Nixon at the trial.

A of offence, disqualified for two years and his licence was endorsed. She was fined £20, disqualified for twelve months and her licence was endorsed. Mrs. Nixon applies for an extension of time in which to appeal against that sentence, but her counsel in this court concedes that, if the conviction is sustained, there is nothing that he can usefully say about her sentence.

B As I have said, this point as to jurors after they have retired seeing a motor vehicle that forms part of the case was discussed in this court very recently in *R. v. Lawrence* (2), and there the court took the view that the strict rule that no evidence of any kind may be admitted after the end of the summing-up, still less after the jury have retired, must be enforced. The court in that case found themselves unable to apply the proviso (3). They followed an earlier decision of the Court of Criminal Appeal in *R. v. Gearing* (4), in the course of which C LORD PARKER, C.J., said:

“It has always been a very strict rule of this court that no evidence whatever must be introduced after the jury have retired”,

D and he referred to an earlier case (5). That principle was emphasised in *R. v. Lawrence* (2). Counsel for the Crown has called our attention to a somewhat different case, *R. v. Sanderson* (6). That was different in this sense. A defence witness arrived late but just before the end of the summing-up. The summing-up ended and the defence applied for leave to call the witness. The witness was called, but after that there was a supplemental summing-up by the recorder, and the court took the view that there was nothing wrong with that, though it was exceptional and unusual and perhaps undesirable; but that did not invalidate the conviction.

E In the present case, it has been submitted to us by counsel for the Crown that we should distinguish the facts of this case from those in the earlier authorities, and he has asked us to apply the proviso. As I understand his argument, he would like to contend that there was not a breach of the rule; but, if there was a breach of the rule, he submits that there was no miscarriage of justice. We have F anxiously considered this case, but we have come to the conclusion that that latter contention is correct. The defence here during their final speech asked the jury to look at the car. There was no difficulty over identification of the car in the present case, unlike that of *R. v. Lawrence* (2), for, as was rightly pointed out by counsel for the Crown, the registration number of this particular Vauxhall motor car appeared in the indictment against Mr. Nixon. It was G alleged that he was driving a Vauxhall Viva motor car having the registered number SN 18. So the jury could not have been mistaken as to that. I think that we were told also by counsel that the registration book was in evidence.

H It was a simple and short issue. All the matters were put to the jury by the learned deputy chairman. When the jury came back with their request, as appears from the passage in the transcript which I have read, the deputy chairman asked counsel for the defence more than once what he wanted done, and I counsel made it abundantly clear that, even at that stage, at that improper stage strictly in law, he wished the jury to see the car. Therefore, this irregularity—for irregularity it was—took place with the express consent and at the express wish of the defence. There again this case is different from *R. v. Lawrence* (2), since in *R. v. Lawrence* (2), although the defence did not object to the jury seeing the car after they had retired, counsel for the defence said (7) in effect to the I commissioner “I don’t mind them seeing it, I think it might help me; but if you do let them see it, I am quite certain that the Court of Appeal will quash

(2) [1968] 1 All E.R. 579.

(3) I.e., the proviso to s. 4 (1) of the Criminal Appeal Act, 1907, as amended by the Criminal Appeal Act 1966, s. 4 (1) (c), s. 10 (2) and Sch. 3.

(4) [1968] 1 All E.R. 581, n.

(5) I.e., *R. v. Wilson*, (1957), 41 Cr. App. Rep. 226.

(6) [1953] 1 All E.R. 485.

(7) [1968] 1 All E.R. at p. 580.



the conviction", which, in fact, it did. This case is entirely different from that. The evidence of the police officers was clear, if the jury accepted it, as they obviously did, that it was Mr. Nixon who was driving the car when they first saw it. In the opinion of this court, there was no miscarriage of justice here at all. Therefore, despite the breach of this rule, which normally is a very strict rule, the court dismisses the appeals. Mrs. Nixon's application for an extension of time in which to appeal against her sentence, has not been pursued by counsel. In those circumstances, both appeals against conviction and Mrs. Nixon's application for an extension of time are dismissed.

*Appeals and application dismissed.*

Solicitors: *Registrar of Criminal Appeals* (for the appellants); *Tree, Hemming & Johnston*, Worcester (for the Crown).

[*Reported by N. P. METCALFE, Esq., Barrister-at-Law.*]

## THE ASTLEY INDUSTRIAL TRUST, LTD. v. MILLER (OAKES, Third Party).

[LIVERPOOL ASSIZES (CHAPMAN, J.), May 24, 1967\*.]

*Agent—Mercantile agent—Possession of goods—Power of mercantile agent to transfer title dependent on possession being given to him as mercantile agent—Motor car—Company operating mainly self-drive hire business but selling second-hand cars as ancillary business—New car released to company by motor distributors, as addition to self-drive hire fleet—Sale of new car to customer—Hire-purchase agreement by company with finance house after sale of car—Whether title to car passed on sale by company to customer—Factors Act, 1889 (52 & 53 Vict. c. 45), s. 2 (1).*

On Nov. 25, 1960, a Vauxhall motor car was consigned by the makers to L., Ltd., a firm of motor distributors, who were recorded as the first owners in the car's registration book, issued on Dec. 2, 1960, the order being given because D., Ltd., who in the main ran a self-drive hire business but who sold second-hand cars as an ancillary, had asked for a car of that particular kind. D., Ltd. wishing to buy the car on hire-purchase, the plaintiffs, a finance company, were approached. On Dec. 2, 1960, the car was released by L., Ltd. to D., Ltd. on the basis of its being an addition to their fleet of self-drive cars. The defendant had some two weeks previously asked D., Ltd. for a car of the same description. Delivery of this car was tendered to him by D., Ltd. on Dec. 2, 1960, but the defendant did not accept and pay for it until Dec. 3, 1960. He received the tax disc and registration book from D., Ltd. on Dec. 6, 1960, effected insurance as from Dec. 7, 1960, and the first change of ownership of the car into his name was registered on Dec. 9, 1960. On Dec. 9, 1960, a hire-purchase agreement was signed on behalf of D., Ltd. and witnessed by L., Ltd. On the same date a delivery receipt was signed by D., Ltd. and a dealers' invoice by L., Ltd. in favour of the plaintiffs. The plaintiffs received L., Ltd.'s cheque for the car on Jan. 4, 1961, on which date they founded their title to the car. D., Ltd. defaulted in their hire-purchase payments to the plaintiffs; and, as the car was found in the defendant's possession in 1962, the plaintiffs claimed against him for detainee, alternatively for conversion, of the car. By s. 2 (1)† of the Factors Act, 1889, where a mercantile agent was, with the consent of the owner, in possession of the goods, any sale of the goods made by him when acting in the ordinary course of his business as a mercantile agent, would be as valid

\* The hearing was at Manchester Assizes on Apr. 17, 18 and 19, 1967.

† Section 2 (1) is set out at p. 39, letter G, post.

A as if he were expressly authorised by the owner of the goods to make the same.

**Held:** (i) the statutory power of a mercantile agent to pass title, which was conferred on a mercantile agent by s. 2 (1) of the Factors Act, 1889, applied only where he had possession in his capacity as a mercantile agent and on the true owner having consented to his having possession in that capacity; on the facts, D., Ltd. did not have possession of the car in their capacity as mercantile agents, nor did L., Ltd., the true owners, consent to D., Ltd.'s having possession in that capacity and, therefore, D., Ltd. had no power to pass title to the defendant (see p. 42, letter D, post).

Dicta of CHANNELL, J., in *Oppenheimer v. Frazer and Wyatt* ([1907] 1 K.B. at p. 527), of MACKINNON, J., in *Staffs Motor Guarantee, Ltd. v. British Wagon Co., Ltd.* ([1934] All E.R. Rep. at p. 324); of DENNING, L.J., in *Pearson v. Rose & Young, Ltd.* (Little, Third Party, Marshall, Fourth Party) ([1950] 2 All E.R. at p. 1033) and of WILLMER, L.J., in *Stadium Finance, Ltd. v. Robbins (or Robins)* ([1962] 2 All E.R. at p. 638) applied.

*Pacific Motor Auctions Pty., Ltd. v. Motor Credits (Hire Finance), Ltd.* ([1965] 2 All E.R. 105) explained.

(ii) accordingly, the claim being pleaded primarily in detinue, the defendant must return the car to the plaintiffs, or alternatively pay its present value of £165, plus damages of £75 for detention of vehicle (calculated at the rate of 7½ per cent. for 2½ years and being based on the charges obtainable had a new hire-purchase transaction been effected in 1962 on the car if returned at that time), plus damages of £125 in respect of depreciation over the same period (see p. 45, letters D and G, post).

Per CURIAM: the fact that the log book was not received by the defendant on Dec. 6, 1960, did not take the disposal of the car by D., Ltd. to the defendant outside s. 2 (1) of the Factors Act, 1889, as being a transaction that was not in the ordinary course of business of D., Ltd. as mercantile agents, having regard to the circumstances that this car was a new car and that the log book was with the registration authority in order that the car should be registered and taxed (see p. 44, letters B and D, post).

[As to goods the subject of disposition by mercantile agents in the ordinary course of business, see 1 HALSBURY'S LAWS (3rd Edn.) 214, 215, para. 488; and for cases on the subject, see 1 DIGEST (Repl.) 383-389, 491-524, 392, 393, 539-544.

As to the measure of damages in actions of detinue, see 38 HALSBURY'S LAWS (3rd Edn.) 791, 792, para. 1317; and for cases on the subject, see 46 DIGEST (Repl.) 515, 605, 524, 672-679.

For the Factors Act, 1889, s. 2, see 1 HALSBURY'S STATUTES (2nd Edn.) 30.]

#### Cases referred to:

*Belsize Motor Supply Co. v. Cox*, [1911-13] All E.R. Rep. 1084; [1914] 1 K.B. 244; 83 L.J.K.B. 261; 110 L.T. 151; 26 Digest (Repl.) 660, 16.

*Central Newbury Car Auctions, Ltd. v. Unity Finance, Ltd.*, [1956] 3 All E.R. 905; [1957] 1 Q.B. 371; [1956] 3 W.L.R. 1068; 21 Digest (Repl.) 484, 1713.

*Eastern Distributors, Ltd. v. Gobring (Murphy, Third Party)*, [1957] 2 All E.R. 525; [1957] 2 Q.B. 600; [1957] 3 W.L.R. 237 26 Digest (Repl.) 675, 77.

*Edwards (Percy), Ltd. v. Vaughan*, (1910), 26 T.L.R. 545; 39 Digest (Repl.) 624, 1358.

*General and Finance Facilities, Ltd. v. Cooks Cars (Romford), Ltd.*, [1963] 2 All E.R. 314; [1963] 1 W.L.R. 644; 46 Digest (Repl.) 524, 678.

*Helby v. Matthews*, [1895-99] All E.R. Rep. 821; [1895] A.C. 471; 64 L.J.Q.B. 465; 72 L.T. 841; 60 J.P. 20; 26 Digest (Repl.) 660, 14.

*Oppenheimer v. Frazer and Wyatt*, [1907] 1 K.B. 519; 76 L.J.K.B. 276; *reversd.* C.A., [1904-07] All E.R. Rep. 143; [1907] 2 K.B. 50; 76 L.J.K.B. 806; 97 L.T. 3; 1 Digest (Repl.) 390, 530.

- Pacific Motor Auctions, Pty., Ltd. v. Motor Credits (Hire Finance), Ltd.*, [1965] 2 All E.R. 105; [1965] A.C. 867; [1965] 2 W.L.R. 881; Digest (Cont. Vol. B) 634, 1582a. A
- Pearson v. Rose & Young, Ltd. (Little, Third Party, Marshall, Fourth Party)*, [1950] 2 All E.R. 1027; [1951] 1 K.B. 275; 1 Digest (Repl.) 387, 520.
- Rosenthal v. Alderton & Sons, Ltd.*, [1946] 1 All E.R. 583; [1946] 1 K.B. 374; 115 L.J.K.B. 215; 174 L.T. 214; 46 Digest (Repl.) 515, 605. B
- Stadium Finance, Ltd. v. Robbins (or Robins)*, [1962] 2 All E.R. 633; [1962] 2 Q.B. 664; [1962] 3 W.L.R. 453; Digest (Cont. Vol. A) 7, 509a.
- Staffs Motor Guarantee, Ltd. v. British Wagon Co., Ltd.*, [1934] All E.R. Rep. 322; [1934] 2 K.B. 305; 103 L.J.K.B. 613; 151 L.T. 396; 39 Digest (Repl.) 655, 1580.
- Wickham Holdings, Ltd. v. Brooke House Motors, Ltd.*, [1967] 1 All E.R. 117; [1967] 1 W.L.R. 295. C

### Action.

This was a claim by the plaintiffs, The Astley Industrial Trust, Ltd., against the defendant, Ernest Miller, for detainee or, alternatively, for conversion of a motor car. The following facts are taken from the judgment. On Nov. 25, 1960, a Vauxhall Victor Super Saloon car, was consigned on sale or return terms to Lomas Bros. (Motors), Ltd. (hereafter called "Lomas") of Glossop, Derbyshire, who were the main distributors of Vauxhall's in that part of Derbyshire. The order was given because a car of that particular kind had been asked for by John Oakes who, with his brother, Stanley Oakes, were the third parties in the proceedings; and they and one Davenport, were directors of Droylsden Self-Drive Service Station, Ltd. (hereinafter called "Droylsden") of Droylsden, which carried on a business that in the main was a self-drive hire business but included selling second-hand cars as an ancillary activity. Mr. John Oakes died before the hearing. On Dec. 2, 1960, the registration book for the car was issued by the Derbyshire County Council to Lomas, that company being recorded as the first owners, which pursuant to the Sale of Goods Act, 1893, s. 18, r. 4 (a), operated (so His Lordship CHAPMAN, J., found) to transfer the title in the car from Vauxhall to Lomas. Droylsden wished to buy the car on hire-purchase: accordingly the plaintiffs were approached as the finance house to back the hire-purchase transaction. On Dec. 9, 1960, a hire-purchase agreement was signed by Mr. Davenport and Mr. John Oakes on behalf of Droylsden and witnessed by a Mr. Price for Lomas. On the same date the delivery receipt was signed by Droylsden in favour of the plaintiffs, and the dealers' (viz. Lomas') invoice in favour of the plaintiffs was also signed on that date. The plaintiffs received Lomas' cheque on Jan. 4, 1961, on which date they founded their title to the car. The trial judge found that the car was released by Lomas to Droylsden on Dec. 2, 1960, on the basis of its being an addition to their fleet of self-drive cars which was to be covered in due course by hire-purchase arrangements. D

Some two weeks prior to Dec. 2, 1960, the defendant had a discussion with Mr. Stanley Oakes about buying a new Vauxhall car. On Dec. 2, 1960, delivery of the car in question was tendered to the defendant by Droylsden, but he did not accept and pay for it until Dec. 3, 1960. He received the tax disc and the log book from Droylsden on or about Dec. 6, 1960, effected insurance as from Dec. 7, 1960, and the first change of ownership of the car into the defendant's name was registered on Dec. 9, 1960. F

Droylsden defaulted in their hire-purchase payments to the plaintiffs and in August, 1961, their cheque (for £199 8s. 4d.) was dishonoured on presentation, leaving a balance outstanding on the hire-purchase account of £499 10s. 10d. The car was found to be in the defendant's possession, and a demand for its delivery up to the plaintiffs was made on May 1, 1962. The defendant refused to comply with that demand unless ordered to do so by the court. G



A The cases noted below\* were cited during the argument in addition to those referred to in the judgment.

*J. M. Lever* for the plaintiffs.

*J. Jaffe* for the defendant.

The third party, Mr. Stanley Oakes, appeared in person.

*Cur. adv. vult.*

B

May 24. CHAPMAN, J., stated the facts, and continued: It is plain from the facts as I have found them above that the plaintiffs acquired title to the car by the relevant hire-purchase documents executed by Lomas, unless by the date of these documents title had already passed to the defendant. On the other hand, the defendant must base his claim to title on there being title in or conferred

C

by Droylsden. He never had any contractual relationship with Vauxhall's or with Lomas; Droylsden and Droylsden alone, are the source from which he must derive his title. Reliance has to some extent been placed by counsel for the defendant on s. 21 (1) of the Sale of Goods Act, 1893, which covers the case, in the concluding words, where "the owner of goods is by his conduct precluded from denying the seller's authority to sell". The owners at the material time

D

were Lomas and the sellers Droylsden. Were Lomas precluded by their conduct from denying the authority of Droylsden to sell? There is direct authority for the proposition that, merely by handing a car with a log book to a person, an owner does not preclude himself from denying that that person had authority to sell (*Central Newbury Car Auctions, Ltd. v. Unity Finance, Ltd.* (1); see also GOODE ON HIRE-PURCHASE LAW, p. 273, GUEST ON LAW OF HIRE-PURCHASE,

E

para. 729), and there is here nothing else on which an estoppel can be founded. There is no sort of representation by words or conduct from Lomas to the defendant at all. Indeed, they were not in contact at all and had not even heard of each other. Nor, again, can any reliance be placed on s. 25 (2) of the Sale of Goods Act, 1893, reproducing s. 9 of the Factors Act, 1889, and dealing with a "buyer" who, with the consent of the seller, is in possession of the goods before

F

paying for them, because Droylsden were not "buyers" within the meaning of that provision (see *Percy Edwards, Ltd. v. Vaughan* (2), *Helby v. Matthews* (3), and *Belsize Motor Supply Co. v. Cox* (4)).

The main plank on which the defendant has relied is s. 2 (1) of the Factors Act, 1889, which provides that:

G

"Where a mercantile agent is, with the consent of the owner, in possession of goods . . . any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorised by the owner of the goods to make the same . . ."

subject to a proviso as to the good faith, etc., of the recipient, as to which there is here no question. It is to be noted that this provision is founded on three express primary conditions of a basic character, namely: (a) the goods must be in the possession of someone who is not the true owner; (b) that possession must be with the consent of the true owner; (c) the person who has this possession must be a person who fulfils the requirements of being "a mercantile agent". A mercantile agent is defined by s. 1 (1) of the Act of 1889 as being

H

"a mercantile agent having in the customary course of his business as such agent authority either to sell goods or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods."

I

\* *Sachs v. Miklos*, [1948] 1 All E.R. 67; [1948] 2 K.B. 23; *Strand Electric & Engineering Co., Ltd. v. Brisford Entertainments, Ltd.*, [1952] 1 All E.R. 796; [1952] 2 Q.B. 246.

(1) [1956] 3 All E.R. 905; [1957] 1 Q.B. 371.

(2) [1910], 26 T.L.R. 545.

(3) [1895-99] All E.R. Rep. 821; [1895] A.C. 471.

(4) [1911-13] All E.R. Rep. 1084; [1914] 1 K.B. 244.

So far as these conditions are concerned, it is plain on the facts as I have found them: (a) that at the material time the car in question was in the possession of Droylsden, who were not then the true owners; (b) that this possession by Droylsden was with the consent of the true owner, Lomas; (c) that Droylsden were persons who were, albeit as a sideline and as a subsidiary to their main business of hire car operators, trading as motor dealers in the sense that they bought and sold cars, at any rate on the second-hand market. A

Counsel for the defendant has contended that, if these three conditions are satisfied, the situation is that a person who is in fact a mercantile agent, and who has in fact possession of someone else's property with the consent of that someone else, is clothed with ostensible or apparent authority to make any sale, pledge or other disposition of it which may appeal to his lust for pecuniary gain or his urge to perpetrate a fraud. Counsel for the plaintiffs, on the other hand, has contended that there is inherent in the statutory language a fourth condition, namely, that the goods must have been entrusted by the true owner or with his permission to the mercantile agent in his capacity as a mercantile agent; unless this is so, there is, he contends, no basis for saying that the true owner has clothed the mercantile agent with authority to act in that capacity. Counsel for the defendant has disputed this interpretation of the statute on the basis that it involves reading into the statute words which are not there. B C D

Of course, one must always construe the words of an Act of Parliament strictly; that is, with precision. This is particularly true when questions of title are concerned and especially when the title is that of a completely honest, respectable and blameless person. The meaning of words, however, does not always end at the minimal dictionary content of each word taken as a separate entity, and this is as true of words in a section of an Act of Parliament as of words in a passage of verse or poetry. Counsel for the defendant's construction would, for example, lead to this result: if I take my car into the local garage to have a puncture repaired, or to be greased, or to have a general check-up before going on holiday, I would be at the risk of the garage not only purporting to sell it, but actually passing good title if, besides carrying out repairs and servicing for customers, they professed the business of buying and selling motor cars (whether second-hand or new). This would seem a startling conclusion. Or to go further to extremes: if my next-door neighbour (being in fact a motor dealer) came to me and said, "My car has to go into dock for a fortnight. You are going on a cruise for your holidays. Would you, as a friend, lend me your car while you are away?" If, as one neighbour to another, I yielded to his importunity, I would, according to counsel's argument, be at risk of losing my car, merely because he happened to be a motor dealer, if he decided to flog it to some fly-by-night. At such a conclusion one's commonsense revolts. E F G

The authorities seem to be all one way on this point, namely, in favour of counsel for the plaintiff's argument and against counsel for the defendant. In *Oppenheimer v. Frazer and Wyatt* (5) CHANNELL, J., said: H

"It seems to me that the true rule is that where there is a consent of the owner of the goods to the possession of the goods by the mercantile agent as a mercantile agent and that is the important part of the matter that then the section applies, provided the other conditions are fulfilled . . ."

In *Staffs Motor Guarantee, Ltd. v. British Wagon Co., Ltd.* (6), MACKINNON, J., adopted that statement by CHANNELL, J., and contended: I

"I observe that SIR MACKENZIE CHALMERS, the learned draftsman of the Sale of Goods Act, 1893, in his comment on this section [s. 2 (1) of the Act of 1889], makes the same suggestion and illustrates it by what seems to me to be a very forcible example: 'Suppose a house were let furnished to a man who happened to be an auctioneer. Could he sell the furniture by auction

(5) [1907] 1 K.B. 519 at p. 527.

(6) [1934] All E.R. Rep. 322 at p. 324; [1934] 2 K.B. 305 at p. 313.

A and give a good title to the buyers? Surely not: " (CHALMERS SALE OF GOODS  
 ACT, 1893 (11th Edn.), p. 176). That, of course, is an extreme case, but I  
 think, the same principle applies here. Because one happens to entrust his  
 goods to a man who is in other respects a mercantile agent, but with whom  
 he is dealing, not as a mercantile agent, but in a different capacity. I do not  
 think that it is open to a third party who buys the goods from that man  
 B to say that they were in his possession as a mercantile agent and that,  
 therefore, he had power to sell them to a purchaser and so give a good title  
 to them. The claimant must be able to assert not only that the goods were  
 in the man's possession as a mercantile agent, but also that they were  
 entrusted by the owner to him as a mercantile agent. As CHANNELL, J.,  
 said, it is the consent of the owner of the goods to the possession of them by  
 C the mercantile agent as a mercantile agent that is the important part of  
 the matter."

In *Pearson v. Rose & Young, Ltd.* (Little, Third Party, Marshall, Fourth Party) (7),  
 DENNING, L.J., said:

D " (iii) If the true owner consents to the mercantile agent having the  
 goods for repair but not for sale, is that a consent which enables the Factors  
 Act to operate? The answer would seem at first sight to be ' Yes,' because  
 it is undoubtedly a consent to the agent having possession, but this needs  
 testing. Suppose, for instance, that the owner of furniture leaves it with a  
 repairer for repair and that the repairer happens to be a dealer as well.  
 Does that mean that the repairer can deprive the true owner of his goods  
 E by selling them to a buyer? Clearly not, if the owner did not know the  
 repairer to be a dealer, and, even if he did, why should that incidental  
 knowledge deprive the true owner of his goods? Such considerations have  
 led the courts to the conclusion that the consent, which is to enable the  
 Factors Act to operate, must be a consent to the possession of the goods  
 by a mercantile agent as a mercantile agent: see per CHANNELL, J., in  
 F *Oppenheimer v. Frazer and Wyatt* (8), and per MACKINNON, J., in *Staffs*  
*Motor Guarantee, Ltd. v. British Wagon Co., Ltd.* (9). That means that the  
 owner must consent to the agent having them for a purpose which is in some  
 way or another connected with his business as a mercantile agent. It may  
 not actually be for sale. It may be for display or to get offers, or merely  
 to put in his showroom, but there must be a consent to something of that  
 kind before the owner can be deprived of his goods."

G This statement was accepted by WILLMER, L.J., in *Stadium Finance, Ltd. v.*  
*Robbins (or Robins)* (10):

H " To come within the section, Palmer's possession of the car must be  
 possession with the consent of the defendant in his capacity as mercantile  
 agent—i.e., as one clothed with apparent authority to sell. In saying  
 this, I adopt the view expressed by DENNING, L.J., in *Pearson v. Rose &*  
*Young, Ltd.* (11)."

I Counsel for the defendant has contended that this formidable body of authority  
 has all been swept away by *Pacific Motor Auctions Pty., Ltd. v. Motor Credits*  
*(Hire Finance), Ltd.* (12). That case dealt with s. 28 (1) of the Sale of Goods  
 Act, 1923-1953, of New South Wales, which covers cases where a person, having  
 sold goods, continues in possession of the goods. That is the equivalent of  
 s. 25 (1) of our Sale of Goods Act, 1893. The Privy Council, in a judgment delivered  
 by LORD PEARCE, held that the continuity of possession required by the section

(7) [1950] 2 All E.R. 1027 at p. 1032; [1951] 1 K.B. 275 at p. 288.

(8) [1907] 1 K.B. at p. 527.

(9) [1934] All E.R. Rep. at p. 324; [1934] 2 K.B. at p. 313.

(10) [1962] 2 All E.R. 633 at p. 638; [1962] 2 Q.B. 664 at p. 674.

(11) [1950] 2 All E.R. at p. 1032; [1951] 1 K.B. at p. 288.

(12) [1965] 2 All E.R. 105; [1965] A.C. 867.



was continuity of a physical possession, and that it did not matter if, by a private transaction, there was a change in the legal nature of the possession, e.g., from possession of a seller, paid or unpaid, to possession of a bailee under a hire-purchase agreement. In so holding, the Privy Council expressly dissented from the view expressed by MACKINNON, J., in *Staffs Motor Guarantee, Ltd. v. British Wagon Co., Ltd.* (13) (and followed without discussion by the Court of Appeal in *Eastern Distributors, Ltd. v. Goldring (Murphy, Third Party)* (14)). But this view of MACKINNON, J., as to the effect of s. 25 (1) of the Sale of Goods Act, 1893, is entirely separate and distinct from the view expressed by the same judge in the same case on the effect of s. 2 (1) of the Factors Act, 1889. On the Sale of Goods Act point, the learned judge has been overruled, but I find nothing in the *Pacific Motor Auctions* case (15) to suggest that the learned judge's point of view on the Factors Act point has been in any way eroded. To achieve that, it would have been necessary to say, not merely that MACKINNON, J., was wrong, but also that CHANNELL, J., DENNING, L.J., and WILLMER, L.J. were all wrong—and there is no hint of that at all.

Accordingly, I take it to be well settled and unchallenged law that the statutory power to pass title which is vested in a mercantile agent depends on his having possession in his capacity as a mercantile agent and on the true owner having consented to his having possession in that capacity. In the present case, on the facts as I have found them, Droylsden did not have possession of the Vauxhall in their capacity as mercantile agents, nor did Lomas consent to their having possession in that capacity. Droylsden, therefore, had no power to pass title to anybody.

A further impediment to the defendant's claim to title is suggested by counsel for the plaintiffs. Founding himself on the decisions of the Court of Appeal in *Pearson v. Rose & Young, Ltd.* (16), and *Stadium Finance, Ltd. v. Robbins (or Robins)* (17), he argues that the sale of the car by Droylsden to the defendant was not a sale made in the ordinary course of business of a mercantile agent because, at the time, the car was minus its registration book. Counsel for the defendant urges, first, that these authorities deal only with second-hand cars and are not applicable to a new car in mint condition straight from the manufacturers; secondly, that the absence of the log book at the time a car is delivered does not matter if there is a satisfactory explanation for its absence and the deficiency is in fact later made good. It is to be observed that, in *Pearson's* case (16), the foundation of the Court of Appeal's decision was that the mercantile agent's possession of the registration book was without the consent of the true owner. There are in fact indications of some confusion between two rather different things, namely, the nature of the possession originally acquired (that is, whether or not it is possession acquired with authority to sell) and the nature of the sale which has been effected (that is, is it such a sale as complies with the ordinary routine of business?). The two do not necessarily correspond. A person's authority (actual, implied, apparent or ostensible) would depend on the circumstances in which he obtained possession; but the ordinary course of business of a vendor does not depend in any sense on the circumstances in which he acquired possession. This confusion appears particularly where SOMERVILLE, L.J., said (18),

"The ostensible authority which enabled Mr. Hunt to effect a sale 'in the ordinary course of business' arose because of his possession of the log book without the consent of the owner."

(13) [1934] All E.R. Rep. 322; [1934] 2 K.B. 305.

(14) [1957] 2 All E.R. 525; [1957] 2 Q.B. 600.

(15) [1965] 2 All E.R. 105; [1965] A.C. 867.

(16) [1950] 2 All E.R. 1027; [1951] 1 K.B. 275.

(17) [1962] 2 All E.R. 633; [1962] 2 Q.B. 664.

(18) [1950] 2 All E.R. at p. 1029; [1951] 1 K.B. at p. 284.

A He had, however, previously stressed (19):

“It is, I think, clear that on the sale of a second-hand car the vendor will ordinarily deliver and the purchaser require the delivery of the registration, or ‘log’, book.”

Again, DENNING, L.J., said this (20):

B “When the significance of the log book is realised, it becomes plain that the consent of the owner, which is necessary for the Factors Act, to operate, is a consent to the possession by the mercantile agent, not only of the car, but also of the log book that goes with it. So long as the owner retains the log book, the mercantile agent cannot dispose of the car in the ordinary course of his business, because it is not in the ordinary course of anyone’s business to dispose of a second-hand car without a log book. The retention by the owner of the log book therefore, effectually prevents the Factors Act from operating. The handing over of the log book with the car enables the Act to operate. The owner then clothes the agent with apparent authority to dispose of the car, and the agent is enabled to dispose of it in the ordinary course of his business, and the Factors Act operates to give a good title to an innocent purchaser. To put it shortly, in the case of a car, ‘goods’ in the Act means the car together with the log book.”

This closing sentence as a synthesis summarising the principle is expressly refuted by ORMEROD and DANCKWERTS, L.J.J., in the *Stadium Finance* case (21).

Similarly, in the *Stadium Finance* case (22), ORMEROD, L.J., said: “I do not accept the submission that the registration book was put in Palmer’s possession with the consent of the defendant.” WILLMER, L.J., said (23):

E “On the learned judge’s finding, I do not think that Palmer can be said to have been in possession of the registration book with the consent of the defendant.”

DANCKWERTS, L.J., said (24): “But the mercantile agent, Palmer, did not come into possession of the registration book with the consent of the owner.”

F In the present case, the registration book was with the Derbyshire County Council at Matlock for the purpose of the crucial first registration by Lomas on Friday, Dec. 2, 1960; but the car on that date turned up at the defendant’s premises when Droylsden tendered delivery of it. The defendant did not take delivery of the car until noon on Saturday, Dec. 3, 1960, and the explanation given to him for the absence of the registration book on that date was the true one: that it was with the taxing authority for the purpose of the car being taxed. The defendant received the registration book plus the taxation disc by about Tuesday, Dec. 6, 1960, from Droylsden; this would fit in with those documents having arrived at Lomas’ from the County Council on about Monday, Dec. 5, and having been received by Droylsden from Lomas on that day, or the Tuesday. Is there any reason to suppose that Droylsden got their hands on the registration book without Lomas’ consent? Of course, it is possible that Droylsden took the car by some trick without Lomas knowing anything about it and then subsequently succeeded in stealing the registration book and tax disc, but it is certainly more likely that the car was released prematurely but willingly by Lomas and the registration book was later, when received back from the county council, voluntarily handed over by Lomas to Droylsden so as to join the car to which it belonged.

I If that was the course of events, as I find that it was, so far as the acquisition of the car and the registration book by Droylsden was concerned, both being

(19) [1950] 2 All E.R. at p. 1029; [1951] 1 K.B. at p. 283.

(20) [1950] 2 All E.R. at p. 1033; [1951] 1 K.B. at p. 289.

(21) [1962] 2 All E.R. at pp. 636, 639; [1962] 2 Q.B. at pp. 670, 671, 676.

(22) [1962] 2 All E.R. at p. 636; [1962] 2 Q.B. at p. 671.

(23) [1962] 2 All E.R. at p. 637; [1962] 2 Q.B. at p. 673.

(24) [1962] 2 All E.R. at p. 640; [1962] 2 Q.B. at p. 676.

received albeit on different dates with the consent of the owners, was the disposal of the car and the registration book by Droylsden vitiated as being outside the ordinary course of business by the fact that a few days intervened between the handing over of the car and the handing over of the registration book? In the case of a new car, coupled with the explanation (in fact, a true one) that the registration book was with the county council for the purpose of getting the car registered and taxed, I should not myself be disposed so to hold, and I do not think that the authorities cited compel me so to hold. There is all the difference in the world between a case where an owner of a second-hand car retains the log book while handing over physical possession of the car to a dealer so as to ensure that no-one will suppose that the dealer has authority to sell the car, and the case where a dealer effects a sale of a new car while the registration book is with the registration authority for registration or tax purposes. I find it difficult to see why a sale of the latter type should not be in the ordinary course of business of a motor dealer who holds a car on sale or return terms. It is not, of course, necessary for me to decide this point in view of my decision on the main point in the case, but, in deference to the argument which has been presented to me, I think it is fair to say that, in my view, counsel for the defendant is right about this matter.

In these circumstances, what is the proper order to make? Counsel for the plaintiffs has urged that he is entitled to damages commensurate with the unpaid instalments under the hire-purchase agreement, relying on *Wickham Holdings, Ltd. v. Brooke House Motors, Ltd.* (25), as authority for the proposition that this is the measure of the interest of a finance house in a hired chattel. I do not doubt that, in a claim in conversion, particularly against the hirer of a vehicle who has wrongfully sold it, the damages recoverable may be so measured: but this case has been pleaded primarily in detinue. DIPLOCK, L.J., has now provided us with an invaluable dissertation on the various forms of order in such cases: see *General and Finance Facilities, Ltd. v. Crooks Cars (Romford), Ltd.* (26). I can see no reason why, in the present case, the defendant, who is entirely blameless, should not have the opportunity of closing the matter by electing (and it was agreed that the option was his) whether to hand over the car, which he still has, or to pay its present value plus damages for having detained it. That the present value (that is, at the date of judgment) is the proper basis in a case of detinue is laid down in *Rosenthal v. Alderton* (27). Unfortunately, I have no evidence what the figure should be, and there will have to be an assessment or further evidence unless the parties can agree to my proceeding on the basis of the standard work of reference, "GLASS'S GUIDE", which puts the range (according to condition, mileage, etc.) at £130 to £200. A mean figure would be £165.

In addition, damages must be paid for the detinue of the car. How should these be assessed? The principle, it seems to me, is that I should look at the position in which the plaintiffs would have been if the car had been handed back on demand being made in 1962. Again, I am in the difficulty of having no adequate evidence of value at that date, but reference again to GLASS'S GUIDE suggests that its then value would be of the order of £500. The plaintiffs would then have had to find a new purchaser. Droylsden, plainly, were right out of the picture by then. A new purchaser would be required to pay in cash something of the order of £100 so that the plaintiffs' profit, of which they were deprived by the defendant's detinue of the vehicle, would be their charges for financing a transaction at about £400. At 7½ per cent. (their rate in the Droylsden transaction) this would come to £30 per annum. How many months should be allowed? Plainly, it cannot be the full period for which the plaintiffs went to sleep on their rights and, in any case, a hire-purchase transaction is normally cleared off and the title passed to the hirer in about two years, or three at the

(25) [1967] 1 All E.R. 117.

(26) [1963] 2 All E.R. 314 at p. 317.

(27) [1946] 1 All E.R. 583; [1946] 1 K.B. 374.



A outside. If I allow  $2\frac{1}{2}$  years—that is, £75—that would, I think, be generous.

There must be judgment for the plaintiffs accordingly, but I should indicate that I have put in those figures merely as estimates on the basis that, if precise figures are required by the parties, then we must have some further evidence so that I can deal with the matter. I have put the figures in in this way so as to indicate the basis on which I am proceeding. It may be possible that the parties  
B can agree what would be the proper figures or, if necessary, we would have to have further evidence. I should also state this: that I do not know—I have had no means of discovering what, if any, hire-purchase control provisions were operative in 1962. In 1964, of course, the position is that a purchaser would have had to pay a deposit equivalent, I think, to twenty-five per cent. of the cash value of the vehicle and the maximum period for which payments could have  
C been extended would have been, I think I am right in saying, twenty-seven months, but what the law was in relation to 1962 I am afraid I do not know.

[After argument.]

CHAPMAN, J.: Counsel for the plaintiffs has asked me to reconsider the latter part of the judgment as to the form of order which should be made in this case. He has told me that the figures which I put forward as tentative  
D figures are acceptable both to his clients and to the defendants as figures on which one can proceed; in other words, that the value today can be taken as £165 and the figure of £75 as also representing substantially what would have been obtained by way of charges at the rate of  $7\frac{1}{2}$  per cent. had a new hire-purchase transaction been effected in 1962 on the vehicle if it had been returned at that time. Counsel for the plaintiffs has urged me that, in addition to  $2\frac{1}{2}$  years at  
E  $7\frac{1}{2}$  per cent. on £400, I should include something in respect of the depreciation of the vehicle. I think, on reconsidering the matter, that counsel is right about that. If the vehicle had been returned in 1962, then on any commercial basis of hiring with a chattel of this kind which is subject to depreciation, any hire charge which was made would take into account the depreciation of the vehicle and I think that counsel is right in saying that something under  
F that head should be awarded as damages for the detention of the vehicle. The period should, in my view, be the same period as I have allowed for the period of re-hiring at charges amounting to  $7\frac{1}{2}$  per cent. on £400—in other words,  $2\frac{1}{2}$  years—and I think that there should be a figure to cover the depreciation of the vehicle during that period of time which the plaintiffs have been deprived of the opportunity of making hire charges which would have covered  
G that depreciation. The rate of depreciation I assess at £50 per annum. I think the major depreciation on a vehicle of this kind would undoubtedly take place in its first year or two; thereafter, the annual rate of depreciation would be substantially lower. It seems to me that a figure of £50 a year would not be out of the way. That means that to my figure for damages for detention of £75 based on the charges which have been lost there must be added the sum of £125  
H in respect of depreciation over the same period of time.

With regard to the question of costs which counsel for the plaintiffs has ventilated, I have listened to all that he has had to say about the matter. I still remain of the same opinion. In all the circumstances of this case, I do not think that the defendant ought to be charged with paying the plaintiffs' costs at all. Accordingly, there will be judgment without costs on the lines which I have  
I indicated.

*Judgment for the plaintiffs for the return of the vehicle or, alternatively, £165, its value, plus damages for its detention assessed in the sum of £200. No order as to costs.*

Solicitors: *Taylor, Hindle & Rhodes*, Manchester (for the plaintiffs); *Casson & Co.*, Manchester for the defendant).

[Reported by K. B. EDWARDS, Esq., Barrister-at-Law.]

WINDLE *v.* DUNNING AND SON, LTD.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Winn, L.J., and Ashworth, J.), February 26, 1968.]

*Road Traffic—Heavy motor car Lorry hired with driver from haulage contractors by quarry owners and loaded with tarmac at quarry owners' works—Quarry owners responsible for correct weight of lorry leaving works—Lorry overloaded and driven on road by haulage contractors' driver—Whether quarry owners were "using" lorry at the time—Whether contravention by them of Road Traffic Act, 1960 (8 & 9 Eliz. 2 c. 16), s. 64 (2) as amended by Road Traffic Act, 1962 (10 & 11 Eliz. 2 c. 59), s. 8, Sch. 1, Pt. 2, para. 19—Motor Vehicles (Construction and Use) Regulations 1966 (S.I. 1966 No. 1288), reg. 70 (1).*

The respondents manufactured tarmac at their quarry. They hired from haulage contractors, W., Ltd., lorries to carry loads in the latter's vehicles. The drivers of the lorries were employed by W., Ltd. and were hired with the lorries. At the quarry the lorries were loaded under supervision of the respondents' servants, and were driven by W., Ltd.'s drivers and weighed at the respondents' weighbridge. The respondents were responsible for the correct weight of the loaded vehicles. About forty miles from the quarry three of the lorries so loaded were stopped. Their loads exceeded the permitted weight. On appeal from dismissal of a charge under the Road Traffic Act, 1960, s. 64 (2)\*, against the respondents of "using" the lorries on a road carrying loads exceeding that allowed by reg. 70 (1) of the Motor Vehicles (Construction and Use) Regulations 1966,

**Held:** the respondents were not "using" the lorries, as opposed to "causing them to be used" within the meaning of those words in s. 64 (2) of the Road Traffic Act, 1960; accordingly contravention of s. 64 (2) was not established (see p. 48, letters E and F, post).

Dictum of the Lord Justice-General (LORD CLYDE) in *MacLeod v. Penman* ([1962] S.L.T. at p. 75) applied.

Appeal dismissed.

[As to user of motor vehicles in contravention of regulations, see 33 HALSBURY'S LAWS (3rd Edn.) 487, 488, para. 832, note (f); and for a case on the subject, see 45 DIGEST (Repl.) 70, 205.]

For Road Traffic Act, 1960, s. 64 (2) as amended, see SUPPLEMENT to 40 HALSBURY'S STATUTES (2nd Edn.) 763, para. [870] Amended Texts.]

Case referred to:

*MacLeod v. Penman, Hamilton v. Blair and Meechan, Hawthorn v. Knight*, [1962] S.L.T. 69; 1962 S.C. (J.) 31; 45 Digest (Repl.) 135, \*1178.

### Case Stated.

This was a Case Stated by the justices for the petty sessional division of Malvern in the county of Worcester in respect of their adjudication as a magistrates' court sitting at Malvern on June 28, 1967.

The appellant, Lawrence Frederick Windle, an inspector of weights and measures for the county of Worcester, preferred against the respondents, Dunning & Son, Ltd., who were quarry owners and tarmac manufacturers, six separate informations. The informations alleged that on Mar. 29, 1967, the respondents used four heavy motor vehicles, not being public service vehicles, on a road at Guarlford in the county of Worcester, none of which complied with reg. 70 (1) of the Motor Vehicles (Construction and Use) Regulations 1966, made by the Minister of Transport in exercise of her powers under s. 64 (1) of the Road Traffic Act, 1960, as amended by s. 51 and Sch. 4 to the Road Traffic Act, 1962. The informations alleged that in respect of all four vehicles the total weight transmitted to the road surface by the two rear wheels exceeded nine tons, and that in respect

\* Section 64 (2), so far as material, is set out at p. 48, letter C, post.

A of two of the vehicles only, the sum of the weights transmitted to the road surface by all the wheels exceeded fourteen tons.

The six informations by consent were heard together. The respondents pleaded guilty to the first information which involved their own vehicle, but pleaded not guilty to the other five informations which involved vehicles which they did not own.

B The following facts were found. The three vehicles, the subject of the disputed informations, were inspected by the appellant on Mar. 29, 1967, at Guarlford and on being weighed, each of the vehicles exceeded its permitted weight in the manner alleged in the informations; each of the said vehicles had been loaded with tarmac at the respondents' Haughmund quarry where it had been loaded under the supervision of the respondents' servants and had been weighed  
C at the quarry by the respondents' servants who then provided the driver of each vehicle with a conveyance note stating the weight; the excessive weight of each of the three vehicles was due to the default of the respondents' servants who exercised control over the loading and weighing of the vehicles; each of the three vehicles was owned by a firm, J. W. Wickson, Ltd. (hereinafter referred to as Wicksons) haulage contractors, and each vehicle was operated by that firm  
D under the terms of a B licence, there being no separate hire document; each of the vehicles was driven by a driver supplied and employed by Wicksons; the drivers' pay and National Insurance contributions were paid by Wicksons; the system of operating the vehicles was as follows. When the respondents required a vehicle they contacted Wicksons; Wicksons directed the driver to report to the respondents' quarry; the driver reported to the respondents' weighbridge clerk, by whom he was directed to the mixing point; the driver  
E there loaded his vehicle under the supervision of the respondents' servants, by tipping the contents of two-ton pre-mixed hoppers of tarmac into his vehicle. At this stage the driver was able to control the distribution of the tarmac load in the lorry; after loading, the driver drove to the respondents' weighbridge, where the vehicle was weighed by the respondents' servants. The weighbridge  
F dial would be visible to the driver and to the respondents' weighbridge clerk and to their quarry foreman: facilities were provided by the respondents at their quarry for the unloading of vehicles which exceeded their permitted weight; on the day in question, each of the vehicles was loaded in the manner above described, and weighed by the respondents' servants; the weighbridge clerk was inexperienced having been in the employment of the respondents for only six weeks; in respect of two of the vehicles, the records of the respondents' quarry  
G showed tare weights of less than the true tare weights. The load on each of the vehicles was the property of the respondents whose servants were mainly responsible for the correct weight of each vehicle and whose servants were wholly responsible for directing the respective drivers to their destinations. Wicksons were paid solely on a tonnage and mileage basis according to the type of material carried. Each driver was hired with the lorry by the respondents for between  
H sixty per cent. and ninety-five per cent. of his time on a 5½ day week.

The respondents contended that they did not "use" the vehicles within the meaning of the regulations, since they were at most only the hirers. The appellant contended that they did "use" since they were controlling, managing and operating the vehicles.

I The justices were of opinion that the respondents were correct in contending that they were not "using" the vehicles; and that the ultimate responsibility for the use of each vehicle rested either with the driver thereof or his employer, and accordingly they dismissed the informations.

The cases noted below\* were cited during the argument in addition to the case referred to in the judgment.

\* *Gifford v. Whittaker*, [1942] 1 All E.R. 604; [1942] 1 K.B. 501; *James & Son, Ltd. v. Smea*, [1954] 3 All E.R. 273; [1955] 1 Q.B. 78; *Brown v. Roberts*, [1963] 2 All E.R. 263; [1965] 1 Q.B. 1.



*Ian McLean* for the appellant.

*R. Smith* for the respondents.

**LORD PARKER, C.J.:** We are concerned with three heavy motor vehicles found on a road at Guarlford, when the total weight transmitted to the road surface by the wheels of each vehicle was more than nine tons; two exceeded fourteen tons, all contrary to reg. 70 (1) (a) of the Motor Vehicles (Construction and Use) Regulations 1966 (1). The facts were not in dispute. [His Lordship summarised the facts hereinbefore set out (see p. 47, letters B to I, ante) and continued:] The justices held that the respondents were not using any of those vehicles. The offences were laid under s. 64 (2) of the Road Traffic Act, 1960 (2) which provides:

“Subject to the provisions of this section, it shall not be lawful to use on a road a motor vehicle or trailer which does not comply with any such regulations as aforesaid, applicable to the class or description of vehicles to which the vehicle belongs, . . . and [these are the important words] a person who uses a motor vehicle or trailer in contravention of this subsection, or causes or permits the vehicle to be so used, shall be liable on summary conviction . . .”

and so on. In my judgment, as was said by the Lord Justice-General (LORD CLYDE) in giving judgment in *MacLeod v. Penman, Hamilton v. Blair and McEchan, Hawthorn v. Knight* (3),

“The presence in the section of the alternatives of causing or permitting the use must limit the scope of what is ‘using’. Normally ‘using’ is applicable to the actual driver.”

I entirely agree with that, and in my judgment, “using” when used in connexion with causing and permitting has a restricted meaning. It certainly covers the driver; it may also cover the driver’s employer if he, the driver, is about his master’s business, but beyond that I find it very difficult to conceive that any other person could be said to be using the vehicle as opposed to causing it to be used. Of one thing I am quite clear, that in relation to the user at Guarlford of these vehicles, it is quite impossible to say on any view that these respondents (4) were using the vehicle. On that short point I am satisfied that these justices came to a correct decision and I would dismiss this appeal.

**WINN, L.J.:** I agree.

**ASHWORTH, J.:** I agree.

*Appeal dismissed.*

Solicitors: *Sharpe, Pritchard & Co.*, agents for *W. R. Scurfield*, Worcester (for the appellant); *Burrell Davis & Goode*, Brownhills, Staffs. (for the respondents).

[Reported by N. P. METCALFE, Esq., Barrister-at-Law.]

(1) S.I. 1966 No. 1288.

(2) As amended by the Road Traffic Act, 1962, s. 8, Sch. 1, Pt. 2, para. 19.

(3) 1962 S.C. (J.) 31 at p. 46; [1962] S.L.T. 69 at p. 75.

(4) The respondents were quarry owners. The vehicle belonged to haulage contractors, whose employees the drivers were.

A

NOTE.

## R. v. HARRIS.

[COURT OF APPEAL, CRIMINAL DIVISION (Lord Parker, C.J., Winn, L.J., and Ashworth, J.), March 12, 1968.]

B

*Drugs—Dangerous drugs —“Supply” —Accused injected another accused with heroin unlawfully in the latter’s possession—Whether administering injection was supplying the drug—Dangerous Drugs (No. 2) Regulations 1964 (S.I. 1964 No. 1811), reg. 8—Dangerous Drugs Act 1965 (c. 15), s. 13 (a).*

C

[As to the prohibition of supplying etc. drugs, see 26 HALSBURY’S LAWS (3rd Edn.) 208, para. 475; and for cases concerning the administration of dangerous drugs etc., see 33 DIGEST 552, 553, 238-243.]

**Appeal.**

D

The appellant was convicted at South West London Sessions on June 23, 1967, before the deputy chairman (J. M. COPE, Esq.) and a jury, of an offence, viz., supplying a dangerous drug (heroin) to one Fowler on Apr. 18, 1967, contrary to reg. 8 of the Dangerous Drugs (No. 2) Regulations 1964 and s. 13 (a) of the Dangerous Drugs Act 1965. The appellant had been a registered drug addict, but was not a registered addict at the time of the trial; she was under medical treatment. At the trial of the appellant another accused, Fowler, pleaded guilty (before the appellant pleaded not guilty to the charge against her) to being in unlawful possession of the heroin contrary to reg. 9 of the regulations of 1964. The appellant was remanded in custody for a month for a medical report, and was then put on probation for two years, being ordered to attend for out-patient treatment at hospital during the first twelve months. The appellant appealed against conviction by leave of the single judge.

E

The case noted below\* was cited during the argument.

F

J. H. Zieger for the appellant.

C. R. Hilliard for the Crown.

G

LORD PARKER, C.J., delivered the judgment of the court: On Apr. 18, 1967, at 7.15 in the evening a man called Jones was passing the waiting room at Kingston Railway Station, and through the window he saw the appellant and the other accused, Fowler, sitting close together. He noticed that Fowler had his right sleeve rolled up and sticking in his arm was a syringe. Mr. Jones then went and fetched a police constable, who also looked through the window and according to his evidence he saw the appellant injecting Fowler’s arm by pushing the top of the syringe. He then entered the waiting room, questioned the two young people, the appellant and Fowler. She, the appellant, said that she was registered as a heroin addict and was using heroin, and Fowler said that he was not a registered addict. Fowler’s right arm showed clear signs that an injection had just taken place. The appellant was found to have on her the paraphernalia which she was entitled to have as a registered drug addict, and at the police station she said: “It isn’t fair. I didn’t give him the jack, it was one of his own. I was only helping him.” She repeated that in evidence at the trial.

H

I

Fowler pleaded guilty to unlawful possession of heroin, and the case for the prosecution, as appears from the transcript, and is acknowledged by counsel for the Crown in this court, was based on this, that if A injects B with B’s heroin, A is supplying heroin contrary to reg. 8 of the Dangerous Drugs (No. 2) Regulations 1964 (1). This court is quite unable to accept that proposition as a matter of law. If B has obtained in some way the possession of the heroin, and all that A is doing is to assist in injecting that heroin into B; then A is not supplying heroin contrary to the regulation.

\* R. v. Mills, [1963] 1 All E.R. 202; [1963] 1 Q.B. 522.

(1) S.I. 1964 No. 1811.

Counsel for the Crown has valiantly sought to argue to the contrary; he has referred to a number of the regulations but this court finds it quite unnecessary to deal with the possible arguments that have been raised because it seems to them quite impossible as a matter of ordinary English common sense and law to say that a person administering heroin in those circumstances is supplying the heroin. It may be, though it certainly seems doubtful, that there was evidence in the case which would have entitled the jury to come to the conclusion that the heroin was not the heroin belonging to Fowler despite his plea of guilty, and that it was the heroin belonging to the appellant. If that were so, she would clearly be guilty of supplying. There was, however, no direction to the jury along those lines, namely, that before they could convict the appellant they must be sure that the heroin was hers and not already Fowler's. By contrast the summing-up was on the basis that it was open to the jury to convict, albeit that the heroin was already the heroin of Fowler. It is quite clear that the deputy chairman erred in law and that this appeal must be allowed and the conviction quashed.

*Appeal allowed. Conviction quashed.*

Solicitors: *Registrar of Criminal Appeals* (for the appellant); *Solicitor, Metropolitan Police* (for the Crown).

[Reported by OM. P. MIDHA, Barrister-at-Law.]

## NORTHCOTE LAUNDRY, LTD. v. FREDERICK DONNELLY, LTD.

[COURT OF APPEAL, CIVIL DIVISION (Willmer, Russell and Sachs, L.J.J.), February 7, 1968.]

*Landlord and Tenant—New tenancy—Business premises—Opposition by landlord—Intention to occupy premises for own business—Landlord's interest, a leasehold interest, created within five years—Date of creation—Whether date of execution of lease or of commencement of term—Sub-tenant's interest arising only on commencement of term, sub-tenant being also freeholder—Whether leasehold landlord debarred from opposition under s. 30 (1) (g)—Landlord and Tenant Act, 1954 (2 & 3 Eliz. 2 c. 56), s. 30 (2).*

By a lease dated Sept. 23, 1964, freeholders demised premises for use for business purposes for a term of twenty-one years commencing on Sept. 29, 1964. Under an informal arrangement between the parties during the negotiations the freeholders retained a small portion of the premises as a London outlet for their main operations, which they were transferring to Shaftesbury, and, after the leaseholders had entered into possession of the premises on Sept. 29, the freeholders became as from that date yearly sub-tenants of the retained portion from the leaseholders. The leaseholders subsequently gave notice to terminate the sub-tenancy, and the sub-tenants applied for a new tenancy under the Landlord and Tenant Act, 1954, contending that the ground of opposition enacted by para. (g) of s. 30 (1) (viz., that the landlords, the leaseholders, required possession of the portion of the premises for their own occupation, as in fact they did) was not available to the leaseholders by reason of s. 30 (2), as the leaseholders' interest had been created within five years and the holding had at all times since the creation of the leaseholders' interest been comprised in a business tenancy to the sub-tenants.

**Held:** the leaseholders' interest was created when the lease was executed on Sept. 23, 1964 and, since between that date and Sept. 29, 1964, there had been no business tenancy of the portion of the premises occupied by the sub-tenants, the leaseholders were not debarred by s. 30 (2) from opposing



**A** under s. 30 (1) (g) the grant of a new tenancy to the sub-tenants (see p. 52, letters F, G and I, post).

Appeal dismissed.

[As to grounds of opposition to a tenant's application for a new tenancy, see 23 HALSBURY'S LAWS (3rd Edn.) 892-895, paras. 1716-1719; and for cases on the subject, see DIGEST (Cont. Vol. A) 1051-1058, 7417o-7417pp and DIGEST

**B** (Cont. Vol. B) 484, 7417pnc, 7417ppa.

For the Landlord and Tenant Act 1954, s. 30, see 34 HALSBURY'S STATUTES (2nd Edn.) 414.]

Case referred to:

*Lawrence (Frederick), Ltd. v. Freeman Hardy & Willis, Ltd.*, [1959] 3 All E.R. 77; [1959] Ch. 731; [1959] 3 W.L.R. 275; Digest (Cont. Vol. A) 1057, 7417po.

**C**  
**Appeal.**

Sub-tenants, Northcote Laundry, Ltd., appealed by notice dated July 24, 1967, against an order made on June 13, 1967, by His Honour JUDGE LEON sitting in Willesden county court, dismissing their application for the grant of a new tenancy of part of premises at 1-5, Northcote Road, Willesden, London, N.W.10, held by them on an annual sub-tenancy from the leaseholders of the whole premises. The ground of appeal was that the judge had misdirected himself on a point of law in holding that, for the purposes of s. 30 (2) of the Landlord and Tenant Act, 1954, the leaseholders' interest was created (the sub-tenants themselves being the freeholders) at the date of the execution of the lease and not at the date on which the leaseholders' interest in the land commenced according to that lease. Under the lease, dated Sept. 23, 1964, to the respondent leaseholders, the first payment of quarterly rent was made payable on the signing of the lease, viz., Sept. 23, 1964, though quarter-day was Sept. 29. The trial judge (JUDGE LEON) relied on this. The note of his judgment ended as follows.

**F** "Counsel for the [respondent leaseholders] relies on the fact that rent is payable on Sept. 23, although it was rent for the period commencing on Sept. 29. That goes against the [sub-tenants]. I come to the conclusion that the lease creates an interest. It provides that the rent shall be paid prior to [the leaseholders] going into occupation. I hold that the interest was created on Sept. 23, 1964, and that [the leaseholders] are entitled to rely on para. (g) of s. 30 (1)."

**G** The trial judge accordingly ordered that the sub-tenants' application be refused, a certificate for compensation under s. 37 (4) of the Act of 1954 being awarded them.

*K. R. Bagnall* for the sub-tenants.

*G. Avgherinos* for the leaseholders.

**H** **RUSSELL, L.J.**, delivered the following judgment at the invitation of **WILLMER, L.J.**: This is a case which raises a short point under the Landlord and Tenant Act, 1954. The appellants, Northcote Laundry, Ltd., were the freeholders of premises at Nos. 1-5, Northcote Road, Willesden. By a lease dated Sept. 23, 1964, they demised these premises to the respondents, Frederick Donnelly, Ltd., for a term of twenty-one years, the term to begin on Sept. 29, 1964. There had been an informal arrangement at the time of the negotiation of this lease whereby the appellants, who were moving their main operations to, I think, Shaftesbury, should retain a small portion of these premises in order to keep, for the time being at least, a London outlet. I need not go into the matter in detail, but what happened in the end was that on Sept. 29 the respondents went into occupation under their lease, and at the same time, pursuant to the informal arrangements, the appellants remained in occupation of a small part of the premises. As the weeks or months went by, the two parties came to an agreement on how much rent should be paid by the respondents on a sub-tenancy. The effect was that as

from Sept. 29, the appellants (hereinafter called "the sub-tenants") became the yearly sub-tenants of the respondents (hereinafter called "the landlords"). A

The landlords, being for the present purpose the landlords under the Act of 1954, and the sub-tenants being the tenants who want an extension of their tenancy of the retained part, the question is simply this: when was the interest of the landlords created for the purpose of s. 30 (2)? That question arises because the landlords require (and have satisfied the judge that they require) the possession of the premises for their own occupation, which is a ground for opposing an application for a new tenancy under s. 30 (1) (g), and the point that the sub-tenants then take is that the landlords are not entitled to rely on ground (g) because of s. 30 (2). B

In the first place it is quite plain that under the first part of that subsection the interest of the landlords, i.e., the interest under the lease of Sept. 23, 1964, was undoubtedly created within the five years period that is mentioned in sub-s. (2). So far, therefore, the sub-tenants rightly say that ground (g) is not open; but sub-s. (2) goes on to say that the landlords can be excluded from relying on ground (g) only if it is also shown that at all times since the purchase or creation of the interest of the landlord the holding has been comprised in a tenancy or successive tenancies of the description specified in s. 23 (1), i.e., a business tenancy. Thus the point is this: was the interest of the landlords created when the lease was executed on Sept. 23, 1964, or was that interest created at the commencement of the term? If the first is the true view, then it is not possible to say (because of the six days difference between Sept. 23 and Sept. 29 when Northcote Laundry, Ltd., became sub-tenants) that at all times since Sept. 23 there has been a business tenancy of this part of the holding, and ground (g) is not excluded. Aliter if Sept. 29 is the date of creation. C E

I find this really not a problem of any difficulty at all. The interest of the landlord in this case is quite clearly the leasehold interest which was created by the lease, and the lease was executed on Sept. 23. I find it quite impossible to construe this subsection in any way other than to hold that the relevant date for the present purposes is Sept. 23. If I may venture to remark, as MEGARRY, J., in his work on the LAW OF REAL PROPERTY has observed (at p. 679): "A lease is a document creating an interest in land." Here the lease, when it was created, was a reversionary lease, but when created it was nevertheless an interest in the land, and it is in respect of that interest that the landlord now claims as such. F

We were referred to *Frederick Lawrence, Ltd. v. Freeman, Hardy & Willis* (1), and the remarks of ROMER, L.J., but no point that is relevant to the present appeal was raised in that case. That case simply finds that, where the landlord acquires within the five year period a head lease under which the tenant is entitled to his current sub-tenancy, the interest of the landlord is created when the head lease is created, and not when the landlord acquired it: purchase, of course, is another matter. It seems to me that what is involved in the contention of the sub-tenants is that s. 30 (2) is to be construed as if it referred not to the creation of the interest of the landlord, but to the commencement in possession of the interest of the landlord. It simply does not say that; it uses perfectly clear language, and all that we can do is to apply that perfectly clear language. There is no justification in my judgment for moulding it or twisting it, whichever approach you prefer, in the direction which the sub-tenants seek. I would dismiss the appeal. G H

SACHS, L.J.: I fully agree and have nothing to add. I

WILLMER, L.J.: I also agree.

*Appeal dismissed.*

Solicitors: *L. O. Glenister & Sons* (for the freeholders); *Russell & Arnholz* (for the leaseholders).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

A

NOTE.

## R. v. HUGHES. R. v. BARCLAY.

[COURT OF APPEAL, CRIMINAL DIVISION (Davies, L.J., Roskill and Cusack, JJ.), February 27, 1968.]

B

*Criminal Law—Sentence—Youthful offender—Youthful offender absconding after sentence of borstal training—Further offence committed while at large—Sentence of fifteen months' imprisonment—Previous sentence of borstal training not served—Sentence of borstal training substituted—Criminal Justice Act, 1961 (9 & 10 Eliz. 2 c. 39), s. 3 (3).*

C

[As to the punishment of youthful offenders, see 10 HALSBURY'S LAWS (3rd Edn.) 514, 515, para. 935; as to borstal training, see *ibid.*, 517, para. 943; and for cases on the subject, see 14 DIGEST (Repl.) 591, 5872-5878.

For the Criminal Justice Act, 1961, s. 3, see 41 HALSBURY'S STATUTES (2nd Edn.) 132.]

Case referred to:

D

*R. v. Leonard*, (1964), 108 Sol. Jo. 425.

**Applications.**

These were applications by Colin Hughes and Frederick Barclay for leave to appeal against their sentences of eighteen months' and fifteen months' imprisonment respectively, imposed by the recorder (JUDGE KILNER BROWN, Q.C.) at Liverpool Crown Court on Oct. 31, 1967, after they had both pleaded guilty to shopbreaking and larceny. They were unrepresented. The applicant Barclay was aged twenty-two at the relevant time and had five findings of guilty and three previous convictions recorded against him. The applicant Hughes was aged eighteen at the relevant time, and had six findings of guilty and two previous convictions recorded against him. On Sept. 23, 1966, he had been sentenced to borstal training, but he absconded on Oct. 31, 1966, since when he had been at large until arrested for the present offence on Aug. 26, 1967.

F

The applicants did not appear and were not represented.

ROSKILL, J., delivered the following judgment of the court, in which, after dismissing the applicant Barclay's application, he continued: The applicant Hughes is only nineteen and, therefore, a sentence of imprisonment cannot be justified unless it can be brought within the special provisions of s. 3 (3) of the Criminal Justice Act, 1961. This was what the learned recorder sought to do. That subsection provides:

G

"In relation to a person who has served a previous sentence of imprisonment for a term of not less than six months, or a previous sentence of borstal training, sub-s. (1) of this section shall have effect as if for the reference to three years there were substituted a reference to eighteen months..."

H

It will be recalled that, under sub-s. (1), in the case of someone aged less than twenty-one, the court must not pass a sentence of imprisonment exceeding six months or less than three years. The attention of the Home Office was drawn by the Governor of the Liverpool Prison to the fact that, in his view, the applicant Hughes ought not to have been sentenced to eighteen months' imprisonment on the ground that, although he had previously been in borstal, he had not served a sentence of borstal training within the meaning of the subsection which I quoted. The court has been referred to a decision of the Court of Criminal Appeal in *R. v. Leonard* (1), where a similar point fell to be considered. LORD PARKER, C.J., in giving the judgment of the court, dealt with the true construction of the phrase in sub-s. (3) in relation to a person who has served a previous borstal sentence, and said:

I

(1) (1964), 108 Sol. Jo. 425.



"The sole question here is whether a man under that subsection has only served his sentence of borstal training if he had in fact been released subject to supervision, or whether it means that the subsection applies if either he has served a previous sentence of borstal training, which is for a maximum of two years, or, having been released earlier and subject to supervision it also applies. The court has come to the conclusion that the meaning here is that this subsection should only apply if a person has been released from borstal training subject to supervision."

In that case, the court held that a prisoner sentenced to borstal training and later transferred from borstal to a mental hospital under s. 72 of the Mental Health Act, 1959, and finally released from that hospital was not a person who had previously served a sentence of borstal training within the meaning of sub-s. (3).

In the present case, in the view of this court, the applicant Hughes had similarly not served the sentence of borstal training previously imposed on him, for he absconded from borstal and thus had not been released under supervision. This is yet again one of the anomalies to which this court has often referred and to which the relevant subsections of s. 3 of the Criminal Justice Act, 1961, all too often give rise. The applicant Hughes was not represented at the Liverpool Crown Court and the attention of the learned recorder was not drawn to this point. For this reason alone, and not because of any merit in this application, the court feels bound to substitute a fresh sentence of borstal training for the sentence of imprisonment passed. This is the only course open to the court. The court will accordingly treat this application as the appeal; but there are no grounds whatever for not sending the applicant back to borstal training.

*Sentence varied.*

[Reported by N. P. METCALFE, Esq., Barrister-at-Law.]

### NOTE.

#### R. v. BURGESS.

[COURT OF APPEAL, CRIMINAL DIVISION (Lord Parker, C.J., Winn, L.J., and Ashworth, J.), March 7, 1968.]

*Criminal Law—Evidence—Confession—Admissibility—Ruling by judge on admissibility—Whether in summing-up to jury subsequently judge should direct them that they must be satisfied that statement was voluntarily made before attaching any weight to it.*

[As to the functions of the trial judge in regard to questions of admissibility of confessions, see 10 HALSBURY'S LAWS (3rd Edn.) 470, para. 863; and for cases on confessions made to the police, see 14 DIGEST (Repl.) 474-477, 4528-4577 and R. v. Ovenell, ([1968] 1 All E.R. 933).]

Case referred to:

*Chan Wai-Keung v. Reginum*, [1967] 1 All E.R. 948; [1967] 2 A.C. 160; [1967] 2 W.L.R. 552.

#### Appeal.

On Aug. 10, 1967, at South-East London quarter sessions, before J. A. GRIEVES, Esq., Q.C. and a jury, the appellant, Harry George Burgess, was found guilty on three charges—(i) office breaking and stealing £15 in cash; (ii) possessing house-breaking implements by night, and (iii) sacrilege and stealing £100 from a church vestry. He was sentenced to a total of five years' imprisonment. The office breaking took place on May 18, 1967, in Croydon, a desk being broken open and money taken from a drawer, and an attempt being made to open safes by using explosives; on May 21 Croydon parish church was broken into by forcing the vestry door, and between £100 and £115 was taken from one of two safes there,

A both of which were opened by explosives. On May 24, a number of police officers stationed themselves round the appellant's house. When the appellant drove up at 11.30 p.m. he was told, according to police witnesses, that they were police officers. He ran off and a chase ensued. The appellant was arrested. According to the police evidence he was walked back a quarter of a mile to his house, where his car was searched, and underneath the driving seat, a case opener or jemmy was found. The appellant was taken back by car, handcuffed, to the police station, where he was handcuffed by one hand to a chair. There was a conflict of evidence as to the handcuffing and the time for which it lasted at the police station. The appellant made a written and oral statement. According to the police evidence he finally said, with regard to safe blowing, that another man blew the safe and all that he, the appellant, did was to take money out of the drawer. In answer to a question from a detective inspector, the appellant said that he threw the explosive away by the garden where he was caught, and that it was in a little tin. A police constable then went and searched the area where some plasticine and a tin box were found; the tin box contained some gelignite and four detonators. He took these back to the police station and, according to the police evidence, the appellant then said "that is it". The fragments of detonator found at the scene of two of the offences, were of the same type as the detonators recovered by the police constable, the plasticine so recovered was similar to that found at the scenes of the alleged offences and there was other forensic evidence attending to identify instruments or materials found by the police as previously stated or taken from the appellant's car with the crimes.

D The appellant gave evidence denying that he had anything to do with the matter. He said that the oral and written statements had been extracted from him, in effect, by force; that he had been handcuffed all the time, that he was threatened with force, and that his statement was not voluntary and that what it contained was false. The chairman ruled at the trial that he was satisfied that the statements, both oral and in writing, were voluntary. Thereafter the police witnesses were cross-examined at length before the jury, and the chairman drew attention in his summing-up to the conflict of evidence in regard to the confession. The appellant now appealed by leave of the single judge against his conviction.

*G. A. Bathurst Norman* for the appellant.

*A. C. L. Lewisohn* for the Crown.

G LORD PARKER, C.J., in the course of delivering judgment said: Leave to appeal was given in this case in order that this court should consider the manner in which the chairman dealt with this confession in the face of the jury. There was a time until recently when it was thought to be the duty of the judge who had ruled that a confession was admissible as being voluntary, to leave that very same matter again to the jury, in other words it was common form to say to jury: "Now you have heard this alleged confession. Before you attach any weight to it at all you must be satisfied by the prosecution so that you feel sure that it was a voluntary statement. If you are not so satisfied, then disregard it entirely." That has not always been the law of this country, but it is undoubtedly true that for many years until recently that has been the position.

I However, the matter has been the subject of more recent decisions, both in the High Court of Australia (1) and in the Privy Council in this country, the most recent decision, that in the Privy Council, being *Chan Wai-Keung v. Reginam* (2). The position now is that the admissibility is a matter for the judge; that it is thereafter unnecessary to leave the same matter to the jury; but that the jury should be told that what weight they attach to the confession depends on all the circumstances in which it was taken, and that it is their right to give such weight to it as they think fit.

(1) *Basto v. Reginam*, (1954), 91 C.L.R. 628.

(2) [1967] 1 All E.R. 948; [1967] 2 A.C. 160.

That was exactly what this chariman did, and in the opinion of this court, if he did not leave the matter to the jury in the way that previously judges have done, that is a matter on which he was fully justified having regard to the recent decision.

*Appeal dismissed.*

Solicitors: *Sotheby & Co.* (for the appellant); *Solicitor, Metropolitan Police* (for the Crown).

[*Reported by OM. P. MIDHA, Barrister-at-Law.*]

## R. v. HOOD.

[COURT OF APPEAL, CRIMINAL DIVISION (Davies, L.J., Roskill and Cusack, J.J.), March 8, 1968.]

*Criminal Law—Trial—Juror—Disqualification—Juror recognising accused's wife when she appeared as witness and knowing from hearsay that accused had criminal record—Juror's knowledge not disclosed at trial to any other juror—Affidavit of juror read, as dealing only with extrinsic matters—Whether jury should be discharged.*

The appellant was indicted for housebreaking and larceny. The appellant's wife gave evidence on his behalf and recognised a juror who lived in the same road as her mother and who, she thought, knew that the appellant had a criminal record. The appellant did not know the juror. At the trial the appellant's counsel moved to discharge the jury on the ground that the juror would have recognised the appellant's wife, and might then realise who the appellant was and inform the other jurors. This submission was overruled by the trial judge without the appellant's wife being recalled to testify concerning her recognition of the juror. On appeal against conviction an affidavit of the juror disclosed that he had recognised the appellant's wife when she entered the witness box; the juror deposed on affidavit that he had not spoken to anyone before or during the time of the trial of his personal knowledge of the appellant, his previous record, or about his wife.

**Held:** although the prudent course at the trial would have been to discharge the jury and to resume the trial with a new jury, the appeal would be dismissed, because, having regard to the evidence as a whole, there had been no miscarriage of justice (see p. 58, letters G and I, post).

**Per CURIAM:** the court is able to look at the juror's affidavit only because it is dealing entirely with extrinsic matters, not with what took place in the jury room (see p. 57, letter I, to p. 58, letter A, post).

*Appeal dismissed.*

[**Editorial Note.** This decision should be considered with *R. v. Box* ([1963] 3 All E.R. 240).

As to misconduct on the part of a juror in a criminal case, see 10 HALSBURY'S LAWS (3rd Edn.) 538, 539, para. 988; and for cases on the subject, see 14 DIGEST (Repl.) 628, 6344, 6345.]

### Appeal.

This was an appeal by William Patrick Hood against his conviction on June 14, 1967, at Glamorgan Assizes, before ASHWORTH, J., and a jury of housebreaking and larceny. He was sentenced to three years' imprisonment. The main ground of his application for leave to appeal was that his trial was prejudiced by the fact that one of the members of the jury, who was a relative of his wife and lived opposite his wife's parents, knew him and his criminal record. The submission had been overruled during his trial by ASHWORTH, J. (see p. 57,



A letter G, post). The application was adjourned by the court (SALMON, L.J., PHILLIMORE AND BLAIN, JJ.) on Feb. 9, 1968, for an affidavit to be tendered from the juror concerned, the relevant portions of which are set out at p. 58, letter C, post. The facts are set out in the judgment of the court.

The cases noted below\* were cited during the argument.

E. J. Prosser for the appellant.

B T. E. R. Rhys-Roberts for the Crown.

CUSACK, J., delivered the following judgment of the court: On June 14, 1967, at the Glamorgan Assizes the appellant was convicted of housebreaking and larceny and was sentenced to a term of three years' imprisonment.

C During the course of the trial, counsel who then appeared for him intervened to impart certain information to the learned trial judge which counsel had shortly before received. He told the learned trial judge that his instructions were that Mrs. Hood, the appellant's wife, who had already given evidence on his behalf, had recognised a particular jurymen as a person who had lived in the same street as her mother and that she, the appellant's wife, believed that the jurymen knew that her husband, the appellant, had a record and had criminal convictions. Counsel also informed the judge that the appellant himself did not know the particular jurymen and for that reason had not challenged him at the time the jury were empanelled. What was put before the learned judge was that the jurymen would certainly recognise the wife, would then realise who the appellant was, and that not only might he know the record of the prisoner but that he might impart the information to his fellow jurors.

E The learned judge heard submissions from both sides with regard to this difficulty. The court has every sympathy with the trial judge faced with a sudden difficulty of that kind in the middle of a serious case. Having heard the arguments on both sides, the learned judge took the decision not to discharge the particular jurymen and not to discharge the jury as a whole. The trial, therefore, continued with the jury as originally constituted and it was that jury F which convicted. The transcript of what took place indicates the reason the learned judge took the course he did. He said this:

"Where I think this application fails is that the basis on which it is made is not supported by any concrete evidence that the jurymen himself recognised the witness; much less recognised the [appellant]. There is no solid reason to suppose that the jurymen in question knows of the witness's G previous conviction, much less of the accused's..."

It is the fact, we are told, although it was not disclosed at the trial, that the wife of the appellant herself also had convictions.

H Difficulties of the kind which occurred at the trial have arisen in the past but never on precisely similar facts. From the decided authorities it emerges as a principle that even if there is knowledge by a juror of a prisoner's previous convictions or character, that does not automatically disqualify that juror from sitting; but in all the earlier cases the fact or suggestion that the juror had some previous knowledge of a character adverse to the prisoner has not emerged until after the trial. Here it is a matter which was certainly mentioned during the course of the trial and really the basis of this appeal is that the judge exercised his discretion wrongly. From the decided cases there also emerges a second I principle; that the court will not ordinarily inquire into what passes between jurors; either in the jury box or in the jury room, and will certainly not inquire as to the means by which they arrive at their verdict (1). That is a principle which is established and which ought to be maintained. In this particular case this court has seen an affidavit by the jurymen in question, but it should be

\* *R. v. Thompson*, [1962] 1 All E.R. 65; *R. v. Box*, [1963] 3 All E.R. 240; [1964] 1 Q.B. 430; *R. v. Rouds*, [1967] 2 All E.R. 84; [1967] 2 Q.B. 108.

(1) See *R. v. Thompson*, [1962] 1 All E.R. 65 and cases cited therein.

made clear that he is not dealing with what took place in the jury room or dealing with the manner in which the jury arrived at the conclusion they did. He is dealing entirely with extrinsic matters. It is for that reason and that reason alone that the court has felt able to look at his affidavit. From his affidavit it appears that, through no fault of his own, the learned judge was not, at the time when he exercised his discretion, fully apprised of the situation because in his affidavit this juror says that some years ago he was informed by a Mr. and Mrs. James, whom he knew, that their daughter, Janice, had married a man named Hood. He did not know this man, but he subsequently came to know him by sight. They never had any conversation. Then he says,

"A few years ago I heard that Mr. Hood had gone to prison but I do not know for what offence. On June 13, 1967, I served as a juror at the Glamorgan Assize at Cardiff in a case involving William Hood [the appellant] who I thought might be the husband of the said Janice Hood but I was not certain. My uncertainty was dispelled when Janice Hood entered the witness box for I recognised her immediately. I had not previously seen Janice Hood that day either in court or in the precincts thereof. I did not point out the said Janice Hood to anyone. I most definitely did not speak to anyone before or during the time of the trial of my personal knowledge of [the appellant], his previous record, or about his wife, Janice Hood."

This court takes the view that the judge was correct if it was in his mind that he could not in the circumstances put questions to that particular juror, at any rate whilst he remained a member of the jury, because, without going now into elaborate details, that course would present very grave problems and might lead to inquiries which would be unjustifiable as well as out of place.

It is also urged that the learned judge, if he took the view that questions could not be put to the particular juror, could at least have had Mrs. Hood recalled and had evidence from her in support of the matters which counsel had quite rightly put before him. In fairness to the learned judge it should be said that the suggestion was not made at the trial that this might have been a course open to him. He reached the decision which he did, as this court finds, in ignorance of the true facts, the true facts now being disclosed in the affidavit to which I have referred. Therefore, he was exercising his discretion on information which was inaccurate. This court thinks, sympathetic though it is having regard to the problem which arose, that Mrs. Hood might have been recalled, but that in any event the wiser course would have been to discharge the jury as a whole and to resume the trial with a new jury. That course was not adopted, but the court holds the view that that would have been the prudent course, although it is easy with hindsight to put forward these matters when a fuller story is revealed than was in fact put before the judge himself.

Then the further question arises whether this conviction can stand. It is unnecessary to go into the full facts of the matter, but there was a formidable body of evidence against the appellant; evidence of a kind which would have carried, it may be thought, the greatest weight with any jury. Although this matter, which can perhaps be called an irregularity and at any rate is something which it is desirable should not have occurred, took place, the court holds, having regard to the evidence as a whole, that there was no miscarriage of justice in the conviction of the appellant. For that reason, this appeal will be dismissed.

*Appeal dismissed.*

Solicitors: *C. Stuart Hallinan & Blackburn Gittings*, Cardiff (for the appellant); *D. A. Roberts Thomas*, Cardiff (for the Crown).

[Reported by N. P. METCALFE, Esq., Barrister-at-Law.]

**A** RADSTOCK CO-OPERATIVE & INDUSTRIAL SOCIETY, LTD.  
v. NORTON-RADSTOCK URBAN DISTRICT COUNCIL.

[COURT OF APPEAL, CIVIL DIVISION (Hartman, Russell and Sachs, L.J.J.),  
November 30, December 1, 4, 5, 1967, February 5, 1968.]

**B** *Nuisance—Sewer—Obstruction to flow of river caused by pipe of sewer constructed by local authority beneath river bed but becoming exposed as river bed washed away—Damage to plaintiffs' property from eddies caused—Sewer not out of repair—Whether any breach of duty to plaintiffs by statute or common law established—Covenant, in lease demising sewerage rights, that local authority would not interfere with flow of water in river—Benefit of covenant not assigned to plaintiffs subsequently becoming riparian owners—Statutory powers of sewage disposal overriding lease.*

**C** In 1907 the defendants' predecessors in title, Radstock Urban District Council, obtained by agreement under s. 14\* of the Public Health Act, 1875, a lease for ninety-nine years enabling them to build and maintain a sewer across the River Somer. By cl. 14 of the lease the council covenanted with the lessor (which term was defined to include assigns) that the council would not "in the exercise of the powers aforesaid" interfere with the flow of water in the river. The sewer was built and the relevant part of it was laid across and in the bed of the River Somer. The sewer vested by statute in the council and had since remained vested in them or their successors, the defendants, as local authority, the relevant statutory provisions\* overriding pro tanto the lease. Subsequently the plaintiffs acquired from the freeholder first (in 1915) a lease of two pieces of land contiguous to the sewer, one on each side of the river, together with the bed of the stream between them and later (in 1953) the freehold of this land. There was no assignment of the benefit of cl. 14 of the lease of 1907, or of the rentcharge reserved by the lease, to the plaintiffs. Without any fault on the part of the council or the defendants the bed of the river became washed away, and the pipe of the sewer became exposed. The exposed pipe caused eddies in the flow of water which damaged the plaintiffs' property. In August, 1965, the plaintiffs sued the defendants for an injunction and damages. It was not alleged that the sewer was improperly laid originally or that its presence contributed to the lowering of the bed of the river. The plaintiffs' claim was put on three grounds, (a) nuisance at common law by interference with the flow of water in the river to the plaintiffs' riparian property, (b) breach of cl. 14 of the lease of 1907 and (c) that the water was injuriously affected within s. 331† of the Public Health Act, 1936, by being diverted by the defendants' pipe with consequential damage to the plaintiffs. On appeal by the plaintiffs from a decision on a preliminary point of law that on the facts pleaded they were not entitled in law to the relief claimed,

**H** **Held:** (i) (SACHS, L.J., dissenting) the statement of claim disclosed no valid cause of action and the action accordingly was rightly dismissed, for the following reasons—

(i) in regard to nuisance, (a) (per HARMAN, L.J., SACHS, L.J., concurring in this) the burden of proof lay on the defendants on the pleadings to justify

**I** \* Section 14 of the Act of 1875 provided: "Any local authority may . . . acquire from any person . . . any right of making or of user or other right in or respecting a sewer . . ." Section 13 of the Act of 1875 provided that "All . . . sewers within the district of a local authority . . . shall vest in and be under the control of such local authority".

† Section 331 provides, so far as relevant, that: "Nothing in this Act shall authorise a local authority injuriously to affect any . . . river . . . or the supply, quality or fall of water contained in . . . any . . . river . . . without the consent of any person who would, if this Act had not been passed, have been entitled by law to prevent, or be relieved against, the injurious affection of, or the supply, quality or fall of water contained in, that . . . river."



the presence of the obstruction (the sewer) in the river (see p. 65, letter I, and p. 71, letter F, post), but (SACHS, L.J., not concurring) something which had begun by not being a nuisance (and obstruction of the river originally by the sewer should not be presumed) could not grow into a nuisance by mere lapse of time; moreover, the plaintiffs in the circumstances took the river bed as it was when they acquired their land and the defendants had not altered the sewer which was then there (see p. 66, letter F, and p. 66, letter I, to p. 67, letter A, post; cf., p. 73, letter E, post).

(b) (per RUSSELL, L.J.) the right of the plaintiffs as riparian owners was to have the waters flow in their natural course through the plaintiffs' property, not a right to have their property undamaged by the natural flow; the defendants had been entitled to maintain their sewer where it was laid, and the natural change in the bed of the stream over the years did not alter their entitlement (see p. 69, letter E, post).

*R. v. Bell* ((1822), 1 L.J.O.S.K.B. 42) applied.

*Slater v. Worthington's Cash Stores (1930), Ltd.* ([1941] 3 All E.R. 28) distinguished.

(ii) in regard to the alleged breach of cl. 14 of the lease of 1907 (SACHS, L.J., reserving decision on this, see p. 76, letter C, post)—

(a) there was neither privity of contract nor privity of estate between the plaintiffs and the defendants in respect of the covenant (cl. 14) and it was not enforceable by the plaintiffs as a restrictive covenant (per HARMAN, L.J.) there being no breach of the covenant on its true construction and (per HARMAN and RUSSELL, L.J.J.) there being no annexation of the benefit of the covenant to the plaintiffs' land nor assignment of the benefit of the covenant to the plaintiffs (see p. 67, letter F, and p. 70, letter B, post).

(b) nor was the covenant (cl. 14) a condition on fulfilling which alone the defendants could assert a right to maintain the sewer (see p. 67, letter I, and p. 70, letter C, post).

*Westhoughton Urban District Council v. Wigan Coal and Iron Co., Ltd.* ([1919] 1 Ch. 159) distinguished.

(iii) (SACHS, L.J., concurring as to the effect of s. 331) s. 331 of the Public Health Act, 1936, merely saved common law rights and, accordingly, did not provide the plaintiffs in the present case with a cause of action additional to nuisance at common law, which was not maintainable for the reasons given at (i) above (see p. 67, letter I, p. 69, letter I, p. 71, letter A, and p. 75, letter C, post).

Per HARMAN and SACHS, L.J.J.: where a point of law dealt with the whole subject of the action, the appropriate procedure was by motion to strike out the statement of claim, not by way of preliminary point of law; but proceedings to strike out the statement of claim would have been unsuitable in the present case as it was not a plain case (see p. 65, letter F, and p. 70, letters D and H, post).

Decision of UNGOED-THOMAS, J. ([1967] 2 All E.R. 812) affirmed.

[As to duties arising in relation to the diversion or obstruction of water in streams, see 28 HALSBURY'S LAWS (3rd Edn.) 162, para. 231, text and note (l); 39 *ibid.*, 523, para. 693; and for cases on the subject, see 47 DIGEST (Repl.) 656-666, 162-252.

As to freedom from liability for acts done in the exercise of statutory powers without negligence, see 30 HALSBURY'S LAWS (3rd Edn.) 690, 691, p. 694, para. 1335 (express proviso preserving liability for nuisance); and for cases on the subject, see 38 DIGEST (Repl.) 13-18, 49-77. As to the need to establish negligence in an action in respect of statutory sewage disposal, see 31 HALSBURY'S LAWS (3rd Edn.) 223, para. 325.

As to the vesting and maintenance of public sewers, see 31 HALSBURY'S LAWS (3rd Edn.) p. 200, para. 294, p. 209, para. 304; and as to the construction of sewers crossing water courses, see *ibid.*, p. 206, para. 299.]

**A Cases referred to:**

*Fisher v. Ruwslip-Northwood Urban District Council and Middlesex County Council*, [1945] 2 All E.R. 458; [1945] K.B. 584; 115 L.J.K.B. 9; 173 L.T. 261; 110 J.P. 1; 26 Digest (Repl.) 459, 1529.

*Fowler v. Sanders*, (1617), Cro. Jac. 446; 79 E.R. 382; 26 Digest (Repl.) 510, 1875.

**B**

*Great Central Ry. Co. v. Hewlett*, [1916-17] All E.R. Rep. 1027; [1916] 2 A.C. 511; 85 L.J.K.B. 1705; 115 L.T. 349; 38 Digest (Repl.) 6, 14.

*Hayward's Case*, (1589), Cro. Eliz. 148; 78 E.R. 405; 36 Digest (Repl.) 345, 857.

*Moore v. Lambeth Waterworks Co.*, (1886), 17 Q.B.D. 462; 55 L.J.Q.B. 304; 55 L.T. 309; 50 J.P. 1756; 38 Digest (Repl.) 41, 213.

**C**

*Pride of Derby and Derbyshire Angling Association v. British Celanese, Ltd.*, [1953] 1 All E.R. 179; [1953] Ch. 149; [1953] 2 W.L.R. 58; 117 J.P. 52; 47 Digest (Repl.) 677, 312.

*R. v. Bell*, (1822), 1 L.J.O.S.K.B. 42; 47 Digest (Repl.) 754, 920.

*Rogers v. Hosegood*, [1900-03] All E.R. Rep. 915; [1900] 2 Ch. 388; 69 L.J.Ch. 652; 85 L.T. 186; 40 Digest (Repl.) 340, 2769.

**D**

*Rylands v. Fletcher*, [1861-73] All E.R. Rep. 1; (1868), L.R. 3 H.L. 330; 37 L.J.Ex. 161; 19 L.T. 220; 33 J.P. 70; 36 Digest (Repl.) 282, 334.

*Slater v. Worthington's Cash Stores, (1930), Ltd.*, [1941] 3 All E.R. 28; [1941] 1 K.B. 488; 111 L.J.K.B. 91; 26 Digest (Repl.) 503, 1850.

*Stretton's Derby Brewery Co., Ltd. v. Derby Corpn.*, [1891-94] All E.R. Rep. 731; [1894] 1 Ch. 431; 63 L.J.Ch. 135; 69 L.T. 791; 38 Digest (Repl.) 16, 67.

**E**

*Taylor v. Oldham Corpn.*, (1876), 4 Ch.D. 395; 46 L.J.Ch. 105; 35 L.T. 696; 26 Digest (Repl.) 536, 2110.

*Westthoughton Urban District Council v. Wigan Coal and Iron Co., Ltd.*, [1919] 1 Ch. 159; 88 L.J.Ch. 60; 120 L.T. 242; 33 Digest (Repl.) 825, 876.

*Westminster Corpn. v. Johnson, Westminster Corpn. v. Fuller*, [1904] 2 K.B. 737; 73 L.J.K.B. 774; 91 L.T. 334; 68 J.P. 549; 26 Digest (Repl.) 583, 2439.

*Williams v. Wilcox*, [1835-42] All E.R. Rep. 25; (1838), 8 Ad. & El. 314; 7 L.J.Q.B. 229; 112 E.R. 857; 36 Digest (Repl.) 322, 670.

*Ystradyfodwg and Pontypridd Main Sewerage Board v. Bensted (Surveyor of Taxes)*, [1906] 1 K.B. 294; *affd.* C.A., [1907] 1 K.B. 490; *affd.*, H.L., [1907] A.C. 264; 76 L.J.K.B. 876; 97 L.T. 141; 71 J.P. 425; 28 Digest (Repl.) 5, 3.

**G**

*Zetland (Marquess of) v. Driver*, [1938] 2 All E.R. 158; [1939] Ch. 1; 107 L.J.Ch. 316; 158 L.T. 456; 40 Digest (Repl.) 341, 2772.

**Appeal.**

This action was begun by writ issued on Aug. 6, 1965, by the plaintiffs,

**H**

Radstock Co-operative and Industrial Society, Ltd., against the defendants, Norton-Radstock Urban District Council, who were the local authority for that urban district for the purposes of the Public Health Act, 1936. By their amended statement of claim, re-served on Feb. 21, 1967, the plaintiffs pleaded, among other matters, that they were owners of premises at Radstock which consisted of a bakery shop and other buildings and included a bridge carrying a private carriageway over the River Somer for the use of the plaintiffs. They pleaded that the defendants had laid a sewer in 1904 by virtue of powers conferred by the Public Health Act, 1875, through the land of the plaintiffs, under an agreement dated Aug. 26, 1904, between Earl Waldegrave, the plaintiffs' predecessor in title, and the defendants, and under a lease dated Mar. 15, 1907, between the same parties, and that the sewer was vested in the defendants under the Public Health Act, 1936; that the sewer was laid across land of the plaintiffs and across the river, and was laid in the bed of the river; that it was a term of the lease by cl. 14, that "the council will not interfere with the flow of or pollute the water

**I**

in the River Somer". The plaintiffs pleaded the demise to them of the premises by lease dated June 1, 1915, by Earl Waldegrave, and that in 1915 the plaintiffs constructed a bridge in the same line as the sewer in such manner as to make the bridge independent of the sewer and to avoid interference therewith. The plaintiffs pleaded their purchase of the reversion on Apr. 10, 1953, to their premises, including the bed and banks of the river within their boundaries. They pleaded that the sewer was now above the level of the bed of the river and by reason thereof the water flowing along the course of the river was obstructed and eddies and forces of water in the river created by or resulting from the obstruction had eroded the banks of the river and undermined and damaged the bridge of the plaintiffs. The plaintiffs claimed (a) £3,500 damages in respect of injury to the bridge and other adjacent property; and (b) an injunction restraining the defendants from continuing the sewer above the bed of the river. By an order made on July 15, 1966, by GOFF, J., the following question was set down for hearing before trial, pursuant to R.S.C., Ord. 33, r. 3, viz., whether on the footing that all the allegations of facts contained in the statement of claim could be proved the plaintiffs could as a matter of law be entitled to damages or an injunction. UNGOED-THOMAS, J., in a reserved judgment dated Mar. 9, 1967 and reported [1967] 2 All E.R. 812, answered this question in the negative and accordingly dismissed the action. By notice dated June 5, 1967, the plaintiffs appealed from this judgment, stating the grounds of the appeal to be that the judge was wrong in law (i) in holding that the defendants in taking the lease of land for the laying of a public sewer could not therefore bind themselves by covenant to permit re-entry and removal of the sewer pipes for breach of a covenant not to interfere with the flow of water in the river Somer across which the sewer was laid; (ii) in holding that the vesting of the sewer in the defendants under the Public Health Act, 1875, and the Public Health Act, 1936, was a vesting which was independent of the lease of the land for the sewer and overrode the terms of the lease; (iii) in holding that the vesting of the sewer in the defendants under the Public Health Act vested in them as a hereditament for an estate in fee simple subject to defeasance on the hereditament ceasing to be a sewer; (iv) in holding that the continuance of the sewer pipe by the defendants in its existing position causing an interference with the flow of the river was not a nuisance; (v) in holding that the defendants were not liable under s. 331 of the Public Health Act, 1936, for the interference with the fall of the water of the river by their sewer pipe; (vi) in holding that the defendants were entitled to take advantage of the lease of land for the laying of their sewer without complying with the clause in the lease restricting them from interfering with the flow of the river; and (vii) in holding that even if the clause in the lease was a condition of the exercise of the power of the defendants to lay and maintain their sewer, the vesting in them of the fee simple of their sewer under the Public Health Acts overrode the terms of the lease and the defendants would not be restricted by that condition.

*Douglas Frank, Q.C., and H. Parrish* for the plaintiffs.

*Raymond Walton, Q.C., and W. H. Goodhart* for the defendants.

*Cur. adv. vult.*

Feb. 5. The following judgments were read.

**HARMAN, L.J.:** In the years 1904 to 1907 the defendants' predecessors, the urban district council of the district of Radstock in the county of Somerset, were engaged, as their obligation was under the Public Health Act, 1875, s. 15, in providing their district, and particularly the town of Radstock, with a system of sewerage. The local landowner was the then Earl Waldegrave and the council appears to have entered into some agreement with him on Aug. 26, 1904, in connexion with a sewer laid or proposed to be laid under his land. This document is not before us, but we do have a lease made on Mar. 15, 1907, between the Earl and the council under which the Earl in exercise of his Settled Land Act



A powers demised to the council a piece of land extending to some four acres for the purpose of a sewage works. Secondly there was demised an approach road then recently made by the council; thirdly a right to use a bridge over the River Somer, and fourthly

B "full and free power and liberty to convey sewage and waste water from the town and district of Radstock aforesaid . . . under the hereditaments shown on the plan hereto annexed and thereon coloured blue, (a) by means of . . ."

sewer pipes of a specified size along lines coloured red on the plan, and so forth,

C "... and for the purpose aforesaid to lay down and make under the said hereditaments pipes of the description hereinbefore mentioned . . . as may from time to time be necessary or expedient and shall be approved by the lessor."

There was also demised power to repair, replace and maintain the sewer pipes and for that purpose to enter on certain pieces of land coloured blue on the plan. The mines and minerals and power to work them by underground working were reserved. The habendum was in these terms:

D "To hold the said pieces of land powers liberties and premises unto the council and their successors except and reserving as aforesaid for the term of ninety-nine years from June 24, 1904, for the purposes of the disposal of the sewerages of the town and district subject to the existing tenancies "

E at rents there set out. The term and the rent were to begin at Michaelmas, 1904, when presumably the sewer was laid.

By this lease the council for themselves their successors and assigns covenanted with the lessor among other things:

F "(5) To complete the sewage tanks and other works shown on the plan in accordance with specifications to be approved on behalf of the lessor and at all times during the term to keep and maintain the pipes and other works in a proper condition and state of repair.

G "(14) The council in the exercise of the powers aforesaid will do as little damage as may be to the hereditaments coloured blue on the said plan or the timber or other trees underwood crops or vegetation gardens roads buildings gates and fences thereon and will as soon as may be make good any damage which may be done and the council will not interfere with the flow of or pollute the water in the River Somer."

Clause 18 provided for compensation to the landlord for any loss or damage sustained by reason of any work or operation of the council, including compensation such as would have been payable under the Public Health Act on compulsory acquisition. The term "lessor" is expressed to include

H "his heirs assigns and successors in title or other the person or persons for the time being entitled to receive the rent thereby reserved . . ."

I A large plan annexed to the lease shows a number of sewers, some not comprised in the lease, and shows also the sewer passing across the bed of the River Somer between points marked "M" and "N" on the plan, the nearest manholes being numbers 35 and 36 shown on the plan. According to the statement of claim the sewer was at this point laid in the bed of the river and though it is stated in the defence that it was not in fact sunk in the bed but laid on it, we must accept for the present purposes the allegation in the statement of claim. The sewer pipe was a twelve-inch pipe and it must be taken that, as the lease provides, it was laid with the approval of the lessor who owned the bed and soil of the river as riparian owner of the land on each side.

Why this transaction was carried out by lease is not apparent, and it would seem to be an odd way of putting the council into possession, for, so far as I can see, directly the sewers were laid they vested in the council for a freehold estate

which overrode the term created by the demise. See per COZENS-HARDY, L.J., in *Ystradgynodwg and Pontypridd Main Sewerage Board v. Bensted (Surveyor of Taxes)* (1), where he said this: A

"I think it has now been settled by a long series of authorities binding upon all courts that a sewer vests in the authority, not merely in the sense of their having an easement, but in the sense that they are owners of the space embraced by the sewer, and that they have a right to that space as owners, as long as it is required for the purposes of the sewer. Perhaps the last authority on that point is the case of *Westminster Corpn. v. Johnson* (2), in which [SIR RICHARD HENN COLLINS, M.R.] said 'The person acquiring the interest are a corporation, and acquire it in fee'. They acquire it in fee, subject to a defeasance analogous to that in the case of an estate *durante viduitate*. We are not really concerned here as to when or under what circumstances it may come to an end. I think there is no doubt the authority are the owners of this sewer, and they have the property vested in them." B C

See also the last part of the headnote to *Taylor v. Oldham Corpn.* (3), where I find this:

"The usual clause in local Acts vesting sewers in the sewer authority confers an absolute property in that part of the subsoil occupied by any sewer, and not merely an easement or right of sewerage." D

That statement is justified by the judgments there delivered. This would leave the lessee's covenants operative as covenants as between lessor and lessee and possibly their successors in title but they would no longer be lessee's covenants attached to the demise. E

The sewage works were apparently built to the satisfaction of the landlord and nothing more is heard of this piece of land until the year 1915, when Earl Waldegrave let to the plaintiffs two pieces of it, contiguous to the sewer, one on each side of the river and shown pink on the plan, together with so much of the bed of the stream as lay between them. There was reserved among other things the free passage of water running in the stream, and the plan on this lease shows the sewer passing across the stream from the pink land on one side to the pink land on the other. Oddly enough, the existence of the sewer is not mentioned in this lease, but of course the lessee must have taken with knowledge of its existence and subject to the rights of the council in respect to it. At some time, about 1915, the plaintiffs, presumably with the consent of their lessor, built a private bridge over the stream to connect the two pieces of land or the buildings on them. This bridge in fact is immediately above the line of the sewer, but was built so as to be independent of it. In the year 1953 the successors in title of Earl Waldegrave, the Waldegrave Estates Company, sold the reversion on this last-mentioned lease to the plaintiffs, so that there has been, I suppose, a merger of the term and the freehold, mines and minerals being always excepted. F G

At some date unknown to the court but presumably in recent years something has occurred, for which neither the plaintiffs nor the defendants are responsible, to deepen the bed of the river, scouring out the bed to such an extent that the sewer formerly lying on or in the bed, is now in times of normal water above the water level but in times of flood the water rises and covers the sewer and its presence in the water creates turbulence, so it is said, and eddies, which have eroded the banks of the river forming part of the plaintiffs' property, and has undermined the piers on which the bridge rests. This is stated in para. 10 of the amended statement of claim in the following terms: H I

"The said sewer is now above the level of the bed of the river and by reason thereof the water flowing along the course of the said river is

(1) [1907] 1 K.B. 490 at p. 499.

(2) [1904] 2 K.B. 737 at p. 745.

(3) (1876), 4 Ch.D. 395 at p. 396.

A obstructed and eddies and forces of water in the said river created by or resulting from the obstruction have eroded the banks of the said river and undermined and damaged the said bridge of the plaintiffs referred to in para. 1 and para. 8 hereof."

By agreement during the hearing below the plaintiffs' case was set out in para. 9 of an amended statement of claim in the following terms:

B "The plaintiffs contend that the defendants are liable to the plaintiffs as follows:—(i) In nuisance at common law. (ii) In negligence for failure to exercise their statutory powers to avoid the creation of a nuisance or an injury to the plaintiffs. (iii) For breach of the aforementioned covenant [viz., cl. 14 of the 1907 lease]. (iv) For breach of the provisions of s. 331 of the Public Health Act, 1936."

C The defendants demur to this claim, and an order was made on July 15, 1966, stated to have been pursuant to R.S.C., Ord. 33, r. 3, directing the setting down of the following issue to be disposed of before the trial, namely:

D "Whether on the footing that all the allegations of fact contained in the statement of claim in this action (so far as not admitted in the defence) can be proved the plaintiffs can as a matter of law be entitled to damages or an injunction as claimed in their statement of claim."

UNGOED-THOMAS, J., heard argument on this issue and came to the conclusion (4) that the defendants were right, or in other words that the statement of claim showed no cause of action, and he dismissed the action under R.S.C., Ord. 33, r. 7. The plaintiffs appeal.

E At this juncture I should like to protest against this method of procedure. This is not a *preliminary* point at all. It deals with the whole subject-matter of the action, and without any evidence, and the court is left in a most unsatisfactory position and has to guess at many things which on a hearing would be properly proved in evidence. The procedure proper to this kind of situation is by way of motion to strike out the statement of claim as showing no cause of action. That is a well-known method of putting an end to actions without substance, but it is also well known that the court will only strike out a statement of claim in plain cases where it is clear that the action cannot possibly succeed. That procedure would be entirely unsuitable to a case like the present, in which more than a score of authorities have been cited and argument has lasted over five days. Still, we are now confronted with a position in which both parties have acquiesced. The plaintiffs at any rate have only themselves to thank if they think the result unsatisfactory. The matter having gone so far, this court must, I think, accept the situation and deal with it as it finds it. I therefore approach the plaintiffs' case as stated in the amended statement of claim. This is based as stated at letter B, above.

H First, nuisance. The plaintiffs' case here is that the sewer in its present position is admittedly, at least in times of flood, an obstruction to the course of the water, that this obstruction is maintained by the defendants to the damage of the plaintiffs' property and is therefore on the face of it a nuisance, the plaintiffs being entitled as a natural right to the unobstructed flow of the water in the river. It seems to me that there is enough in this to throw on the defendants the burden of justifying the presence of the obstruction. This they do on several grounds:—(a) that the sewer was placed where it is with the approval of the plaintiffs' predecessor in title to the bed and banks of the river and has been properly maintained and never moved nor altered in any way since it was first laid; (b) that the scouring out of the bed of the river and the increased flow of water in it has nothing to do with the defendants, but is the result either of some natural cause or the operations of a riparian owner further up the stream, indeed, the defendants name the body said to have been the cause;



(c) it is admitted that the sewer as laid was not and continued not to be for many years afterwards a nuisance, and the defendants argue that it could not have become so through mere lapse of time without any action on their part. In support of this the defendants rely on the old case of *R. v. Bell* (5), where the headnote (so far as relevant) reads as follows:

"That, which is not a nuisance at the time it is done, cannot become so by length of time. It was proved that two batts or heaps of stones, made use of in throwing and landing nets, had been in the Tweed a time before the memory of man; and although they were admitted to be nuisances now, yet the court would not presume that they were so at the time of their erection, but on the contrary, intimated an opinion that the presumption ought to be, that at first they were not nuisances."

That was a decision of the Court of King's Bench sitting in banc and concerned two heaps of stones, known as batts, which in course of time had become an obstruction to navigation in the River Tweed. In the judgment, which was the judgment of the court, I find this (6):

"If the batts were not nuisances at the time of their erection, we cannot now adjudge them to be so, no more than we should be justified in calling a gate across a road a nuisance, because it now impeded the way, although, when it was first placed, it was, perhaps, of service to the public. Although, according to the cases of *Fowler v. Sanders* (7), and *Hayward's Case* (8), you cannot prescribe for a nuisance, yet that which was not a nuisance at its commencement, cannot become so merely by process of time. Under no such circumstances as those now presented to us, can we presume that originally they obstructed the course of the river."

This case is mentioned in 39 HALSBURY'S LAWS OF ENGLAND (3rd Edn.) 537, note (v) in support of the statement that something which begins by not being a nuisance cannot grow to be one by mere lapse of time and appears to bear out that statement, which seems to me, apart from authority, to be right.

The plaintiffs much relied on *Slater v. Worthington's Cash Stores (1930). Ltd.* (9), where the defendants were the owners of a roof on which a mass of snow had collected. This slid off the roof and injured a passer-by and the defendants were held liable for a public nuisance; but there the nuisance consisted in the fall of the snow, not its presence on the roof. I should have held that the defendants were liable on the principle of *Rylands v. Fletcher* (10) in that they allowed the 'dangerous thing to collect on their property and thence to escape. They knew of it but made no attempt to remove it. That seems to me to be no authority applicable to the present case.

Ground (d) is that the sewer as vested in the council under the Public Health Act is a freehold hereditament existing in the land and that when the plaintiffs bought from Earl Waldegrave this situation already existed and the plaintiffs who are subsequent purchasers, must take subject to the rights of persons already owning adjoining or contiguous hereditaments. In other words, say the defendants, the plaintiffs took the river bed as it was with such inconveniences if any as were inherent in it and must take the situation as they find it. The bed of the river is the property of the plaintiffs and so is the space between the two banks except so much of it as is occupied by the sewer itself, which is freehold property of the defendants, and if a remedy be required the plaintiffs are entitled to make up the river bed to its former height and thus to put an end to the so-called nuisance.

In my opinion these submissions of the defendants are sound in law and the plaintiffs have no right to complain of a state of things which has existed before

(5) (1822), 1 L.J.O.S.K.B. 42.

(6) (1822), 1 L.J.O.S.K.B. at p. 44.

(7) (1617), Cro. Jac. 446.

(8) (1589), Cro. Eliz. 148.

(9) [1941] 3 All E.R. 28; [1941] 1 K.B. 488.

(10) [1861-73] All E.R. Rep. 1; (1868), L.R. 3 H.L. 330.

A and ever since they came into possession in 1915 and has never been altered by the defendants or anyone for whom they are responsible. I would therefore hold that the plea of nuisance is bad.

The judge relied on *Moore v. Lambeth Waterworks Co.* (11), where a water authority had placed a fire plug in a public highway which subsequently subsided leaving the plug sticking up. They were absolved because they were not responsible for the highway which was the liability of the highway authority. That body was not liable for nonfeasance, the state of the road not rendering them liable to be indicted, but that did not throw liability on the water company. This case seems to me to be distinguishable on its facts.

The second ground relied on by the plaintiffs is negligence. It was explained to us at the hearing that this plea was only intended to allege negligence in so far as it is a necessary element in claims of nuisance against a local authority. The negligence alleged is failure to exercise their statutory powers to avoid the creation of a nuisance. In other words, say the plaintiffs, the defendants, knowing of the state of things, have taken no steps to amend it. This is agreed, but unless the state of things itself would in a private person amount to a nuisance the failure to amend it cannot be a breach of the defendants' duty and this plea cannot succeed.

The third plea is breach of covenant in the lease. This is a covenant between the lessor, defined as I have mentioned, and the lessee, the words being "the council will not interfere with the flow of or pollute the water in the River Somer". In my judgment, in the first place this agreement not to interfere is limited to the "exercise of the powers aforesaid", that is to say so far as relevant the laying and maintenance of the sewer. It is common ground that when the sewer was laid it did not interfere with the flow nor has any default been made by the council in repairing or maintaining the sewer itself. I am therefore of opinion that this covenant does not help the plaintiffs. Apart from that it is in my opinion not a covenant the benefit of which passes to the plaintiffs, for they were merely subsequent lessees of hereditaments adjoining the sewer and not successors in title of the lessor in the sense referred to in the lease, not being persons entitled to the rent reserved who alone can enforce the lessees' covenant with the lessor. Moreover there was no attempt expressly to assign the benefit of the covenant to the plaintiffs. Furthermore the covenant cannot be enforced, in my opinion, as a restrictive covenant not being annexed to any particular land of the lessor either expressly or by implication. It was argued that it was annexed to any land of the lessor capable of being benefited by it; and *Marquess of Zeland v. Driver* (12) was cited in support. In my opinion this is not in point. The covenant there was expressed to be for the benefit of, among other things, the land then settled land in the hands of the vendor remaining unsold or persons to whom he should have expressly assigned the benefit of the covenant. The nuisance was such as should be in the opinion of the vendor a nuisance, and that was held to entitle him to affirm the opinion that the land to be benefited was so limited. There is nothing of that sort here. Apart from that I never heard that the doctrine of *Rogers v. Hosegood* (13) applied to covenants in a lease.

It is further suggested that this covenant might operate as a condition and that as such the council cannot take advantage of the right conferred by the lease to lay and maintain the sewer without complying with the condition; and *Westhoughton Urban District Council v. Wigan Coal and Iron Co., Ltd.* (14) was cited in support of this. In my judgment the short answer is that this covenant is not and cannot be construed as a condition and the principle does not apply.

Lastly, the statement of claim seeks to rely on s. 331 of the Public Health Act, 1936. This section, however, merely preserves the common law rights of persons injuriously affected and does not arise in the absence of nuisance.

For all these reasons, while deploring the method by which the action has been

(11) (1886), 17 Q.B.D. 462.

(12) [1938] 2 All E.R. 158; [1939] Ch.1.

(13) [1900-03] All E.R. Rep. 915; [1900] 2 Ch. 388.

(14) [1919] 1 Ch. 159.

conducted I cannot but come to the conclusion that the statement of claim A  
discloses no valid cause of action and the case was therefore rightly dismissed  
by the judge as he had power to do under R.S.C., Ord. 33, r. 7.

**RUSSELL, L.J.:** We are asked to decide whether, on the assumed basis B  
that the relevant facts are truly stated in the statement of claim, the plaintiffs  
are entitled in law to fix responsibility for the damage to their property there  
alleged.

Those facts may be thus conveniently set out:—(i) the defendants' predecessors C  
in title laid a sewer across the River Somer in its bed by virtue of their powers  
under the Public Health Act, 1875, and under a ninety-nine year lease between  
Earl Waldegrave and the defendants' predecessors, to which reference may be  
made and in particular to covenant 14 by the defendants' predecessors. (ii) The D  
defendants are the local authority for the relevant district for the purposes of  
Part 2 of the Public Health Act, 1936. The sewer is vested in the defendants  
under s. 20 of the Act of 1936. (iii) In 1915 Earl Waldegrave demised to the  
plaintiffs premises including the bed and banks of the river surrounding and  
adjacent to the sewer. In 1915 the plaintiffs built a bridge on the demised  
premises over the river in the line of the sewer but so as not to interfere with E  
the sewer. (iv) In 1953 the freehold reversion expectant on the 1915 lease in  
the property then leased was conveyed to the plaintiffs by the successors in title  
to Earl Waldegrave to that reversion. (v) The sewer (without having moved)  
is now above the level of the bed of the river, and by reason thereof the water  
flowing in the river is obstructed and eddied, and forces of water in the river  
created by or resulting from the obstruction have eroded the plaintiffs' banks  
and undermined and damaged their bridge. (vi) The defendants have not exer- F  
cised any statutory powers to avoid the injury to the plaintiffs' property. (vii)  
Covenant 14 in the 1907 lease was with the lessor (which expression was defined  
as including where the context admitted his heirs assigns and successors in title  
or other the person or persons for the time being entitled to receive the rent  
thereby reserved) and was in the terms already read.

The question is whether on those facts, together with any other facts emerging F  
from the three documents mentioned, no claim can in law be sustained by the  
plaintiffs against the defendants in respect of the damage to their property,  
either under the heading of nuisance, or of breach of covenant 14, or by virtue  
of s. 331 of the Public Health Act, 1936.

I will take first the heading of nuisance, an unwarrantable and damaging G  
interference with the riparian rights of the plaintiffs; and in this connexion it  
is to be observed that it is not alleged that there was any impropriety in the  
original laying of the sewer in its present line and level, nor that the presence of  
the sewer has contributed to the lowering of the bed that has left the sewer so  
to speak in mid-water.

Suppose a case in which a riparian owner A builds for his own proper purpose H  
a structure on his own land near the river bank, perhaps with deep pile founda-  
tions. Years go by, and for some unknown reason (perhaps an increase in surface-  
water drainage into the river upstream, but anyway through no act or fault  
of A, the river starts to scour and erode the bank until ultimately the pile  
foundations nearest the river are exposed to the water and finally obstruct the  
flow, causing turbulence and eddying which reacts damagingly on the property I  
of a lower riparian owner B. Surely in such a case B could not complain in law  
that A, was guilty of nuisance in interfering with the natural right of B to the  
accustomed flow of water, nor be entitled to require A either to pull down the  
structure or undertake other works to end the turbulence and eddying. Nor  
can I see that the position would be otherwise in law if the structure was a drain-  
age pipe laid originally and harmlessly in the bed of the river, and the scouring  
by the waters years later was of the bed rather than the banks. *R. v. Bell* (15)



A concerned an alleged public nuisance of obstruction to navigation in the River Tweed by maintaining in the river artificial heaps of stones (known as batts) used in throwing and landing fishing nets. The procedural details do not matter, but the court was clearly of the view that if when originally constructed the batts were not an obstruction to navigation, either because they were constructed on dry land, or because they were constructed in shallow places not susceptible to navigation, they could not become such nuisance merely because of an alteration in the course or channel of the river. I am not confident that it is necessarily safe to draw conclusions as to private nuisance from cases about public nuisances: but it would certainly seem likely that the court in that case would agree with the views that I have expressed above.

B The nuisance alleged is a damaging interference with the riparian rights of the plaintiffs. The right of a riparian owner is not a right to have his property undamaged by the waters of the stream, but a right (so far as now material) to have the waters flow in their natural course to and through his property in their accustomed manner. If the waters change their course naturally, either laterally or horizontally, and the new course makes them impinge with consequent turbulence on an existing artificial construction, that construction cannot be said to interfere with the accustomed manner of the flow in that course, because in that course the manner of flow has never been otherwise.

D What then of the present case? It differs only from the second example given above in that the drain-pipe (the sewer) is not upstream from B but is actually in B's property, and indeed was there for many years before B bought. I cannot see that those facts or either of them serve to improve B's position in law. As against B, the owner of the pipe, quite apart from any particular privilege as a sewer authority, was perfectly entitled to maintain the pipe in the line and level where he laid it, and a natural change in the bed of the stream over the years does not alter that entitlement.

E We were much pressed with *Slater v. Worthington's Cash Stores (1930), Ltd.* (16), (in the Court of Appeal) as pointing to liability in this case. Try as I can, I cannot see its relevance. In that case to the knowledge of the defendants there had been for several days a massive collection of snow and ice on the sloping roof of their shop, and it was or should have been obvious that a sudden thaw would precipitate it on to the pavement to the danger of a passer-by; and by just such an avalanche the plaintiff was injured while window-shopping. The defendants knew of the risk of such injury and they could have avoided it by clearing their own roof, and should have done so. It is suggested that the water in the stream in the present case, bouncing or falling off the sewer and causing damage, is the equivalent of snow coming on to the roof and then falling off; but I have no doubt that if in the *Slater* case (16) it had appeared that the danger could only have been avoided by moving the defendants' premises no nuisance would have been found. The right of the injured person was not to complain of the existence of the roof because it had snow on it but to complain of the failure to remove the snow when it was obviously dangerous and could have been removed.

H In my judgment these considerations dispose briefly of the assertion of nuisance, and it is not necessary to consider other aspects of this part of the case—in particular the question of some degree of negligence in failing to exercise statutory powers being an essential part of an allegation of nuisance against this statutory authority by reason of judicial interpretation of s. 31 of the Public Health Act, 1936, and whether s. 331 of the Act of 1936 in this case removes the requirement.

I Equally those considerations dispose of the suggestion that a claim may be founded on s. 331 of the Public Health Act, 1936: for that section is a mere saving of common law rights.

That leaves the question of covenant 14 in the 1907 lease. The lease purported to grant an easement in respect of this length of sewer for a period of ninety-nine

years; but I have no doubt on authority that under the Public Health Acts the sewer vested in the authority (as is asserted in the statement of claim) and moreover vested in it for a determinable fee. When the relevant bed and banks were leased to the plaintiffs in 1915 and conveyed to the plaintiffs in 1953, no title to or reversion to the sewer was leased or conveyed to the plaintiffs. There was neither privity of contract nor privity of estate between the plaintiffs and defendants in respect of this covenant. Nor can this covenant be enforced by the plaintiffs apart from such privity as a restrictive covenant. There has never been an annexation of the benefit of the covenant to any land now of the plaintiffs either in the 1907 lease or subsequently.

It was further argued that the covenant might be treated as a condition on which alone the defendants could assert a right to keep the sewer in the line and level laid, and that by analogy with *Westhoughton Urban District Council v. Wigan Coal and Iron Co., Ltd.* (17) the plaintiffs could insist on the condition. I am far from satisfied that the covenant in fact relates to maintaining the sewer in its position as distinct from the laying of it; but in any event it cannot be construed as a condition.

I would dismiss the appeal.

**SACHS, L.J.:** In the category of cases which come before the courts in an unsatisfactory form, the one now under consideration ranks high. Any preliminary issue that falls to be tried in the course of an action should always be one in which great care is taken to ensure that the issue presented for decision is well-defined and that the facts on which it has to be considered are clearly ascertainable. In the present case there is not simply a single point for consideration but a whole series, and no such care was taken as regards any of them: moreover when the pleadings came to be amended in the middle of the trial before the judge of first instance the result was to make the matters less rather than more clear.

The mischief has arisen from an order which the plaintiffs opposed but from which they failed to appeal. This seeks in effect to reintroduce proceedings in the nature of a demurrer, when the foundations for such proceedings have very rightly long been swept away. The order, the precise effect of which will be further analysed later in this judgment, was that a preliminary issue of law be tried on the basis that the facts set out in the statement of claim were true. That might have worked in the first part of the last century, but since then pleadings have been encouraged to become somewhat imprecise as regards facts, with liberal latitude given for amendments, and law need not be pleaded at all. The essence of demurrer proceedings was precision both on facts and law.

Nowadays the defendant who considers that the statement of claim discloses no cause of action should, save in most exceptional cases of which this is not one, seek to strike out the statement of claim on that ground. Had such an application been made in the present case it could not possibly have succeeded. If, however, there is some compact point of law which can be raised by way of a preliminary issue this should be, as above stated, clearly defined. In these circumstances any judgment which I can give must be delivered without any confidence that it will meet the justice of the case on either side.

The nature of the action is a claim by the plaintiffs as riparian owners of certain premises and lands for damage being caused to them by the flow of the River Somer. The causes of action as laid are in nuisance and in breach of covenant—and at this early stage it is convenient to mention that although para. 9 of the statement of claim refers to negligence, that has been specifically stated at the Bar not to refer to any independent cause of action but merely to certain supplementary facts which have to be proved in order to get a claim for nuisance on its feet against a public authority. There is also an allegation that

A relief is claimed under s. 331 of the Public Health Act, 1936—but that is not a section which of itself could provide any plaintiff with a cause of action.

It seems to me convenient to consider first the claim in nuisance—only referring to the position between the parties created by the leases of 1907 and 1915 and the conveyance of 1953 in so far as it may provide a defence to such a claim. The damage alleged in the statement of claim to have been suffered by the plaintiffs arose, according to the allegations in the statement of claim, from there lying across the River Somer and “above the level of the bed of the river” a sewer (i.e., an artificially constructed object) which is vested in the defendants. The plaintiffs’ case is that that sewer causes eddies which have eroded the bank structure of their land on either side of the river and have also adversely affected a private bridge of theirs which joins their premises on the two sides. Those allegations must for the purposes of this judgment be assumed to be true.

It is as well at the outset to note that at any rate in cases of the class now under consideration an action in nuisance differs from one in negligence in that (save in certain exceptional cases) once facts are established which show that there emanates from the defendant’s property something which in law *prima facie* constitutes a nuisance causing damage, then in nuisance it is for the defendant to exculpate himself, whilst in negligence it is for the plaintiff to prove that the damage was caused by the fault of the defendant. Once it is shown that an artificial object belonging to a defendant is so placed in the bed or stream of a river that it diverts the fall of the water in such a way as to cause damage to a riparian owner, then that state of affairs *prima facie* constitutes a nuisance for which the person to whom the damage is caused has an action. In cases, however, where the defendant is a public authority whose works are in the relevant position by virtue of statutory powers, there is engrafted on this principle a brake in the shape of the need for the plaintiff to establish that the state of affairs complained of is in some degree due to the fault, usually referred to as negligence, of the defendant authority.

In the present case the court has to commence its examination of the position from the footing that the sewer is the property of the defendants, that by reason of its position at the date of action brought it is interfering with the flow of the river, and that this interference is causing damage to the plaintiffs. Such interference being *prima facie* a nuisance I accordingly agree with Harman, L.J., that the onus lies on the defendants to justify that state of affairs. What then are the matters raised by the defendants so as to exculpate themselves? These appear to be as follows. First, that there is no allegation in the statement of claim that the sewer was a nuisance when first it was laid and/or that the defendants have taken since it was laid any active step turning it into a nuisance; secondly, that the terms of the Public Health Acts provide a defence; thirdly, that the plaintiffs do not on the pleadings show a *prima facie* case of that negligence which must be established before a public authority can be liable in nuisance; and fourthly, that the terms of the leases and the conveyance and their effect provide a defence.

Before examining these defences in more detail it seems at this stage proper to analyse the pleading position. The only allegations in the statement of claim which were needed to raise a *prima facie* case in nuisance were those set out in para. 1 (which sets out what are the premises of which the plaintiffs are owners); para. 2, which sets out that the defendants are the local authority and laid the sewer under their powers as such authority; that the defendants are the owners of the sewer; the facts set out in para. 10 of the amended statement of claim (18) as to the position of the sewer and the present effects of its being in the river; and lastly an allegation (to be found in para. 9 of the amended statement of claim (19)) that the defendants were negligent in failing to exercise their statutory powers to avoid the creation or existence of a nuisance or injury to the

(18) Paragraph 10 is printed at p. 64, letter I, to p. 65, letter A, ante.

(19) Paragraph 9 is printed at p. 65, letter B, ante.



plaintiff. Any further allegations in the statement of claim, though needed to raise a claim under the covenant in the 1907 lease, are redundant from the point of view of raising a *prima facie* case in nuisance; but once thus set out they can, of course, be relied on by the defendants as raising defences to the *prima facie* case—and indeed it is only by so relying on them that the defendants seek to succeed on a demurrer. For this purpose, however, these allegations must in practice be scrutinised in the same way as if they had been transferred to a defence and there examined to see whether such allegations without supplementation by any other facts must necessarily entitle the defendants to succeed. Much thus turns on the onus of proof. A B

The adoption of this method of looking at the matter assists in the ascertainment whether facts have been omitted from the pleadings which the defendants must establish before they can succeed and also whether the facts are sufficiently clearly stated as to present any single picture which might lead the court to say that in no circumstances can the plaintiffs obtain a judgment. C

As soon as this is done it becomes evident that no facts are alleged which make it clear how far, when the defendants' predecessors laid the sewer in 1904, they were doing so by virtue of their statutory powers, or how far this was done by virtue of some and if so what agreement—for the agreement of Aug. 26, 1904, has never been placed before the court. Similarly the court is left unaware what precisely is meant by the words "in the bed of" the river (see para. 4 of the statement of claim) or whether it was so laid as to be "under the hereditaments" in accordance with the terms of the 1907 lease. It is to be noted in this behalf that varying suggestions were made during the course of the argument before this court whether the top of the sewer casing was, when originally laid, below the surface of the river bed or projected above it, and that neither of the phrases "in the bed" or "on top of or above the bed" as used in the respective pleadings proved to be free of ambiguities on this point. Again there is nothing in the pleadings to show whether at the time the sewer was originally laid the bed of the river was showing any, and if so what, scouring tendency and whether, thus, those who laid the sewer could reasonably have foreseen that scouring action would gradually lower the bed of the river. (That the bed of the river did at some stage sink is alleged in the defence to be due in part at any rate to "the natural action of the water in the said river"—a point to which I will return.) Another matter of fact which does not appear in the statement of claim, and to which in my view there was no need to refer, is the date at which the scouring began adversely to affect the banks of the river or the bridge respectively: and on demurrer the date most favourable to the plaintiffs should be assumed. The relevance of these facts to the question whether the defendants succeed in justifying the damage being caused by their artificially created property in the stream will be dealt with later: for the present the mere recital of a catalogue of some of the facts not alleged in the assumed defence and unknown to the court makes plain how difficult it may be to attempt to try on a pleading and without evidence what appears to be regarded as an important case having regard to the continuing damage. Had this matter been brought before the court on a Case Stated it would to my mind inevitably have been sent back for further facts to be ascertained—some of which will be referred to later in this judgment. D E F G H

Turning to the first and main justification alleged by the defendants to exculpate them from causing what is *prima facie* a nuisance, the issue seems to be raised in the form that the sewer was laid in 1904 and that there is no allegation in the statement of claim that the defendants have since in any way tampered with it or with the bed of the river. (There is, be it noted, no plea of prescription, nor has it been raised in argument by the defendants; the statutes of limitation cannot, of course, be regarded in demurrer proceedings.) I

Whether the fact that an artificial object causing a damaging interference with the flow of water in a river can be justified by the mere length of time of its

A existence in the water is one of those points on which there is a curious absence of authority. The nearest case is one which was brought to the notice of counsel in this court from note (v) in 39 HALSBURY'S LAWS OF ENGLAND (3rd Edn.) p. 537, viz., *R. v. Bell* (20) which concerned an indictment relating to batts placed in a navigable river at some time beyond the memory of man. The issues arose on the case being removed by a writ of certiorari into the Court of King's Bench

B after verdict. From the judgment of the court it appears that they were of the opinion that (21)

"If the batts were not nuisances at the time of their erection, we cannot now adjudge them to be so... you cannot prescribe for a nuisance, yet that which was not a nuisance at its commencement cannot become so merely by process of time."

C Judgment was, however, suspended so that the prosecutors might have an opportunity of preferring another indictment at the trial of which it could be left to the jury to say whether these batts, immemorially erected, were a nuisance, when first erected. How far that case is a satisfactory authority in relation to the issues now before the court is much open to question. It concerned a criminal

D trial; it related to a navigable river and thus the public right of navigation; it seems in part at variance with the later case of *Williams v. Wilcox* (22); and it does not appear to have been cited in that later case or in any other authorities or text-books found by counsel in their researches. Moreover it does not purport to consider the issue whether when the batts were erected there was a reasonable possibility or likelihood of their becoming later a nuisance which could have been then foreseen.

E The authorities on the question of foreseeability (some of which are referred to in 39 HALSBURY'S LAWS OF ENGLAND (3rd Edn.) p. 523) were not fully canvassed before this court, but as at present advised to my mind the owner of an erection which prima facie constitutes a nuisance cannot exculpate himself by the mere plea that it was not a nuisance when first erected.

F The mere unsupplemented fact that it was not a nuisance when erected is no more in principle a cast-iron defence on demurrer whether the erection is stated to have taken place sixty days, sixty weeks, sixty months or sixty years before the date of action brought: and that would be so whether or not causation of damage is an essential ingredient in a cause of action in nuisance by interference with the flow of water. In an action for nuisance where it is for the defendant

G to exculpate himself it is not for the plaintiff to allege in the statement of claim that the erection might well later cause damage; it is for the defendant to allege and prove that this could not be foreseen. The onus is on the defendant. There is no fact set out in this statement of claim of which the defendants can avail themselves on this point and that, to my mind, is of itself sufficient to disable them from seeking an order as on a demurrer.

H It is convenient next to turn to the second of the legs on which the defendants sought to rest their first justification. They contended—indeed strongly reiterated—the point that since 1904 they had done nothing to create the nuisance: it was, so the argument ran, the action of the waters themselves that created the nuisance.

I Nuisance is, as has often been observed, a tort of which the components vary so much that it is not susceptible of any comprehensive definition; but one thing is clear. The action of time or weather or other natural forces not under the defendant's control can in certain events result in there being a nuisance emanating from the defendant's property through no original active fault of his which he must remedy because it may be his duty to stop the effects of what has happened through no such fault.

(20) (1822), 1 L.J.O.S.K.B. 42.

(21) (1822), 1 L.J.O.S.K.B. at p. 44.

(22) [1835-42] All E.R. Rep. 25; (1838), 8 Ad. & El. 314.

Instances can be found such as the nuisance caused by snow that has fallen on a properly erected building (*Slater v. Worthington's Cash Stores (1930), Ltd.* (23) or the spreading, perhaps after scores of years, of the roots of a self-seeded tree. The air-raid shelter case (*Fisher v. Ruislip-Northwood Urban District Council and Middlesex County Council* (24)) may be an example of the effect of changing circumstances, but seems in a different category. In *Slater v. Worthington's* (23) the plaintiffs founded their case on the defendant having "suffered" a state of affairs to continue after it came to his knowledge: OLIVER, J., held (25) and SCOTT and GODDARD, L.J.J., (23) specifically affirmed, that it was a clear case in nuisance to which there was no answer. Taking no action to remedy a state of affairs of which one has or ought to have knowledge is the essence of certain types of nuisance (see the cases discussed by OLIVER, J.), of which this to my mind is one—at any rate if the action of the natural flow of waters was foreseeable. It follows that in the present case this second leg of the defendant's justification also does not provide them with a defence for demurrer purposes.

So far I have considered the position without reference to the fact that the defendants laid the sewer under their powers as a public authority; but that fact puts an additional difficulty in their way on demurrer. This emerges from passages in the judgments of SIR RAYMOND EVERSLED, M.R., and ROMER, L.J., in *Pride of Derby and Derbyshire Angling Association, Ltd. v. British Celanese, Ltd.* (26)—even after taking into account the fact that that case was concerned with pollution of water and not with turbulence of water. In that case the sewer works had been carried out by a local authority in a manner entirely proper at the time when they were executed. There is mentioned the submission of counsel for the second defendants which was parallel to that made by counsel for the defendants in this case. It ran (27):

"Once it is shown that the works were authorised by the local Act and carried out satisfactorily by the local authority, there can be no liability if later, through circumstances outside the control of the local authority, damage results."

That argument was rejected by SIR RAYMOND EVERSLED, M.R., (28) and also by ROMER, L.J. (29). In both judgments reference is made to the local authority having no answer to an action in nuisance unless it can show that the nuisance complained of is the inevitable consequence of that which the Act both authorised and contemplated.

On that footing if the sewer in the present case was laid by virtue of the provisions of the Public Health Acts, it appears that the onus on these defendants is even higher than that which I have indicated. It seems that they can only exculpate themselves if they can show that it was inevitable that a sewer laid on the relevant line under the River Somer would become a nuisance. Thus they might have to show that irrespective of the depth which they could lay under the bed and irrespective of any measures which they might take by way of foundations or ramping, the sewer would inevitably have later emerged into mid-stream and cause the damaging turbulence. Here again it is to my mind not for the plaintiffs to allege that the turbulence was "not inevitable"; it would be for the defendants to allege and prove that it was inevitable. If so, that is a further reason for deciding against the defendants on a demurrer.

The artificiality of the situation which faces this court is underlined by counsel for the defendants having frankly conceded that if the statement of claim had contained an allegation of foreseeability he would not have been there arguing

(23) [1941] 3 All E.R. 28; [1941] 1 K.B. 488.

(24) [1945] 2 All E.R. 458; [1945] K.B. 584.

(25) [1941] 1 K.B. at p. 490.

(26) [1953] 1 All E.R. 179; [1953] Ch. 149.

(27) [1953] Ch. at p. 157; see [1953] 1 All E.R. at p. 186, letter B.

(28) [1953] 1 All E.R. at p. 194, et seq.; [1953] Ch. at p. 175, et seq.

(29) [1953] 1 All E.R. at p. 205; [1953] Ch. at p. 193.



A for a demurrer decision: and that seems equally applicable to any inevitability issue. The artificiality is patently increased when there is to be found in the defence allegations that the sewer was laid on or above the bed of the river and that "the natural action of the water" was one cause of the bed of the river becoming lower: those two allegations point towards rather than against foreseeability of what has now happened.

B The next issue is whether the Public Health Acts provide the defendants with a defence if they would, but for those Acts, be liable at common law. Subject to the point whether the plaintiffs' allegations in the statement of claim, if accepted as accurate, show a prima facie case of negligence (the next question to be discussed) the answer to my mind is clearly in the negative.

C Section 331 of the Act of 1936 (which replaces s. 332 of the Act of 1875) manifestly preserves the relevant rights of riparian owners as regards nuisance. Moreover s. 31 of the Act of 1936, which reads

"A local authority shall so discharge their functions under the foregoing provisions of this Part of this Act as not to create a nuisance", goes even further. Indeed, as indicated by ROMER, J., in *Stretton's Derby Brewery Co. v. Derby Corpn.* (30), when he refers to the parallel s. 19 in the Act of 1875 "casting a liability" on the public authority, it seems to me to provide a cause of action: and if failure to remedy a state of affairs may be said to create a nuisance (as appears from the authorities already mentioned) then it may in the present case be of affirmative use to the plaintiffs, if pleaded and relied on in lieu of s. 331.

E As regards the cases discussed by the trial judge, I will refer to two. The first is *Moore v. Lambeth Waterworks Co.* (31): there no reference was made to any provisions in the statutes then under consideration which were parallel to s. 31 and s. 331 in the Public Health Act, 1936. The second is *Great Central Ry. Co. v. Hewlett* (32). That turned on statutory authority relating to specific posts in position; and I respectfully agree with and adopt the view expressed by LORD GREENE in *Fisher v. Ruiship-Northwood Urban District Council* (33) that the *Great Central Railway* case (32) should be regarded as of authority only in relation to a somewhat narrow set of facts. I doubt if either of these authorities is strictly in point in the present case.

F Next I turn to the issue of that negligence which must be established where s. 31 applies (*Stretton's Derby Brewery Co. v. Derby Corpn.* (30) and which is intended to be raised in para. 9 of the amended statement of claim in the following words:

"In negligence for failure to exercise their statutory powers to avoid the creation of a nuisance or an injury to the plaintiffs."

A more unsatisfactory and imprecise way of alleging negligence is hard to conceive: there are no particulars as to what ought to have been done and no specific reference to provisions of any acts under which this could be done. I am not prepared in demurrer type proceedings, however, to assume in the absence of evidence that at all relevant times after they were aware of the likelihood of damage to the plaintiffs' property from the disturbance of the flow of the river the defendants were unable to remedy the situation. A concrete ramp up to the top of the sewer is one possible remedy and there are others. Nor am I prepared to say on demurrer that the defendants had no power to provide a remedy. It would be absurd if they could not: and apart from any specific powers they have inherent powers to do such work. So the defendants can in the proceedings before this court derive no comfort or protection from the fact that they are a public authority.

That leaves for consideration the final question whether there is anything to

(30) [1891-94] All E.R. Rep. 731; [1894] 1 Ch. 431.

(31) (1886), 17 Q.B.D. 462.

(32) [1916-17] All E.R. Rep. 1027; [1916] 2 A.C. 511.

(33) [1945] 2 All E.R. at p. 464; [1945] K.B. at p. 598.

be collected from the terms of the leases of 1907 and 1915 or the conveyance of 1953 which necessarily results in the defendants having a complete defence to the plaintiffs' claim. Here again it is a pity that the preliminary issues of fact and law were not crystallised for submission to the court. In so far as it was suggested on behalf of the defendants that a defence arises because the parties both derive their title from a common source, I am unable to see how that of itself provides a defence. For the rest the the defendants' case seemed to be the equivalent of a defence of leave or licence, or perhaps an estoppel. The moment, however, one looks at the lease of 1907 (without, incidentally, having had a sight of the 1904 agreement) it seems more than difficult to assert leave and licence to create a nuisance when that lease contains in cl. 14 an express covenant that "the council will not interfere with the flow of . . . the water in the River Somer". The provision in the same clause that the council is not to pollute the water shows, incidentally, that it was intended that the obligations set out in the covenant were to continue throughout the ninety-nine years duration of the lease. Even if the plaintiffs cannot found an action on the covenant in cl. 14 (a matter on which I refer to reserve my opinion—for the order requires no more than a decision on the statement of claim as a whole), it seems to me that the defendants in the face of that covenant cannot rely on the lease as a grant of leave or licence to create a nuisance. Nothing that has happened since gives them such leave or licence.

As regards the effect of any concurrence by the lessor in any plans used when the sewer was erected, there is no material from which this court can gather what if anything the plans showed as to the depth at which the sewer was to be laid, what if any concurrence of the lessors was obtained, and whether any concurrence was before or after the date of the lease. If the defendants wish to rely on such matters they must allege them and prove them by evidence. It does not seem to me that such issues can or should be decided in demurrer type proceedings—remembering that the defendants seek to shut the plaintiffs out from having their case tried in the normal way.

On a final analysis it appears that the matters on which I have the misfortune to differ from my brethren in regard to the cause of action in nuisance are in essence points of pleading. Must certain allegations be set out in the statement of claim or if so set out would they in law merely seek to anticipate a potential defence of which the burden lies on the defendants? The difference may be even narrower if it stems from variations of approach to pleadings as between divisions of the High Court. In any event it has been, as already mentioned, underlined by factors to which I have already referred.

In those circumstances, even if wrong in the views which I have expressed on these demurrer type issues, I would not myself have exercised the discretion given by R.S.C., Ord. 33, r. 7 in such a way as may finally debar the plaintiffs from pursuing their claim or create estoppels against them.

I would have preferred only to determine by means of a declaration the precise point put before the court for decision—whether the particular set of allegations in the statement of claim discloses a cause of action—leaving it to the plaintiffs then to decide what their course should be. The courts should to my mind lean against shutting out the plaintiff from pursuing a claim which, despite any lacuna in their present pleading, may well yet prove to be properly founded.

For these reasons I would have set aside the order under appeal—but that is a view to which effect will not be given by the court.

*Appeal dismissed. Leave to appeal to the House of Lords granted.*

Solicitors: *Taylor Willcocks & Co.*, agents for *Kent, Rathmell & Young*, Radstock (for the plaintiffs); *Knapp-Fishers*, agents for *Faulkner, Creswick & Gould*, Bath (for the defendants).

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

A R. v. GREEN. R. v. DALE. R. v. REYNOLDS. R. v. LAIRD.

[COURT OF APPEAL, CRIMINAL DIVISION (Salmon, L.J., Phillimore and Blain, J.J.), February 22, 1968.]

B Legal Aid—Criminal cases—Grant—Practice—Offer of legal aid to be made by court where heavy sentence likely, even though accused pleads guilty—Sentence of thirty months' marginal—Duty of court to ensure representation where circumstances clearly require careful inquiry.

C It has previously been intimated by the court\* that where it is likely that a prisoner who pleads guilty will receive a sentence of the order of five years' imprisonment, he should be offered legal aid before he is sentenced. It is not, however, desirable that a particular term of sentence should be treated as requiring legal representation to be offered. Regard should be had to all the circumstances, and, though a sentence of only thirty months' imprisonment may be marginal for this purpose, yet where there are circumstances that clearly require careful inquiry, as where a social inquiry report recommends probation, it is the duty of the court to try to ensure representation before passing a severe prison sentence (see p. 80, letters E and F, post).

E Sentences of thirty months' imprisonment on each of four accused who pleaded guilty were reviewed on applications for leave to appeal, the sentences having been imposed without legal representation having been offered to the accused; the Court of Appeal, having granted legal aid, reduced two of the four sentences, one accused being put on probation (see p. 79, letters A and E, post).

[As to legal aid in criminal cases, see 10 HALSBURY'S LAWS (3rd Edn.) 371-373, paras. 675, 676.]

Cases referred to:

F R. v. Mahoney, R. v. Stevens, (June 23, 1967), unreported.

R. v. O'Brien, (Nov. 14, 1967), unreported.

R. v. Serghiou, [1966] 3 All E.R. 637, n.; [1966] 1 W.L.R. 1611; Digest (Cont. Vol. B) 509, 556a.

### Applications for leave to appeal.

G The applicants had pleaded guilty to various offences of housebreaking, larceny or false pretences, and, without being offered legal aid, had been sentenced at Inner London Quarter Sessions each to thirty months' imprisonment. They applied for leave to appeal against sentence. The charges and sentences were as follows. The applicants Charles Guy Green and Anthony Michael Dale had each pleaded guilty on Aug. 22, 1967, to three counts of housebreaking and larceny, and they were each sentenced to thirty months' imprisonment. The applicant John Reynolds, pleaded guilty on Aug. 9, 1967, at Old Street magistrates' court to charges of obtaining by false pretences and larceny. He was committed to quarter sessions for sentence on Aug. 22, 1967, and was sentenced to thirty months' imprisonment for obtaining by false pretences and six months' concurrent on the larceny charge. The applicant John Richard Laird, pleaded guilty on Aug. 2, 1967, at South Western magistrate's court to a charge of larceny. He was committed to quarter sessions for sentence on Aug. 22, 1967, and he was sentenced to thirty months' imprisonment. The facts are set out in the judgment of the court.

I G. A. Bathurst Norman for the applicants Green and Reynolds.

R. S. J. Brock for the applicants Dale and Laird.

PHILLIMORE, J., delivered the following judgment of the court: The court has heard these four applications together, since they have certain features

\* See, e.g., R. v. Serghiou, [1966] 3 All E.R. 637, n.



in common. Each applicant received a sentence of thirty months' imprisonment from the same deputy chairman, at Inner London quarter sessions, O.S. MACLEAY, Esq. All were sentenced on the same day. In each case the applicant was not represented, and for this reason the single judge has referred each application to this court expressing the view that the decisions of this court required that before passing such a sentence the court should endeavour to ensure that the accused is legally represented. This court has itself granted legal aid and has had every assistance from counsel. The court proposes, to deal with each application on its merits, and to reserve any general observations to the end of this judgment. A B

First then are the applications of Green and Dale. The applicant Green is twenty-four and the applicant Dale is twenty-one and on Aug. 22, each pleaded guilty to three counts of housebreaking and larceny at Inner London Quarter Sessions and are sentenced to thirty months' imprisonment. The circumstances were that the applicant Green lived in the house of a Mr. Marshall, the house having been divided into flats, and on July 18, the applicants Green and Dale took the keys of Mr. Marshall's flat from a cupboard outside Mr. Marshall's room, and then having entered the room stole £8. On July 19, they returned to his room and stole clothing and other property. Finally, having taken from Mr. Marshall's room keys to other rooms in the house, they entered the room of a Mr. Ellu and stole clothing, a tape recorder and other property. Some of the stolen property was recovered from the applicant Dale's home but property worth about £140 was said to be missing. C D

Counsel on behalf of the applicant Green has pointed out that the statement that he made to the police really was only an admission on the first count, and in effect alleged that the second and third counts to which he had pleaded guilty, were the work of the applicant Dale and two other men. It is also pointed out that in his case he was some years ago committed to a mental hospital and was there for three years. The court does not think that there is any ground for supposing that these two applicants did not commit these three offences to which they pleaded guilty, and it does not propose to differentiate between them on any grounds of the sort put forward in the applicant Green's statement. Each of them had sufficient experience of courts to decide on these pleas. E F

So far as the applicant Green is concerned, he has a very bad record. He has had nine previous convictions of which no less than five were for housebreaking, and on the last two offences, i.e., in July 1964 and April, 1966, he received sentences of nine months and twelve months' imprisonment respectively, and in between he had a sentence of a month's imprisonment for receiving. The court thinks that in his case a sentence of thirty months was proper and did not err in severity. Accordingly his application is dismissed. G

In the case of the applicant Dale, however, there was a probation officer's report. The applicant Dale, when asked whether he wanted to say anything, referred to the fact that there was a report and the deputy chairman said "I have seen the report" and then turned to the applicant Green and asked him what he wanted to say. Now, in fact that report contained a strong recommendation, in spite of the applicant Dale's record, for probation. The basis on which it was put was this, that the applicant Dale, who is immature and ill-educated, had been living with his mother and she then had left their home taking the furniture and fittings, leaving him with no food or money and it was in those circumstances that he had embarked on the commission of these offences. He had, however, more recently found a home with a Mr. McEwan whom he looks on as his father. The probation officer expressed the view that the applicant Dale would settle down in an institution and would be no trouble to anybody there; but if he is ever to live a life in society, what he needs is help to manage his life and affairs in a socially acceptable way. The court, in such circumstances, could very well have been assisted by hearing the probation officer, and if it had done that, it would have been reasonable to give him legal aid so that his counsel could consider the matter and urge such matters as he thought fit on behalf of the H I

A applicant. This was not done, and accordingly this sentence was passed. This court thinks that this is a case for probation. [His LORDSHIP then asked the applicant Dale whether he was prepared to be put on probation, and, having explained the effect of being put on probation, directed him to be put on probation for three years, making it a condition of the probation order that he should reside where the probation officer decided.]

B I turn now to the case of the applicant Reynolds. He is twenty-five, and he pleaded guilty on Aug. 9 at a magistrate's court to a count of obtaining by false pretences and to a count of larceny, and was committed for sentence at Inner London Quarter Sessions, where on Aug. 22 he was sentenced to thirty months' imprisonment on the first count and six months' concurrent on the second count. What he had done was that on Aug. 8 he had gone to the Ministry of Social Security offices and stated that he had acquired lodgings, which was untrue, and attempted to obtain £6 10s. national assistance. When he was seen by the police, he admitted the offence, and when he was searched, a driving licence and a certificate of insurance, stolen from a Mr. Coppin, were found on him. He stated that he found them, and there was nothing to show that this was other than stealing by finding. He had a bad record, although some of his offences have been comparatively trivial. However, on the last occasion when he was before the court, he was sentenced to twelve months' imprisonment for attempted false pretences and office breaking with intent, on which he had previously been conditionally discharged and four other matters were taken into consideration.

This was a case where clearly a prison sentence was inevitable, but he had no representation and the matters that were to be put forward on his behalf were not mentioned. The statement that he had made to the police was never read, and this court feels that in all the circumstances this sentence was too severe. Each member of this court independently took the view that the proper sentence would have been eighteen months, twelve months for false pretences and six months consecutive for the larceny. Accordingly this court is prepared to treat this application as the hearing of the appeal, and to substitute the sentence I have indicated. Of course, in these circumstances he is free to return to this court to seek some further reduction, but we certainly give him no encouragement to take that course.

Finally, the applicant Laird's application for leave to appeal against sentence. He is thirty-eight, and on Aug. 2, at a magistrates' court he pleaded guilty to larceny and was committed for sentence to Inner London Quarter Sessions, where on Aug. 22 he was sentenced to thirty months' imprisonment. The circumstances were that he was employed by a firm to sell goods on credit and also to collect money for goods that he had previously sold, and he was supplied with a van by his employers. He arranged with two men, whom he met in a public house, that he would leave his van in a particular place, so that they could hijack it. In return he was to receive a third of the proceeds from the sale of the goods in the van. In pursuance of this plan he left his van on July 29, at the pre-arranged place and left in it clothing and other goods worth over £1,000. The van had disappeared when he returned and he reported this loss to the police, and it was subsequently found but the goods had disappeared. He was a man who had a good character until 1965, and then he was convicted of a number of charges of falsification of accounts and charges of fraudulent conversion and sentenced to nine months' imprisonment. This court can find no ground for reducing the sentence in his case. Thirty months was by no means too long, and accordingly his application is dismissed.

Before parting with these applications, this court desires to add a few words as to the grounds on which the single judge referred them. In *R. v. Mahoney, R. v. Stevens* (1), DIPLOCK, L.J., said about the application by Stevens for leave to appeal from a sentence of five years passed at Inner London Quarter Sessions

(1) (June 23, 1967), unreported.

"The circumstances in which he failed to be legally represented are not known to this court but we think it right to say that where it is likely that a prisoner on pleading guilty will receive a sentence of the order of five years' imprisonment, it is proper and desirable that legal aid be offered to him."

Very much the same was said in *R. v. Serghiou* (2), where judgment was given by EDMUND DAVIES, L.J., that being also a case involving a sentence of five years. In *R. v. Stevens* (3), the sentence was reduced to four years' imprisonment. On an application in *R. v. O'Brien* (4) for leave to appeal from a sentence of thirty months' imprisonment, passed at Surrey quarter sessions, WINN, L.J., said on Nov. 14, 1967:

"... this court does attach very great importance indeed to the provision of legal aid in any case where it may seem likely that quite a serious sentence will be imposed, and where there may well be need for the court to be fully informed, so that justice may be done, of all relevant circumstances, (which does not seem to have been satisfactorily achieved in this case) -the sentence is reduced to eighteen months."

This court fully adheres to what was said in *R. v. Stevens* (3) and in *R. v. Serghiou* (2). Obviously an accused ought to be offered representation before he is sentenced to five years' imprisonment. This court also agrees with what was said in *R. v. O'Brien* (4) in the special circumstances of that case. It is not desirable to specify a particular term which should be treated as requiring the offer of representation. The problem must be viewed in all the circumstances, and thirty months might perhaps be regarded as marginal. Thus in the case of the applicant Laird, where the nature of the offence amply justified a sentence of thirty months' imprisonment, irrespective of the record of the accused, we do not consider that the deputy chairman is to be criticised for failing to ensure representation. Nor would such a sentence, in the absence of representation, appear in any way unreasonable in the case of a man who had recently committed a similar offence for which he was sentenced to two years. Where, however, there are circumstances which clearly require careful inquiry, as for example where a social inquiry report recommends probation, it is the clear duty of any court to try to ensure representation before passing a severe prison sentence.

This court is well aware of the pressure on the judges at the Inner London and other quarter sessions due to the volume of the work with which they have to deal. Representation is apt to result in a case taking longer to dispose of and it may be that in many cases it will not affect the sentence to be imposed. Nevertheless, this court has had to reduce drastically two out of four of the sentences of thirty months' imprisonment which we have just dealt with, sentences which would not have been imposed if the recipients had been legally represented at sessions. Pressure of work must not be allowed to result in injustice, which could have been avoided.

*First and fourth application refused, second and third allowed and sentences substituted.*

Solicitor: *Registrar of Criminal Appeals.*

[Reported by BRIAN POCOCK, Esq., Barrister-at-Law.]

(2) [1966] 3 All E.R. 637, n.

(3) (June 23, 1967), unreported.

(4) (Nov. 14, 1967), unreported.



A

## HUNTER v. SMITH'S DOCK CO., LTD.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Winn, L.J., and Ashworth, J.),  
February 22, 23, 1968.]

B

*Employment—Redundancy—Period of continuous employment—Rivetter in service of ship-repairers for forty years with occasional breaks—Work of spasmodic nature, temporary dismissals and re-engagements—Last break in claimant's service for thirty-one days—Whether a temporary cessation of work which counted as a period of employment by reason of Contracts of Employment Act 1963 (c. 49) Sch. 1, para. 5 (1) (b)—Redundancy Payments Act 1965 (c. 62) s. 1 (1), Sch. 1, para. 1 (1).*

C

The appellant was a rivetter employed by the respondents who were ship-repairers, a business which involved fluctuations in the number of employees employed for that purpose. Such employment was casual in the sense that ship-repairing work was spasmodic and inevitably resulted in temporary dismissals and subsequent engagement of those formerly employed or new employees. On breaks of service employees were dismissed, and no promise or express undertaking was given by the respondents to re-employ such employees, who neither asked for nor expected any promise or undertaking for re-employment, nor sought employment elsewhere, in the expectation that within a reasonably short period they would be re-employed. The appellant had been in the employ of respondents for a period of forty years with occasional breaks of about a week to forty days. He was last employed on Jan. 6, 1965, and dismissed on May 18, 1967, for which period entitlement to redundancy payment was admitted. There was a break in his employment for thirty-one days in December, 1964, which was taken as an instance for determining whether his absence during that month was on account of a temporary cessation of work for the purposes of para. 5 (1) (b) of Sch. 1\* to the Contracts of Employment Act 1963, on which the question whether his redundancy payment should be calculated on the basis of his whole forty years service depended.

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**Held:** viewing the matter with hindsight, viz., after the employee's re-engagement, and not approaching the matter by seeking to ascertain the intention of the parties at the time of dismissal (but, per WINN, L.J., looking at the circumstances at the time of dismissal) the cessation of work for thirty-one days in or about December 1964 was a temporary cessation within para. 5 (1) (b) of Sch. 1 to the Contracts of Employment Act 1963; accordingly the thirty-one days were to be taken for the purposes of calculating redundancy payment as a period of employment (see p. 84, letter H, p. 85, letters D and E, p. 86, letter D, p. 87, letter B, and p. 88, letters C and E, post).

G

H

*Monarch Electric, Ltd. v. McIntyre* (Jan. 18, 1968, Court of Appeal in Northern Ireland) (unreported) considered.

Appeal allowed.

[As to dismissal of employees by reason of redundancy, see SUPPLEMENT to 38 HALSBURY'S LAWS (3rd Edn.) para. 808e.

For the Contracts of Employment Act 1963, Sch. 1, see 43 HALSBURY'S STATUTES (2nd Edn.) 284.

I

For the Redundancy Payments Act 1965, Sch. 1, see 45 HALSBURY'S STATUTES (2nd Edn.) 338.]

Cases referred to:

*Monarch Electric, Ltd. v. McIntyre*, (1968), unreported.

*Minards v. Courtaulds, Ltd.*, 1967 I.T.R. 219.

*Mullen, Richardson and Patterson, Re*, (Aug. 29, 1967), unreported.

\* Schedule 1, para. 5 (1) is set out at p. 83, letter G, post.

### Appeal.

This was an appeal by the appellant, James Hunter, by notice dated Sept. 12, 1967, from the decision of the Industrial Tribunal, dated Aug. 29, 1967, whereby it was decided that the appellant was entitled only to a redundancy payment already paid to him (viz., computed in respect of the period from Jan. 6, 1965 to May 18, 1967) by the respondents, Smith's Dock Co., Ltd. The appellant sought an order that the tribunal's decision might be reversed and that it might be ordered that the respondents should pay to him a redundancy payment calculated by reference to his total length of service with them. The grounds of the appeal were (A) that the tribunal's decision was wrong in law in that the appellant's breaks of service with the respondents were temporary cessation of work as defined in para. 5 (1) (b) of Sch. 1 to the Contracts of Employment Act 1963, and other grounds not material to be set out in this report. The appellant was dismissed on May 18, 1967, and a redundancy payment of £54 4s. 6d., which he accepted, was paid for the period from Jan. 6, 1965 until the date of his dismissal.

*P. J. M. Kennedy* for the appellant.

*P. A. Gatehouse* for the respondents.

**LORD PARKER, C.J.:** This is an appeal by a workman, Mr. James Hunter, from a decision of the Industrial Tribunal given on Aug. 29, 1967 concerning the period of employment which was to be taken for the purposes of the calculation of a redundancy payment. That he was entitled to a redundancy payment was admitted, but since he had begun his last period of employment on Jan. 6, 1965, his employers, the respondents, contended that he was only entitled to a redundancy payment based on his service from that date. The appellant on the other hand says: I became first employed by these respondents in 1926 or 1927. Save for a few short breaks I have been with them for forty years, and indeed they presented me with a gold watch in recognition of forty years' service. I claim that the whole period from the beginning of that forty years' service ought to be taken into calculation for the purpose of redundancy payment. That was the issue.

This division of the industrial tribunal had at the same time to deal with similar applications concerning a number of workmen, and their main decision on this matter was in *Re Mullen, Richardson and Patterson* (1). The tribunal, when dealing with the appellant's application, adopted the reasoning and findings that they had made in *Re Mullen* (1), and accordingly I will refer to the decision in that case.

The appellant was a rivetter, and the respondents are ship repairers. When they get slack, and ships do not come in for repair, they stand men off for a period, and in general re-engage them as soon as there is more work. In *Re Mullen* (1) the tribunal found this:

"The respondents are ship-repairers, and, apart from the general present recession, this is a business which involves fluctuations in the number of employees required to perform these functions. Employment is casual in the sense that ship-repairing work is spasmodic and inevitably results in temporary dismissals and subsequent engagement of employees, either those formerly employed or new employees. We further find that on each break in service the applicants were dismissed and that no promise or express undertaking was given by the respondents that they would re-employ the applicants at a later date when business warranted an enlargement of employees. We accept that the applicants neither asked for nor expected any promise or undertaking for re-employment and on this aspect of the case we reject the evidence of the applicant [Richardson] we accept that during their breaks in service none of the applicants sought employment elsewhere in the expectation, and with their knowledge of the industry, that within a reasonably

(1) (Aug. 29, 1967), unreported; ref. RP/4122/67, RP/4123/67 and RP/4124/67.

A short period of time the opportunity for re-employment with the respondents was likely to arise."

Then they go on to refer to what, I think, is really irrelevant in this case, the fact that those that were stood off in this way were, as it were, automatically put on the employment exchange and listed as temporarily suspended. The employees did not ask for that, and did not seek other work. Finally the

B tribunal found:

"In general, subject to satisfactory past performance, those ex-employees on the 'Temporary Suspended' list would be re-engaged, but that would not exclude the employment of persons who had never been in the service of the respondents before."

C That was the nature of the business and the nature of the employment.

When one comes to the statute, it is sufficient, I think, so far as the Redundancy Payments Act 1965 itself is concerned, to say that one is referred to Sch. 1 to the Contracts of Employment Act 1963 in regard to the computation of the period of employment, and para. 2 of that schedule provides:

D "Except so far as otherwise provided by the following provisions of this schedule, any week which does not count under paras. 3 to 6 of this schedule breaks the continuity of the period of employment."

Accordingly one has to look at paras. 3 to 6. Paragraph 3 provides: "Any week in which the employee is employed for twenty-one hours or more shall count in computing a period of employment." Paragraph 4 is dealing with employments governed by contract, to which I need not refer, and para. 6 is dealing with industrial disputes and provides:

E "If in any week beginning before this schedule comes into force the employee was, for the whole or any part of the week, absent from work—(a) because he was taking part in a strike, or (b) because of a lock-out by the employer, the week shall count as a period of employment."

F Then I come back to para. 5, on which this case and, we are told many other cases, depends, and that is headed "it is worth observing, 'Periods in which there is no contract of employment'". In other words this is dealing with the case of an employee who has been given notice and given his cards; he is stood off. Paragraph (1) provides:

G "If in any week the employee is, for the whole or part of the week—(a) incapable of work in consequence of sickness or injury, or (b) absent from work on account of a temporary cessation of work, or (c) absent from work in circumstances such as that, by arrangement or custom, he is regarded as continuing in the employment of his employer for all or any purposes, that week shall, notwithstanding that it does not fall under para. 3 or para. 4 of this schedule, count as a period of employment."

H Though not directly relevant, I think that I should read sub-paras. (2) and (3).

"(2) Not more than twenty-six weeks shall count under para. (a) of the foregoing sub-paragraph between any two periods falling under paras. 3 and 4..."

I that is, not more than twenty-six weeks shall count of the period in which the employee is absent from work in consequence of sickness or injury. Sub-paragraph (3) provides:

"Paragraph (b) [viz., absence from work on account of a temporary cessation of work] shall not apply to a temporary cessation of work on account of a strike in which the employee takes part."

The sole question in this case was whether the break, which took place in December, 1964, of thirty-one days was a break when the appellant was absent from work on account of a temporary cessation of work. I should have said that in



his forty years' service, there had been earlier breaks, a week in some cases, and the maximum was forty days. Apart from occasional breaks, he has been throughout employed by the respondents. A

In my judgment certain things are clear; one is that the presence or absence of a custom or arrangement in the trade does not, as it seems to me, determine an issue falling to be dealt with under sub-para. (b) of para. 5 (1) of Sch. 1 to the Act of 1963. It is otherwise under sub-para. (c), which is dealing with an employee being absent from work, having been given notice, viz., absent from work in circumstances such that by arrangement or custom, he is regarded as continuing in the employment of his employer for all or any purposes. I said above, "having been given notice" because the heading to para. 5 to Sch. 1 to the Act of 1963 shows that para. 5 is dealing with periods in which there is no contract of employment. For my part I am too new to the Act of 1963 to fully understand what case para. (c) covers; it is not relied on in the present case, and it may cover the sort of case where an employee is stood off but retained, given a retainer or seconded for other duty or matters of that sort. B

When one comes to sub-para. (b) of para. 5 (1) of Sch. 1 to the Act of 1963 it seems to me also plain that cessation of work there does not mean the closing down of the business, complete cessation of work; it would clearly extend to the cessation of a particular department or, to come nearer to this case, to the cessation of work wholly for rivetters. In my judgment, however, it goes further and is dealing with the cessation of the job of the employee who is dismissed. In dealing with his absence from his job on account of the cessation of that job. C

The only question, then, and I think the more difficult question, is what the word "temporary" means in the connexion of "temporary cessation". The court has been told that many divisions of the industrial tribunal have dealt with these cases on the basis that whether a cessation of work is temporary or not is to be determined by reference to the position when the period began, and that the proper approach is to ask oneself what both employer and employee intended at the time when the man was stood off. In that connexion, the court has been referred to a decision of the Industrial Tribunal in *Minards v. Courtaulds, Ltd.* (2), where it was held that: D

"A temporary cessation of work means a cessation of work for a period which at the time it began was regarded by both employer and employee as intended to come to an end within a foreseeable time."

For my part I see very great difficulties in construing the word "temporary" in that way. One observes in the first instance that no such words in regard to intention appear in the Contracts of Employment Act 1963 at all. To give it that interpretation is, I think, to add something which is not there. It seems to me that the proper approach is to look at the matter after the event, looking backwards, and say to oneself: when the employee is re-engaged, if he is, has the cessation been a temporary cessation? If there is evidence of an intention when it began that it should be temporary, that will be very relevant, but the absence of such an intention does not conclude the matter. It can, of course, be asked: what are the limits of "temporary"? If an employee is re-engaged after three years or after three weeks, or whatever it may be, what guide is there: what is the test as to what is temporary? For my part, I do not propose to lay down any test. It is a question of fact for the tribunal in all the circumstances of the case, bearing in mind that we are dealing here with working weeks, and that, at any rate in the case of sickness and injury, an absence of twenty-six weeks is permissible. That is, however, not the test, but at any rate it is some guide. I would only add that, if one had to look solely to intent, there are great practical difficulties. Is the matter to depend on the exact words that a foreman said when cards were handed to an employee? No doubt if one had to go into E

A that, there would be difference in words used, there would be conflicts of evidence as to the exact words used, and matters of that sort. Those difficulties are not decisive on interpretation, but I should certainly come with reluctance to a decision that one had to look solely at the intention or arrangements specifically made at the time an employee was handed his cards.

B So far as this case is concerned, the tribunal were divided. It was a majority decision, based on *Re Mullen* (3), where they said this:

C “However in the view of the majority of the members of the tribunal the fact that employment in the ship repairing yard is of a casual character and that during breaks the applicants did not seek employment elsewhere, but on each occasion after comparatively short breaks in service returned to the respondents does not in the light of the facts we have found establish an arrangement or understanding to re-engage the dismissed employees and we accordingly find that the applicants are only entitled to redundancy payments on the basis accepted by the respondents, that is from the date of their last engagements.”

D As I have said, whether there has been absence from work on account of a temporary cessation of work is a question of fact, but as it seems to me the tribunal here have misdirected themselves in treating as conclusive the absence of any arrangement or understanding. This is not a para. 5 (1) (c) case which depends on the presence or absence of an arrangement, and I think that what the tribunal are really referring to here by the words “arrangement or understanding” is the intention of the parties, conveyed to each other at the time of dismissal.

E In my judgment, for the reasons which I have endeavoured to state, that is a wrong approach to the matter, and approaching it at the end and looking backwards, it seems to me that the only conclusion to which the tribunal could have come was that these breaks were absences from work on account of a temporary cessation of work. Accordingly, I would allow this appeal, and send the case back to the tribunal to determine, in the absence of agreement, the amount of F the redundancy payment.

Before leaving this case, I should say that the court has been referred to certain transcripts of a case heard in the Court of Appeal in Northern Ireland called *Monarch Electric, Ltd. v. McIntyre* (4). I do not myself know whether it has been reported or whether the transcripts in these cases have been corrected by the judges; but I think it is only right to make a short reference to the case. G The question was whether a very considerable period during which no work was going on at a particular works was a temporary cessation. It is to be observed that if not a complete cessation of the works as opposed to work, it was almost complete because eight hundred, almost the whole of the employees, had been stood off. It is said that the approach to cessation there was an approach which involved considering cessation from the employers' side, and there are passages H which would suggest that if an employee's particular job came to an end, that would not be sufficient. I am by no means certain that in coming to the conclusion that I have reached as to the meaning of “cessation”, I am really differing from LORD MACDERMOTT, C.J., in that case, but it is to be observed that in any event all that he was dealing with was a clear case of a complete or almost complete cessation, and it was unnecessary for him to consider the sort I of facts which have arisen in this case. So far as the word “temporary” is concerned, I am happy to find myself in complete agreement with LORD MACDERMOTT, C.J., and CURRAN and McVEIGH, L.J.J., in the case. LORD MACDERMOTT, C.J., said:

“I do not think a temporary cessation has to be proved as a matter of mutual intention or even expectation... Temporary cessations of work

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(3) (Aug. 29, 1967), unreported.

(4) (Jan. 18, 1968), unreported.

may be so infinitely varied that no inflexible rule as to proof can be formulated, except perhaps to say that if the temporary nature of the cessation cannot be inferred from the relevant events and circumstances of the case, it will usually be necessary to show on the part of the employer a reasonable expectation that the work that has ceased will be resumed."

McVEIGH, L.J., said that it was a matter for the tribunal, and added this:

"I should add that in coming to a conclusion whether a cessation is temporary or not it is open to the tribunal to consider all the surrounding circumstances including what was or was not said at the time of pay-off. One is also, in my view, entitled to look back at the period in issue in the light of the facts then known."

Though the facts were very different in the *Monarch Electric* case (5), I am in general agreement with the court's approach, certainly, the approach as to the meaning of the word "temporary". So far as this case is concerned, it is enough to say that no reasonable tribunal properly directing their minds to the facts of this case would come to any conclusion other than that these breaks in the appellant's service should count towards the period of his employment for the purposes of the calculation of redundancy payment. I would allow this appeal.

WINN, L.J.: I agree. I desire for my own part to stress my complete agreement with what LORD PARKER, C.J., has said about the separation of sub-para. (b) and sub-para. (c) in para. 5 (1) of Sch. 1 to the Contracts of Employment Act 1963. I venture to think that in any case such as the present, where the issue to be decided is whether or not an applicant brings himself within the terms of para. 5 (1) (b), on the path to that goal no helpful guidance would be obtained from any glance at the will o' the wisp constituted by para. 5 (1) (c). Paragraph 5 (1) (c) is an entirely separate matter which may or may not in any given case involve utterly disparate considerations. Otherwise I would say for myself only this, that when one looks at the Redundancy Payments Act 1965, and at the Contracts of Employment Act 1963 which, not very helpfully, has been used, so far as its schedule is concerned, for the purposes of the Act of 1965, one finds constant reference to periods of a week. More particularly when one glances at Sch. 1 to the Act of 1965 to find what is the entitlement to redundancy payment so far as amount is concerned, one finds in para. 1 (1) (c) references to "any week which began before the employee attained the age of eighteen years", then another reference under para. 1 (1) (b) to a week which does not count, and then in para. 2 quantification by weeks' pay; and in s. 17, which deals with a specific and quite unrelated matter, where employment abroad has to be considered, it is quite clear that again the criterion is related to any period of a week.

I think that the scale of time with which Sch. 1 to the Contracts of Employment Act 1963 should be *prima facie* related is that of a week or period of weeks. It will not, I trust, be unduly otiose to draw attention to para. 2 of Sch. 1 as well as to para. 6 and para. 7 (1) and (2) as affording examples of that constant reference to the period of a week. In my own view that is something which should be kept in mind, not as a controlling element, but as a mere scale indication, when the word "temporary" found in para. 5 (1) (b) has to be applied to any particular set of circumstances.

I for myself entirely and respectfully agree with LORD PARKER, C.J., and therefore necessarily do not find myself completely in agreement with the Court of Appeal in Northern Ireland (6). I do not think myself that the issue is to be determined by reference to the completeness, the comprehensiveness of the cessation of the work which it was the business of the employer to carry

(5) (Jan. 18, 1968), unreported.

(6) In *Monarch Electric, Ltd. v. McIntyre*, (1968), unreported.



A out. I do not think that it is related to complete, or even partial closure of his factory or other premises so as to produce something which, by reason of its comprehensive character, is to be assessed as long-lasting in the temporal sense, so as to go beyond what is temporary. I myself think that the test that should be applied is whether, judging in the light of the proven circumstances at the time when the relevant dismissal occurred, taking into account so far as B anyone sees fit to tender the evidence, any oral expression of intention of the employer or indeed of the employee, looking at all those circumstances, is the true view that the appellant's employment had been permanently terminated by the notice which terminated the contract of employment? Was he out or merely off? Was he stood off or had they finished with him?

I think, and it is mere coincidence to which I attach not the slightest evidentiary weight, that the local employment exchange rightly treated the appellant in this case as "suspended"; they happened by sheer chance to adopt a very suitable term for the appellant and the other employees if, as is my view, they were absent from work on account of a cessation of work which was merely temporary. I would venture to suggest for the consideration of tribunals who face this problem in the future, that they say to themselves in the course of D their deliberations: what does this really amount to? Was the employee suspended, not, of course, in the technical sense of being still entitled to draw his pay, still bound to pay his contributions under the various Acts, National Health and so on, not in the position of an official who is suspended for defalcation or a policeman against whom disciplinary charges have been made, but, leaving all that technicality aside, was the employee suspended until his E job was ready and available for him again, or was he put out—put out in the sense of out permanently? If the truth is that one should envisage the employee or any employees during the period when they were absent from work as occasionally going to the gates of the employers' premises and saying "Any use today", and being told "No, your job is not yet available again", then I think that is suspension and absence on account of a temporary cessation of F work. It is the employee's own job which must be found to have suffered a cessation, that is to say to have ceased for a period of time which, judged by the time schedule which is appropriate here, was properly to be called temporary, with perhaps some fairly generous interpretation of that word in this context.

It follows that with all respect I do not myself take the view which, according to the transcripts before the court now, was expressed by LORD MACDERMOTT, G C.J., in the Court of Appeal of Northern Ireland (7) where he is recorded as having said:

"The words 'cessation of work' mean, as I think, a cessation of all or any part of the work at the place in which an employee is employed."

He went on to say that it was rather a confusing dichotomy to draw any line H between cessation of the work at the place at which the employee is employed and cessation of an employee's particular job, because the former would or would be likely to produce as a consequence the latter. I respectfully agree with that observation, but for my own part I do not think that this test under para. 5 (1) (b) of Sch. 1 to the Contracts of Employment Act 1963, is only satisfied where it can be shown that there has been a cessation of all work, or all work of any one department, formerly carried out at a place where the employee was employed. I add I only one further remark, and that is that looking at the transcript and the observations which are there set out, I cannot help, for myself, wondering whether after LORD MACDERMOTT's statement, with which I respectfully agree "An employee can lose his job without any cessation", the next sentence may not belong to that sentence rather than to those which follow it as typed in the transcript.

I agree that this appeal should be allowed.

ASHWORTH, J.: I also agree, but I desire to add a word or two on one point. For my part I share the view expressed by my lord that the intention of the parties at the date of dismissal is neither here nor there, as a decisive factor at any rate, when the time comes to decide whether this was a temporary cessation of work. In the cases that come before tribunals, there must be, so to speak, a beginning and an end. There will be the time of dismissal, and for this problem to arise there then will have been a date of re-engagement. The problem for the tribunal will be: is the interval a temporary cessation of work, and was the man absent from work on that account? As LORD PARKER, C.J., said, in trying to solve that problem, the tribunal will have a great many factors to take into account: the nature of the trade, the nature of the work, possibly, though not decisively, observations or remarks made at the time of the dismissal. With all those factors in mind, they will then come back to the question: was this a temporary cessation of work? A B C

Counsel for the respondents says, in his forceful argument, that applying this principle, the tribunal may for example say: the employee who had been dismissed on Jan. 1 in one year and then was re-engaged three years later could complain that this was a temporary cessation of work. It may be that he could. Speaking for myself, I doubt whether any tribunal would willingly come to that view as a matter of fact. Although the legal problems, as this appeal has shown, may be difficult, I could well imagine that in many cases, when all the facts have been ascertained and the tribunal addresses its mind to the question, was this cessation of work properly called "temporary"? the answer will be, yes. I agree that this appeal should be allowed. D

*Appeal allowed. Case remitted to determine, in the absence of agreement, the amount of redundancy payment.* E

Solicitors: *Berrymans*, agents for *Crute & Sons*, Newcastle-upon-Tyne (for the appellants); *Allen & Overy* (for the respondents).

[Reported by S. A. HATTEEA, ESQ., *Barrister-at-Law*.] F

### PRACTICE DIRECTION.

PROBATE, DIVORCE AND ADMIRALTY DIVISION (DIVORCE). G

*Divorce—Petition—Form of petition—Omission of information—Ex parte application before service—Matrimonial Causes Rules 1968 (S.I. 1968 No. 219), r. 9 (2), App. 2, Form 2.*

Where it is desired to omit from a petition any information required to be contained therein by Form 2 of the Matrimonial Causes Rules 1968, the petition should be filed without such information, but before service is effected an ex parte application must be made to a registrar for leave for the petition to stand. If leave is refused, the registrar will make an order requiring the petition to be amended. H

The registrar's direction dated June 30, 1966 (1) has been cancelled with effect from Apr. 11, 1968. I

Issued with the concurrence of the Lord Chancellor.

Apr. 11, 1968.

COMPTON MILLER,  
Senior Registrar.

A

R. v. BOW ROAD DOMESTIC PROCEEDINGS COURT,  
*Ex parte* ADEDIGBA.

B

[COURT OF APPEAL, CIVIL DIVISION (Lord Denning, M.R., Salmon and Edmund Davies, L.J.J.), February 28, 29, 1968.]

C

*Affiliation—Jurisdiction—Child born abroad when mother domiciled abroad—Child, mother and father in England—English court, where mother resides, has jurisdiction to make affiliation order for maintenance of child—Affiliation Proceedings Act, 1957 (5 & 6 Eliz. 2 c. 55), s. 1, s. 4.*

D

*Statute—Construction—Replacing enactment—Scope of enactment determined by court in 1849—Enactment subsequently repealed and replaced in similar terms by successive statutes—Changed social conditions—Whether intention of Parliament that determination of 1849 should still apply—Affiliation proceedings brought by mother of child born abroad when mother domiciled abroad—Doctrine of stare decisis inapplicable.*

E

Two boys were born in Nigeria to a mother who was domiciled there. She was unmarried. The father came to England in 1960, and the mother joined him there in 1961 with the children. She left the father in 1966, and lived on national assistance. She applied to a domestic proceedings court for an affiliation order. On appeal from dismissal of an application for mandamus to the court to hear her application, the question was whether there would be jurisdiction to determine her application as the children were born abroad to a mother domiciled abroad.

F

**Held:** if a mother and father of an illegitimate child, and the child, were in England, the court had jurisdiction under s. 1 and s. 4 of the Affiliation Proceedings Act, 1957, to make an affiliation order against the child's father for maintenance, notwithstanding that the mother was domiciled abroad at the date of the child's birth and that the child was born abroad; accordingly an order of mandamus would be granted (see p. 92, letters G, H and I, p. 93, letter G, p. 95, letter A, and p. 96, letters B and G, post).

G

*R. v. Blane* ([1843-60] All E.R. Rep. 397); *Tetlau v. O'Dea* ([1950] 2 All E.R. 695), and *R. v. Wilson* ([1952] 2 All E.R. 706) overruled.

Principle stated by LORD DENNING, M.R. in *Royal Crown Derby Porcelain Co., Ltd. v. Russell* ([1949] 1 All E.R. at p. 755) applied.

H

Per SALMON, L.J.: the principle of construction that the court may presume that, when there has been a decision on the meaning of a statute and the statute is re-enacted in much the same terms, it was the intention of Parliament to endorse the decision, is merely a rule of construction for the guidance of the courts; it is not a presumption which the courts are bound to make, and it is always possible that Parliament, however vigilant, may overlook a decision (see p. 95, letter H, post).

Appeal allowed.

I

[**Editorial Note.** A complaint under s. 1 of the Affiliation Proceedings Act, 1957, must be made to a justice acting for the petty sessions area in which the mother of the child resides (s. 3 (1) (a)).]

As to jurisdiction in affiliation proceedings, see 3 HALSBURY'S LAWS (3rd Edn.) 110, para. 171; and for cases on the subject see 3 DIGEST (Repl.) 441, 442, 333-341.

As to the construction of statutes replacing earlier enactments, see 36 HALSBURY'S LAWS (3rd Edn.) 403, 404, para. 609.

As to the principle of stare decisis in relation to decisions of the Court of Appeal and Divisional Court, see 22 HALSBURY'S LAWS (3rd Edn.) 799-800, para. 1687; and as to long-standing decisions, see *ibid.*, pp. 802, 803, para. 1690.



For the Affiliation Proceedings Act, 1957, s. 1, s. 3 (1) and s. 4, see **A**  
37 HALSBURY'S STATUTES (2nd Edn.) 37, 39, 40.]

Cases referred to:

*Buckridge v. Hall*, [1963] 1 All E.R. 509; [1963] 1 Q.B. 614; [1963] 2 W.L.R. 354; 127 J.P. 218; Digest (Cont. Vol. A) 54, 336a.

*Clyde Navigation Trustees v. Laird & Sons*, (1883), 8 App. Cas. 658; 42 Digest (Repl.) 1124, 9387. **B**

*Conway v. Rimmer*, [1968] 1 All E.R. 874.

*Heron II, The, Koufos v. Czarnikow, Ltd.*, [1967] 3 All E.R. 686; [1967] 3 W.L.R. 1491; *affg.*, [1966] 2 All E.R. 593; [1966] 2 Q.B. 695; [1966] 2 W.L.R. 1397.

*Parana, The*, (1877), 2 P.D. 118; 36 L.T. 388; 8 Digest (Repl.) 154, 970.

*Public Trustee v. Inland Revenue Comrs.*, [1960] 1 All E.R. 1; [1960] A.C. 398; [1960] 2 W.L.R. 203; 21 Digest (Repl.) 17, 58. **C**

*R. v. Blane*, [1843-60] All E.R. Rep. 397; (1849), 13 Q.B. 769; 18 L.J.M.C. 216; 13 L.T.O.S. 257; 13 J.P. 825; 116 E.R. 1458; 3 Digest (Repl.) 442, 337.

*R. v. Humphreys, Ex p. Ward.*, [1914-15] All E.R. Rep. 189; [1914] 3 K.B. 1237; 84 L.J.K.B. 187; sub nom. *R. v. Humphrys, Ex p. Ward*, 111 L.T. 1110; 79 J.P. 67; 3 Digest (Repl.) 442, 339. **D**

*R. v. Wilson, Ex p. Pereira*, [1952] 2 All E.R. 706; [1953] 1 Q.B. 59; 116 J.P. 549; 3 Digest (Repl.) 442, 340.

*Robinson Brothers (Brewers), Ltd. v. Houghton and Chester-le-Street Assessment Committee*, [1938] 2 All E.R. 79; 107 L.J.K.B. 369; sub nom. *Robinson Brothers (Brewers), Ltd. v. Durham County Assessment Committee (Area No. 7)*, [1938] A.C. 321; 158 L.T. 498; 102 J.P. 313; 38 Digest (Repl.) 674, 1244. **E**

*Royal Crown Derby Porcelain Co., Ltd. v. Russell*, [1949] 1 All E.R. 749; [1949] 2 K.B. 417; 30 Digest (Repl.) 217, 598.

*Tetaru v. O'Dea*, [1950] 2 All E.R. 695; 114 J.P. 499; sub nom. *O'Dea v. Tetaru*, [1951] 1 K.B. 184; 3 Digest (Repl.) 442, 338.

*Tiverton and North Devon Ry. Co. v. Loosemore*, (1884), 9 App. Cas. 480; 53 L.J.Ch. 812; 50 L.T. 637; 48 J.P. 372; 11 Digest (Repl.) 231, 954. **F**

### Appeal.

This was an appeal by Katherine Aduke Adedigba from an order of the Divisional Court of the Queen's Bench Division dated June 27, 1967, dismissing the appellant's motion for an order of mandamus. By her notice of appeal the appellant sought an order that the Bow Road Domestic Proceedings Court, in Greater London, should hear and determine affiliation proceedings between the appellant and the respondent, Adelake Adedigba. The ground of the appeal was that the Divisional Court was wrong in law in holding that the domestic proceedings court had no jurisdiction to hear and to determine the affiliation proceedings, because the appellant, who was the mother of the two children who were the subject of the proceedings, was domiciled abroad and the children were born abroad. Before instituting affiliation proceedings the appellant had applied for maintenance under the Matrimonial Proceedings (Magistrates' Courts) Act, 1960, for herself and the two children, but the summons was dismissed on the ground that, under English law, she was not married to the respondent. **G**

*Zwi Vardi* for the mother.

*A. T. Glass* for the father. **H**

**LORD DENNING, M.R.:** This is an affiliation summons. The mother and the father are both Nigerians. They were born in Nigeria and lived there. In 1958 the mother went to live with the father in his native village in Nigeria. They were regarded as a married couple; but they were not in fact lawfully married. They had two children, both boys: one born on Mar. 15, 1959, and the **I**

A other on Oct. 9, 1960. Soon after the second child was born, the father came to England by himself, leaving the mother to come later. On Sept. 18, 1961, she joined him here in England with the two children. They lived together until January, 1966, when the mother left the father. She took the two children with her and lived on national assistance. The father had regular work as a postman at Mount Pleasant, but he has not paid a penny to her or to anyone for the upkeep of the two boys. She applied to the Domestic Proceedings Court at Bow Road for maintenance for the children. The court held that it had no jurisdiction to hear the summons. The reason was because the children were born abroad and the mother was domiciled abroad at the time when they were born. An application was made to the Divisional Court for a mandamus directed to the justices to command them to hear the summons. The Divisional Court held that they were bound by previous authorities to hold that there was no jurisdiction. Now there is an appeal to this court.

The old law as to bastardy was founded on a statute of 1576 (18 Eliz. 1 c. 3) under which jurisdiction was given to the justices of the peace for the parish in which the child was born. The parish (who were bound to maintain the child) could proceed against the father. Several statutes were passed afterwards on the same lines: but the modern law dates from the year 1844. By a statute (1) of 7 & 8 Vict. c. 101, s. 2, the old statutes were repealed and the mother was given a direct right against the father for maintenance of the child. The Act of 1844 provided that

E “any single woman who may be with child, or may be delivered of a bastard child . . . may either before the birth, or at any time within twelve months from the birth of such child ”

apply for an order for maintenance on the father.

Five years after the Act of 1844 came *R. v. Blane* (2). A French girl came to this country and lived here in London for thirteen years working as a milliner. She then became pregnant. When she was near her confinement, she went back to France to have the baby. A month later she returned to London with the baby. She applied for an order against the father for maintenance for the child. The magistrates made the order; but the Court of Queen's Bench reversed it. They held that the magistrates had no jurisdiction to order maintenance. LORD DENMAN, C.J., said (3): “. . . children born out of this country are not the subject of our bastardy laws.” ERLE, J., said the same. COLERIDGE, J., said that the previous statutes dealt only with bastards born in this country, and this statute should be construed likewise. He said (4):

“If the word ‘bastard’ is . . . to comprehend any bastard born in any part of the world, an immense field of inquiry must be traversed respecting the status of children according to the different laws of different countries.”

H I am not impressed by the reasons given for that decision; but the case has stood as authority ever since. Statutes have been passed in virtually the same words as the Act of 1844, but nothing has been done to overrule *R. v. Blane* (2).

I In 1872 there was passed the Bastardy Laws Amendment Act, 1872, in precisely the same words as the Act of 1844. In 1914 came *R. v. Humphreys, Ex p. Ward* (5). An English girl was engaged to a man here and became pregnant by him. Soon afterwards she went to Australia and had the baby there. A year later she returned to England and applied for an order against the father for maintenance for the child. The majority of the Divisional Court held that

(1) The Poor Law Amendment Act, 1844.

(2) [1843-60] All E.R. Rep. 397; (1849), 13 Q.B. 769.

(3) [1843-60] All E.R. Rep. at p. 398; (1849), 13 Q.B. at p. 772.

(4) [1843-60] All E.R. Rep. at p. 398; (1849), 13 Q.B. at p. 773.

(5) [1914-15] All E.R. Rep. 189; [1914] 3 K.B. 1237.

she could get maintenance. They distinguished *R. v. Blane* (6) on the ground that in that case the mother was a French girl, whereas in the case before them the mother was an English girl. AVORY, J., dissented. He thought that it was not a valid distinction; but even the majority accepted *R. v. Blane* (6) as binding in the case of a child born abroad of a mother who was not English. A

Then in 1950 came *Tetui v. O'Dea* (7). A German girl living in Germany had a child there in Hamburg. The father was English. When the baby was three months old, the mother brought the baby to England and lived here. She applied for maintenance. The Divisional Court held that there was no jurisdiction to make an order. The case was covered by *R. v. Blane* (6). LORD GODDARD, C.J., said (8): B

"The matter which impresses me is that the legislature, which must be presumed to have had knowledge of the decision in *R. v. Blane* (6), passed the Bastardy Laws Amendment Act, 1872, but did not in any way purport to overrule the decision in *R. v. Blane* (6) or to make any provision that would have the effect of enabling the court to distinguish *R. v. Blane* (6)." C

So *R. v. Blane* (6) still held the field. It was applied in *R. v. Wilson, Ex p. Pereira* (9), when a Gibraltar woman had a baby in Gibraltar of an English father. She came to live in England and it was held that there was no jurisdiction to award her maintenance for the child. D

There followed the present statute, the Affiliation Proceedings Act, 1957. Parliament, in s. 1, again used virtually the same words:

"A single woman who is with child, or who has been delivered of an illegitimate child, may apply by complaint to a justice of the peace for a summons to be served on the man alleged by her to be the father of the child." E

Again Parliament did nothing to say that *R. v. Blane* (6) was wrong. In 1963 there came *Buckeridge v. Hall* (10). A Jamaican woman came to England and she had a child born in England of an English father. The mother could not afford to keep the child in England and sent the child back to Jamaica. She applied for a maintenance order against the father. The Divisional Court held that *R. v. Blane* (6) only applied to children born abroad and not to children born in this country; but SALMON, J., said (11): F

"It may one day be necessary for the courts to consider whether *R. v. Blane* (6) was rightly decided . . ."

None of those cases is binding on this court: and I think that the time has come when we should say that *R. v. Blane* (6) in 1849 was wrongly decided and also the two cases which followed it—*Tetui v. O'Dea* (7) in 1951 and *R. v. Wilson, Ex p. Pereira* (9) in 1952. G

It seems plain to me that if the mother and father are both here and the child is here, the words of the statute are satisfied. I can see no possible reason for denying the court's jurisdiction to order maintenance; and every reason for giving them jurisdiction. The father ought to be made to pay for the child. The difficulty felt by COLERIDGE, J., is not well founded. Every day these courts consider the status of persons born abroad and the foreign law on the subject. I hold, therefore, that the affiliation statutes cover children born abroad as well as those born in England: and cover mothers domiciled abroad at the time of the birth as well as mothers domiciled in England. H

I know that since *R. v. Blane* (6) the statutory provisions have been re-enacted in virtually the same words; but that does not trouble me. I venture I

(6) [1843-60] All E.R. Rep. 397; (1849), 13 Q.B. 769.

(7) [1950] 2 All E.R. 695; [1951] 1 K.B. 184.

(8) [1950] 2 All E.R. at p. 698; [1951] 1 K.B. at p. 188.

(9) [1952] 2 All E.R. 706; [1953] 1 Q.B. 59.

(10) [1963] 1 All E.R. 509; [1963] 1 Q.B. 614.

(11) [1963] 1 All E.R. at p. 512; [1963] 1 Q.B. at p. 621.



A to quote some words that I used in *Royal Crown Derby Porcelain Co., Ltd. v. Russell* (12):

B "I do not believe that whenever Parliament re-enacts a provision of a statute it thereby gives statutory authority to every erroneous interpretation which has been put on it. The true view is that the court will be slow to overrule a previous decision on the interpretation of a statute when it has long been acted on, and it will be more than usually slow to do so when Parliament has, since the decision, re-enacted the statute in the same terms, but if a decision is, in fact, shown to be erroneous, there is no rule of law which prevents it being overruled."

C Nor am I troubled by the fact that *R. v. Blane* (13) has stood for 118 years. It is not a property or commercial case. It has not formed the basis of titles or commercial dealings. It is the sort of precedent which we can and should overrule when it is seen to be wrong. Only yesterday in *Conway v. Rimmer* (14) LORD MORRIS OF BORTH-Y-GEST used words appropriate to the situation:

D "Though precedent is an indispensable foundation on which to decide what is the law, there may be times when a departure from precedent is in the interests of justice and the proper development of the law."

E If we were to affirm today *R. v. Blane* (13) as being the law of this land, the only consequence would be a reference to the Law Commission; then a report by them; and eventually a Bill before Parliament. It would be quite a long time before the law could be set right. Even then the law would only be set right for future cases. Nothing could be done to set right this present case. F The mother here would not get maintenance for the child which she needs now. So I would overrule *R. v. Blane* (13) now. In the days of 1849 the question may not have been of any particular social significance; but now there are many illegitimate children here in England who were born abroad. It is only right and just that the mothers of those children should be able to take out proceedings against the fathers, and that the fathers should be ordered to pay reasonable maintenance for their own children. Otherwise what is the position? The children will be left to the care of the State. The national assistance fund will have to pay—the father will get out of his just responsibilities. That would be a most undesirable state of affairs.

G In my judgment, therefore, there should be, and is, jurisdiction in the domestic proceedings court to order the father to pay maintenance to the mother for the children. The order of mandamus must go so as to enable the magistrates to determine the matter.

H SALMON, L.J.: The Divisional Court considered rightly that it was bound by the decision in *R. v. Blane* (13) and that accordingly it was obliged to decide this case in favour of the respondent. In all the modern cases in which *R. v. Blane* (13) was considered and followed (see e.g., *Tetou v. O'Dea* (15) and *Buckeridge v. Hull* (16), the court was bound by the decision. LORD GODDARD, C.J., in the first two of those cases referred to the fact that a great deal of legislation had been passed since 1849 dealing with the maintenance of illegitimate children and that the legislature had not taken the opportunity of altering the decision in *R. v. Blane* (13). LORD GODDARD, C.J., was not, however, considering whether or not *R. v. Blane* (13) should be reversed because he was sitting in the Divisional Court which had no power to do so. I regard those observations of LORD GODDARD, C.J., as being merely a passing reference to what clearly would have been an important factor in considering whether *R. v. Blane* (13) ought to be reversed.

I In *Buckeridge v. Hull* (16) it was foreseen that the time might arrive when the

(12) [1949] 1 All E.R. 749 at p. 755; [1949] 2 K.B. 417 at p. 429.

(13) [1843-60] All E.R. Rep. 397; (1849), 13 Q.B. 769.

(14) [1968] 1 All E.R. at p. 892, letter D.

(15) [1950] 2 All E.R. 695; [1951] 1 K.B. 184.

(16) [1963] 1 All E.R. 509; [1963] 1 Q.B. 614.

Court of Appeal would have to consider whether *R. v. Blane* (17) was correctly A  
decided. That time has now come. I have no doubt at all but that *R. v. Blane* (17)  
was wrongly decided. It was contrary alike to justice, humanity and common  
sense and had no foundation of any kind in law. The court was considering the  
construction of the Poor Law Amendment Act, 1844. This was an Act for the  
further amendment of the laws relating to the poor in England. It was the first  
statutory provision that gave the mother of an illegitimate child the right to B  
apply to the courts for an order of maintenance for the child against the putative  
father. There is not one word in that statute to support the view that Parliament  
intended to legislate only for bastards born in this country and was intent  
on ignoring bastards born abroad who lived in this country. Quite clearly the  
purpose of the Act of 1844 was to give the mother the right to apply to the  
courts for a contribution from the putative father towards the maintenance of C  
the child. Parliament no doubt gave the mother this right because it realised  
that humanity and justice required that she should have it, and, moreover,  
that if she were given this right, it was less likely that the maintenance of the  
child would be thrown on public funds. The place of the child's birth seems to  
me to be wholly irrelevant for this purpose. A bastard born abroad living with  
his mother in this country is just as likely as a bastard born here to be thrown  
on public funds if it is not supported. Any woman resident in this country is D  
entitled to the protection of our law. Whether her child was born here or abroad  
can make no difference to her need for help towards its maintenance. I find it  
difficult to understand how it is possible to construe the Act of 1844 as excluding  
from its ambit women whose illegitimate children were born abroad. Nor did  
the distinguished court which decided *R. v. Blane* (17) pretend that there was E  
any language in the Act of 1844 which would justify such a conclusion. As I  
understand the judgments, which are very economical of any reasons for the  
decision which they reach, they state that although there may be nothing  
expressed in the Act of 1844 to justify their decision, the earlier Acts make it  
plain that Parliament intended only to legislate for bastards born in this country.  
I entirely disagree. Many said the Act of 1844 was an Act to amend the law, and, F  
as I have already indicated, it was the first Act that gave the mother any right  
to issue proceedings against the putative father.

Even if one goes back to the Poor Law Amendment Act, 1834 (18), which was  
the preceding Act, it contains no more justification than did the Act of 1844 for  
the decision that Parliament intended the laws relating to the maintenance of  
bastards to apply only to bastards born in this country: that Act provided G  
that when any child, by reason of the inability of the mother to provide for its  
maintenance, became chargeable to any parish, then the overseers or guardians  
of that parish might apply for an order against the putative father. I daresay  
that there were fewer illegitimate children in this country who had been born  
abroad in 1834 than there are today. In my view, however, it would have sur-  
prised Parliament to learn that its intention had been interpreted so as to make H  
it impossible for the guardians of the parish, who had to maintain a bastard  
born abroad, to proceed against its father in this country for contributions  
towards its maintenance. There is no reason why the fact that the unfortunate  
child had been born abroad should confer immunity on the putative father  
and prejudice the parish which had been obliged to support it.

It is only if one goes back to the Statute of Elizabeth (19) in 1576 that there I  
is any warrant for the view that Parliament was legislating only for illegitimate  
children born in this country. The aphorism that time marches on and the law  
marches with it was just as valid in 1849 when *R. v. Blane* (17) was decided  
as it is today, but its validity was then perhaps not so generally recognised. In  
1849 time had indeed marched on since the reign of Elizabeth, and today it has

(17) [1843-60] All E.R. Rep. 397; (1849), 13 Q.B. 769.

(18) 4 & 5 Will. 4 c. 76, repealed by S.L.R. Act 1966 s. 1.

(19) 18 Eliz. 1 c. 3.

A marched on still further. There is no reason to suppose that Parliament intended then or now that the law should be the same as it was in 1576. I can see no justification at all for the decision in *R. v. Blane* (20): indeed, the only sentence in any of the judgments with which I agree is the sentence in the judgment of LORD DENMAN, C.J., in which he said (21): "I will only add that the principles of humanity are not concerned in this decision." As LORD DENNING, M.R., has said, the additional reason for the decision put forward by COLERIDGE, J., to the effect that, if the Act of 1844 was construed as applying to illegitimate children born abroad, it might involve an inquiry into whether they were legitimate or illegitimate according to the law of the country in which they were born, is a reason which fails completely to carry any conviction. The courts of this country are everyday making such inquiries.

C It is said that however wrong the decision in *R. v. Blane* (20) may have been, it was made 118 years ago. Moreover, it has been followed ever since, as it had to be followed, by the courts on which it was binding; and accordingly the principle of stare decisis should apply. Certainly we do not readily interfere with the decisions which have stood for 118 years, or, indeed, for any lengthy period of time. This is particularly true of decisions in fields in which it might be said that the community has arranged its affairs in accordance with what has been regarded as the law for many years past. It is, for example, very true of decisions relating to the law of contract; but even in that field, the courts reverse a very old decision when they are completely satisfied that it was wrong. For example, recently this court (22) overruled *The Parana* (23), which had stood for nearly ninety years and had been generally accepted as stating the law relating to the measure of damage for breach of contract for the carriage of goods by sea; and the House of Lords (24) upheld the decision of this court.

E In the present case none of these considerations underlying the principle of stare decisis apply. I do not suppose that the incidence of illegitimate children being conceived and born abroad has been affected in the slightest by the decision in *R. v. Blane* (20). I think it unlikely that any woman in Nigeria, or indeed anywhere else, would forbear to conceive and give birth to an illegitimate child abroad because she might contemplate that if she and the child came to this country with the putative father, she would not, according to the law as laid down in *R. v. Blane* (20), ever have a chance of recovering any sum from him by way of maintenance for the child. Nor do I think that putative fathers have arranged their affairs on the basis that *R. v. Blane* (20) was correctly decided; and if they had, I should have no qualms about upsetting it.

G The only matter which has given me any pause is that there has been a great deal of legislation concerning this subject in the last 118 years, and Parliament has never taken the opportunity of correcting *R. v. Blane* (20). The father has contended that since Parliament has not corrected *R. v. Blane* (20), it must be taken to have approved and endorsed the decision. It is quite true that it is a principle of construction that the courts may presume that when there has been a decision on the meaning of a statute, and the statute is re-enacted in much the same terms, it was the intention of Parliament to endorse the decision; but this is merely a rule of construction for the guidance of the courts. It is not a presumption which the courts are bound to make (see *Royal Crown Derby Porcelain Co., Ltd. v. Russell* (25)). It is always possible that Parliament, however vigilant, may overlook a decision. I think that *R. v. Blane* (20) has been overlooked by the legislature. I am certainly not satisfied that it was the intention of Parliament to endorse it. Indeed, if that decision had been considered by Parliament at

(20) [1843-60] All E.R. Rep. 397; (1849), 13 Q.B. 769.

(21) [1843-60] All E.R. Rep. at p. 398; (1849), 13 Q.B. at p. 772.

(22) See *The Heron II*, [1966] 2 All E.R. 593; [1966] 2 Q.B. 695.

(23) (1877), 2 P.D. 118.

(24) [1967] 3 All E.R. 686.

(25) [1949] 1 All E.R. 749; [1949] 2 K.B. 417.



any time when the intervening legislation was passed, I have little doubt but that it would have been corrected for it manifestly works gross injustice. It seems to me that the words of LORD BLACKBURN in *Tiverton and North Devon Ry. Co. v. Loosenore* (26), can appropriately be applied to the intervening Acts. He said:

"... in construing an Act of Parliament, we ought not to put a construction on it that would work injustice, or even hardship, or inconvenience, unless it is clear that such was the intention of the legislature."

I think it is clear in the present case that such was not the intention of the legislature. I accordingly agree that this appeal should be allowed.

**EDMUND DAVIES, L.J.:** Two questions are involved in this appeal.

(i) Was *R. v. Blane* (27) rightly decided 120 years ago? If it was, it follows that this appeal must be dismissed, for the basic facts are identical in the two cases. (ii) If it was not, ought it nevertheless to be followed by reason of its antiquity? With profound respect, *R. v. Blane* (27) is not one of those cases which command admiration and adherence by virtue of the cogent reasoning enshrined in their judgments. Two members of the court contented themselves with the bald assertion that our bastardy laws do not apply to illegitimate children born in a foreign country, while the third member (COLERIDGE, J.), in seeking to rationalise that conclusion, struck a note which sounds very strange and discordant to modern ears. Nor have those judgments been uniformly followed, for in *R. v. Humphreys, Ex p. Ward* (28), it was held that our courts do possess jurisdiction even in relation to an illegitimate child born in New South Wales. There the mother was domiciled in England and the majority of the Divisional Court held this to be an important difference which served to distinguish the case from *R. v. Blane* (27) and enabled the English courts to exercise jurisdiction. For my part, however, I prefer the dissenting view of AVORY, J., who expressed himself (29) as being "... unable, therefore, to say that the actual point before the court in this case was not the real ground of the decision in *R. v. Blane* (27) ...". It was, however, unqualifiedly followed in *Tetau v. O'Dea* (30), and *R. v. Wilson, Ex p. Pereira* (31), and although doubt was cast on it in *Buckeridge v. Hall* (32), the critical comments in that case were obiter inasmuch as there the mother of Jamaican domicile gave birth to her child in this country.

The question, however, still remains was *R. v. Blane* (27) rightly decided? I concur with my lords, and for the reasons they have given, in concluding that it was not. Then, despite the conviction of this court that it was erroneous, ought it nevertheless to govern the present case simply by reason of its antiquity, even though it may lead to consequences clearly contrary to the public good? In my judgment, that question demands a negative answer. However attractive the patina of old age, it ought not to be allowed to conceal clear mistakes, ancient though they be (see the observations of VISCOUNT SIMONDS in *Public Trustee v. Inland Revenue Comrs.* (33)). In *Robinson Brothers (Brewers), Ltd. v. Houghton and Chester-le-Street Assessment Committee* (34), the House of Lords overruled a decision which had stood for forty years and which had regulated rating practice throughout that period because it found it erroneous in law and that its operation was unfair in placing an unjustifiable burden on the occupiers of other hereditaments. LORD MACMILLAN there pointed out (35) that previously

(26) (1884), 9 App. Cas. 480 at p. 497.

(27) [1843-60] All E.R. Rep. 397; (1849), 13 Q.B. 769.

(28) [1914-15] All E.R. Rep. 189; [1914] 3 K.B. 1237.

(29) [1914-15] All E.R. Rep. at p. 192; [1914] 3 K.B. at p. 1242.

(30) [1950] 2 All E.R. 695; [1951] 1 K.B. 184.

(31) [1952] 2 All E.R. 706; [1953] 1 Q.B. 59.

(32) [1963] 1 All E.R. 509; [1963] 1 Q.B. 614.

(33) [1960] 1 All E.R. 1 at pp. 8, 9; [1960] A.C. 398 at p. 415.

(34) [1938] 2 All E.R. 79; [1938] A.C. 321.

(35) [1938] 2 All E.R. at p. 87; [1938] A.C. at p. 370.

A cases even more venerable had been overruled. Moreover, only yesterday the House of Lords in *Conway v. Rimmer* (36) refused to follow one of its own decisions which was given a quarter of a century ago and which has undoubtedly controlled the course of countless cases decided in the courts during that period.

We are now being asked, however, to overrule a decision which has stood for 120 years and has governed and limited the exercise of jurisdiction in an important respect in this country. It is manifest that the courts should be slow to upset long-established decisions where rights to property or under contracts have been founded on them, or where (proceeding on the basis that they were not only old but also right) the parties have irremediably and materially altered their position. But no such considerations can properly limit the approach of the court in the present case to the question of whether it should follow a decision simply because it was given in 1849. It is, as SALMON, L.J., has just said, hardly to be supposed that when the two illegitimate children of the parties were conceived in Nigeria some years ago the father had in contemplation the limitations on the jurisdiction of the English courts in affiliation proceedings laid down in *R. v. Blane* (37) in the early years of Queen Victoria's reign. Nor, in my judgment, is *R. v. Blane* (37) one of those cases in which the particular interpretation of a statute, on which certain supposed rights are founded, has been acted on for a long period. In such cases it is well-established that the court should be cautious in holding that the supposed rights do not exist (see, for example, *Clyde Navigation Trustees v. Laird & Sons* (38)). *R. v. Blane* (37), however, interpreted no statute; its effect was simply to place a limit on the operation of the Poor Law Amendment Act, 1844, even though no such limit was imposed by the Act itself.

In my judgment the application of that decision to social conditions in the mid-twentieth century can lead to irrational and indeed unjust results, as the present case serves to show. Furthermore, the changing pattern of our society is such that it is plainly on the cards that many similar cases are likely to arise in the future. Indeed, we were told that the present case is a test case and that there are many others awaiting its outcome. Should the courts be obliged to continue to arrive at decisions which are both unjust to the private citizen and inimical to the public weal simply because of something decided decades ago? Paying, as I hope, full respect to the weight which in the ordinary way accrues increasingly to decisions the older they become, I nevertheless consider that in relation to *R. v. Blane* (37) that question should be answered in the negative. I would accordingly concur with my lords in allowing this appeal.

*Appeal allowed. Mandamus issued.*

Solicitors: *Ronald Fletcher Baker & Co.* (for the mother); *Clifford Watts Compton & Co.* (for the father).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

(36) [1968] 1 All E.R. 874.

(37) [1843-60] All E.R. Rep. 397; (1849), 13 Q.B. 769.

(38) (1883), 8 App. Cas. 658 at p. 670.

PRACTICE NOTE.

ROCKWELL MACHINE TOOL CO., LTD. v. E. P. BARRUS  
(CONCESSIONAIRES), LTD. AND OTHERS  
[AND ASSOCIATED ACTIONS].

[CHANCERY DIVISION (Megarry, J.), March 20, 1968.]

*Discovery—Duty of solicitor—Ensuring that clients appreciate their duty in regard to disclosure on discovery—Wide scope of discovery—Preservation of relevant documents that might otherwise be subject to destruction in accordance with business routine.*

[As to the duty of a solicitor in relation to discovery, see 12 HALSBURY'S LAWS (3rd Edn.) 30, para. 42; and for a case on the subject see 43 DIGEST (Repl.) 375, 3981.]

Case referred to:

*Compagnie Financière et Commerciale du Pacifique v. Peruvian Guano Co.*, (1882),  
11 Q.B.D. 55; 52 L.J.Q.B. 181; 48 L.T. 22; 18 Digest (Repl.) 42, 334.

### **Actions.**

These were three associated actions in which the cause of action was alleged passing off. The plaintiffs, Rockwell Machine Tool Co., Ltd., a company incorporated in 1945, carried on business as distributors of and merchants in machine tools. In the principal action the second defendant, a company carrying on business in Pennsylvania, U.S.A., and named Rockwell Manufacturing Company, were manufacturers of, among other products, power tools. The first defendants in the principal action were distributors of tools and other engineering equipment carrying on business in London. The word "Rockwell" was thus common to the names of the plaintiffs and of the second defendants in the principal action. By writ issued on Oct. 24, 1963, in the principal action the plaintiffs sued the defendants claiming relief based, as pleaded in their amended statement of claim, on alleged passing-off of machine tools that were not of the plaintiffs' merchandise as and for the plaintiffs' machine tools in the United Kingdom under the trademark "Rockwell" or by reference to the name "Rockwell". This was denied by the defendants in their defence, who further pleaded that the second defendants had since 1945 carried on business from the U.S.A. in the sale of power tools under and in relation to their corporate name and a device consisting of the word "Rockwell" in a circle associated with the letter "r" and that such tools had been sold in the United Kingdom since 1950; and further that, since 1955, the second defendants had used a device in association with the words "Delta Rockwell" in connexion with the articles sold by them, and that such sales had been world-wide. After hearings lasting for several days the actions were settled, the defendant companies giving an undertaking to the court to the effect that they would not pass off, as the plaintiffs', machine tools not of the plaintiffs' merchandise. At the conclusion of the case His Lordship (MEGARRY, J.) made the observations reported below in regard to discovery.

**MEGARRY, J.:** I do not think that it would be right for me to part from this case without saying a word about a matter which has troubled me from time to time during the case, namely, the process of discovery. Prima facie, discovery by certain defendants in this case has fallen far short of the standard which it ought to have attained. I wish to make it plain that I am not criticising anyone, or attributing or allocating blame. It would be quite wrong for me to do so, because the case has not proceeded to its conclusion, and what might have been said during the remainder of the case might have thrown a new light on what has occurred hitherto. My concern is not so much for the past in this case as for the future in other cases.



A Two matters which in particular disturbed me were these. First, there was a witness for a defendant who, in response to a question in cross-examination, readily undertook one day to make a transatlantic telephone call and the next day announced that documents of prima facie relevance were being despatched by airmail. This at least suggests that the process of discovery had not been complete. No doubt last-minute disclosure is better than none at all; but the

B plaintiffs were entitled to see the documents and consider their effect in advance of the hearing, and not be reduced to prising information out of the witnesses under cross-examination and then considering what was disclosed after the plaintiffs had closed their case and some ten days of the hearing had elapsed. Secondly, it appeared from evidence for the defendants that between the issue of one of the writs in 1963 and the hearing, one of the defendants had been carrying on with its routine process of destroying documents seven years old, even though

C these probably included documents which ought to have been disclosed on discovery.

I have made it plain enough that I am not attributing or allocating blame, but looking only to the future. What I desire to say is this. In preparing for trial solicitors bear a great responsibility and a heavy burden. Not the least

D of these burdens is that of discovery. This is of especial weight in a complex case of passing off such as this was (1). Many litigants (and not least corporate litigants) have little appreciation of the scope of discovery, and the duty of making full disclosure. So often they neither know nor appreciate the requirement that they must search for and disclose to their adversary any document which, in the classic phrase of BRETT, L.J., in the *Peruvian Guano* case (2), "may fairly

E lead him to a train of inquiry" which may either advance his own case or damage his opponent's.

Accordingly, it seems to me necessary for solicitors to take positive steps to ensure that their clients appreciate at an early stage of the litigation, promptly after writ issued, not only the duty of discovery and its width but also the importance of not destroying documents which might by possibility have to be

F disclosed. This burden extends, in my judgment, to taking steps to ensure that in any corporate organisation knowledge of this burden is passed on to any who may be affected by it.

I may add that I have no reason whatever to think that solicitors will not continue fully and loyally to discharge the heavy burden that lies on them, and that cases where the process of discovery is seriously imperfect will be very

G much the exception rather than the rule. But the events of this case have made it seem necessary to voice this matter by way of reminder that there are difficult cases, and especial difficulties in the case of large corporations.

[Reported by R. W. FARRIN, ESQ., Barrister-at-Law.]

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(1) The defendants included, in addition to the English company and the American company hereinbefore referred to, a Swiss company.

(2) *Compagnie Financière et Commerciale du Pacifique v. Peruvian Guano Co.*, (1882), 11 Q.B.D. 55 at p. 63.

## GATLAND AND ANOTHER v. METROPOLITAN POLICE COMMISSIONER.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Ashworth and Milmo, JJ.),  
March 18, 1968.]

*Highway—Danger or annoyance to users—Deposit of builders' hopper—Hopper six feet wide deposited on highway adjacent to kerb to collect builders' rubble—Consent of highway authority not obtained—Commercial convenience not lawful excuse—Road straight and well lit at night—Red lamps lit by hopper—Highway forty-three feet wide—Lorry ran into hopper at night—Lorry driver not, in the circumstances, endangered by hopper—Highways Act, 1959 (7 & 8 Eliz. 2 c. 25), s. 140 (1).*

On Jan. 23, 1967, a company, S., Ltd., by their driver, G., left a builders' hopper adjacent to the kerb in the highway in front of the premises where builders were working. He supplied the builders with two red hurricane lamps and paraffin; the lamps were lit on the relevant evening. No permission was obtained from the highway authority under s. 146 of the Highways Act, 1959 to deposit the hopper. At 12.45 a.m. on Jan. 26, 1967, a lorry driver driving a lorry on the highway collided with the hopper when travelling at ten to fifteen miles per hour. The lorry's headlights were on but were dipped; the road was straight, was forty-three feet wide and was lit by sodium lamps one of which was only thirty feet from the hopper. The hopper was six feet wide. On appeal by the prosecutor from a decision of quarter sessions allowing an appeal by G. and S., Ltd. from convictions of G. of an offence against s. 140 (1)\* of the Highways Act, 1959, and of S., Ltd. for aiding and abetting G.,

**Held:** although commercial convenience was not a lawful excuse for the purposes of s. 140 (1) of the Highways Act, 1959, and although, under s. 81† of the Magistrates' Courts Act, 1952, the burden was on the accused to prove lawful excuse, yet it was for the prosecution to prove that it was in consequence of the hopper having been deposited on the highway that the lorry driver was endangered; and in the present case the finding of quarter sessions that, in effect, depositing the hopper did not endanger the lorry driver, but that his own negligence was the cause of the accident and should stand (see p. 103, letter I, and p. 104, letter A, post).

Appeal dismissed.

[As to causing danger to users of the highway, see SUPPLEMENT to 19 HALSBURY'S LAWS (3rd Edn.), para. 456A, 3.

For the Highways Act, 1959, s. 140, s. 146, see 39 HALSBURY'S STATUTES (2nd Edn.) 562, 568.]

### Case Stated.

This was a Case Stated by the South East London Quarter Sessions (chairman, J. A. GRIEVES, Esq., Q.C.) sitting at Croydon on Aug. 22, 1967.

On May 5, 1967, informations were laid by P.C. 277 'Z' Ricketts, a constable of the Metropolitan Police, charging that: (a) the respondent, Harold Gatland, had, on or about, Jan. 23, 1967, at Mitcham Road, Croydon, without lawful authority or excuse, deposited a thing, namely a metal hopper, on a highway called Mitcham Road, Croydon, in consequence whereof a user of the said highway was endangered, contrary to s. 140 of the Highways Act, 1959; and (b) the respondent company, Geo. Sands & Co., Ltd., had aided and abetted the respondent, Gatland in committing the said offence, contrary to s. 140 of the Highways Act, 1959, and s. 35 of the Magistrates' Courts Act, 1952. On June

\* Section 140 (1) is set out at p. 103, letter C, post.

† Section 81, so far as material, is set out at p. 103, letter D, post.

A 5 and 8, 1967, a magistrates' court, sitting at Croydon, heard the said informations, found them proved, ordered the respondent Gatland to be conditionally discharged and fined the respondent company 40s. with £8 4s. costs. On June 20, 1967, the present respondents gave notice of appeal against their said convictions.

The following facts were found. The respondent company in carrying on business let hoppers for hire to builders for the purpose of containing and disposing of waste materials from sites where building operations were being carried out. They had about sixty hoppers, and were concerned in between four hundred and five hundred such hirings per month. The hoppers, which were six feet wide, were delivered, and, when full, removed by a vehicle, belonging to the respondent company. The vehicle which was known as a road lugger, was eight feet wide. The weight of the vehicle and a full hopper was between eleven and twelve tons.

C The respondent company warned customers of the need to attach red lights to hoppers at night, and supplied without charge two red hurricane lamps ready filled with paraffin with each hopper for that purpose. On Jan. 23, 1967, the respondent Gatland, a driver employed by the respondent company delivered an empty hopper in connexion with the conversion of premises at 688, Mitcham Road, West Croydon. After consultation with an employee of the builder, the respondent Gatland left the hopper in the roadway, adjacent to the kerb, in front of No. 688 Mitcham Road; the driveway adjacent to the premises belonged to the premises next door. The owner thereof did not permit user by vehicles and he had refused the hirer's request for permission for such user. The entrance was too narrow between the gateposts to permit the entry of the road lugger. It was impracticable to set the hopper down in the front garden of the premises

E because owing to the construction of the lugger and the method of lowering the bin, the front garden wall would have had to be demolished before the bin was set down; the respondent Gatland also delivered two red hurricane lamps and paraffin to the builders' servant; the road at the point where the hopper was left was forty-three feet wide. The hopper was the standard six feet wide and approximately ten feet long and three feet high. It was painted orange; no permission was applied for to, or granted by, the relevant highway authority, the London Borough of Croydon, for the hopper to be or remain in Mitcham Road. At about 12.45 a.m. on Jan. 26, 1967, Mr. Ritchie, a lorry driver, left a depot at Mitcham Road, Croydon, driving a five ton articulated lorry. His destination was Corby, in the county of Northampton. At the material time, it was raining, and the windscreen wiper of the lorry was in operation. The lorry was showing side lights and dipped headlights. After travelling eighty-eight yards from the exit to the depot, the lorry collided with the hopper, which was on his nearside of Mitcham Road. The lorry was then travelling at between ten and fifteen miles per hour, and was changing from second into third gear. Mr. Ritchie did not see the hopper before the collision: the lorry sustained extensive damage to its front nearside. Neither Mr. Ritchie nor anyone else

H suffered personal injury. Two damaged red lamps, of a pattern similar to those supplied by the respondent company, were found near the scene of the collision. Lighted red hurricane lamps had been placed at the corners of the hopper on the previous evening by the builder or his employees; Mitcham Road was illuminated at the material time, by sodium lamps (one of which was about thirty feet from the hopper) which gave a very good light; Mitcham Road at the material point runs straight for half a mile in one direction and in the other direction for a further 160 yards leading into a slow curve.

I It was contended before quarter sessions on behalf of the respondents in the High Court (a) that s. 140 (1) of the Highways Act, 1959, created an offence of depositing a thing on a highway, and did not deal with its continued presence there. Therefore, as the depositing in the present case occurred on Jan. 23, the respondents could not be guilty of an offence on Jan. 26; (b) that the words "without lawful authority" in s. 140 (1) referred to the power of the highway authority to consent to the temporary deposit of building materials, rubbish or



other things in the street under s. 146 (1) of the Act of 1959; (c) that the word "excuse" in s. 140 (1) embraced the impracticability of depositing the thing elsewhere than on the highway; (d) that the word "injured" in s. 140 (1) referred to personal injury; (e) that the word "endangered" in s. 140 (1) meant "put in peril of personal injury"; (f) that the respondent company could only be guilty of aiding and abetting the respondent Gatland if they knew the circumstances at the time of the collision.

It was contended before quarter sessions on behalf of the appellant prosecutor: (i) that the words "lawful authority" in s. 140 (1) of the Highways Act, 1959, referred to the consent of the highway authority; (ii) that the word "excuse" in s. 140 (1) was restricted to something beyond the control of the person who deposited a thing on a highway, e.g., a breakdown, and did not extend to the impracticability of depositing the thing elsewhere than on the highway; (iii) that the word "deposits" in s. 140 (1) did not restrict the operation of the subsection to an event which occurred directly after the thing was deposited in the highway. The subsection related to events which occurred during the continued presence of the thing on the highway; (iv) that the words "in consequence whereof" meant that the deposit of the thing in the highway must have been a substantial cause of the injury or danger to a user of the highway; (v) that the word "injured" in s. 140 (1) referred to personal injury; (vi) that the word "endangered" meant something which was likely to put a user of the highway in peril.

Quarter sessions were of the opinion: (a) that the words "lawful authority" in s. 140 (1) of the Highways Act, 1959, included the consent of the highway authority under s. 146 (1) of the Act; (b) that the lawful excuse mentioned in s. 140 (1) was generally restricted to matters outside the control of the person who deposited a thing on the highway, e.g., a breakdown, and that it did not include the commercial impracticability of depositing the thing elsewhere than on the highway because in such event the depositor could obtain consent under s. 146 (1); (c) that the word "deposits" in the section did not restrict the operation of the section to an event which occurred directly after the deposit. The section extended to events occurring subsequently during the continued presence of the thing on the highway provided that the deposit caused injury or danger to a user of the highway; (d) that, as regards proof of lawful authority or excuse, the burden was on the respondents (on the appeal to the High Court) to adduce or point to evidence thereof and (if such evidence appeared) on the appellant to establish absence of authority or consent; (e) that the words "in consequence thereof" meant that the danger must be on account of, that is to say, substantially caused by, the deposit; (f) that the word "injured" referred to personal injury; (g) that the word "endangered" meant put in peril of personal injury; (h) that, if quarter sessions had found that the respondent Gatland had committed an offence under s. 140 (1), the respondent company would be guilty of aiding and abetting him if it was established that the respondent company authorised the respondent Gatland to deposit the hopper in any place which the respondent Gatland thought fit; (i) that on this broad, straight, well-lighted highway Mr. Ritchie was not endangered in consequence of the deposit on by the respondent Gatland of a hopper which projected six feet only into a carriageway forty-three feet wide and was marked by red lamps placed and lit as instructed by the respondent Gatland.

Quarter Sessions accordingly allowed the appeal. The prosecutor now appealed.

The authority and case noted below\* were cited during the argument.

*S. H. Noakes and J. W. McDonald* for the appellant, the Commissioner of Police of the Metropolis.

*J. S. R. Abdela, Q.C.*, and *W. S. Aylen* for the respondents.

\* PRATT AND MACKENZIE LAW OF HIGHWAYS (20th Edn. pp. 718-720, 725-727; *John Henshall (Quarries), Ltd. v. Harvey*, [1965] 1 All E.R. 725; [1965] 2 Q.B. 233.

**A** **LORD PARKER, C.J.**, stated the nature of the appeal and continued: This is a case brought by the Commissioner of Police for the Metropolis with a view, it is said, to getting some guidance as to the method of control of what has now become a well known feature of the London streets, namely the leaving of large metal skips for the receipt of builders' rubble. The skips or hoppers are well known: they are six feet wide, some ten feet long and some three feet high, **B** and they are brought to the position where they are to be deposited by a road lugger, and from time to time they are filled and are hoisted on to the lugger and taken away.

[His LORDSHIP summarised the facts and continued:] On appeal, quarter sessions quashed the conviction, holding that on that broad, straight, well lighted highway the lorry driver was not endangered in consequence of the deposit **C** on it by Mr. Gatland of a hopper which projected six feet only into the carriage-way, forty-three feet wide, marked by red lamps placed and lit as instructed by Mr. Gatland. The section, s. 140 (1), of the Highways Act, 1959, provides that:

"If a person, without lawful authority or excuse, deposits any thing whatsoever on a highway in consequence whereof a user of the highway is **D** injured or endangered, that person shall be guilty of an offence."

It is for the accused to raise and prove lawful authority or excuse. Section 81 of the Magistrates' Courts Act, 1952, specifically provides that:

"Where the defendant to an information or complaint relies for his defence **E** on any exception, exemption, proviso, excuse or qualification . . . the burden of proving the . . . excuse or qualification shall be on him . . ."

It was admitted that there was no authority under s. 146 (1) from the highway authority (1), and the only excuse that was raised was that it was not convenient to deposit the hopper in question at any other place than the place where it was deposited. Quarter sessions held, and I think quite rightly, that commercial, convenience or commercial practicability is not an excuse within the subsection **F** It is, however, in every case for the prosecution to prove, not only that the article in question has been deposited on a highway, but also that in consequence thereof a user of the highway is injured or endangered. There is no question here of anybody being injured, and accordingly it was for the prosecution to prove that the hopper having been deposited, it was as a consequence thereof that the lorry driver was endangered.

**G** There is a finding of fact in the present case, which is clearly binding on this court. It is that on this broad straight well lighted highway the lorry driver was not endangered in consequence of the deposit of the hopper. Counsel for the appellant has sought to say that is wrong by submitting that if anyone leaves a hopper in a roadway, and, someone is in fact endangered, then it must be in consequence of its being there. It sounds at first sight an attractive argument, but quite clearly the endangering may be due to some completely different cause. **H** It may have been the result of a gross act of dangerous driving; it may be carelessness; it may be negligence. The question in each case must be whether in all the circumstances, considering the exact position of the hopper in the road, whether it is a straight road, whether it is near a corner, whether it is lit, and matters of that sort, the article deposited was a cause of a user of the highway being endangered. **I** Provided, however, it does not, in the ordinary sense, endanger a user any more than if a car had been parked there, and the position of the hopper merely forms part of the background, or it may be said the scenery, then the negligence or fault of the user, in this case the lorry driver, can properly be said to be the cause of the endangering.

That, as I understand it, is what quarter sessions have found as a fact, and I see no ground whatever for interfering with that finding, and accordingly I would dismiss this appeal.

ASHWORTH, J.: I agree.

MILMO, J.: I agree.

*Appeal dismissed.*

Solicitors: *Solicitor, Metropolitan Police* (for the appellant); *Rawlence & Son, Croydon* (for the respondents).

[*Reported by N.P. METCALFE, Esq., Barrister-at-Law.*] B

## WESTMINSTER BANK, LTD. v. BEVERLEY BOROUGH COUNCIL AND ANOTHER.

[QUEEN'S BENCH DIVISION (Donaldson, J.), February 20, 29, 1968.] C

*Statute—Construction—Confiscatory construction—Private rights of property not taken away without compensation, unless intention clearly expressed—General control of development under town planning legislation—Special control available in regard to road widening under highways legislation—Liability under special control to pay compensation, but not under general control—General control not intended to be exercised in regard to matters within special control—Highways Act, 1959 (7 & 8 Eliz. 2 c. 25), s. 72—Town and Country Planning Act, 1962 (10 & 11 Eliz. 2 c. 38), s. 12, s. 23.* D

*Town and Country Planning—Development—Permission for development—Refusal of permission—Alternative to exercising statutory power under Highways Act, 1959, s. 72, to prescribe improvement line with a view to road widening—Exercise of power under s. 72 would carry right to compensation, but refusal of development permission would not—Dismissal by Minister of appeal from refusal of permission—Whether Minister's decision valid—Highways Act, 1959 (7 & 8 Eliz. 2 c. 25), s. 72—Town and Country Planning Act, 1962 (10 & 11 Eliz. 2 c. 38), s. 23.* E

*Town and Country Planning—Development—Permission for development—Notification of decision—Reasons—Factors taken into account should be identified—Town and Country Planning (Inquiries Procedure) Rules 1965 (S.I. 1965 No. 473), r. 13 (1).* F

Application by a bank for planning permission for an extension at the rear of branch premises was refused by the borough council, as local planning authority, and, after a local inquiry (which was subsequently re-opened), the bank's appeal to the Minister was dismissed. The reason for the dismissal of the appeal, as also for the refusal of planning permission, was that as a result of the local planning authority's proposals for the town centre generally, the street behind the bank would become a main internal traffic road and would require to be widened; and that, though no date for the widening could be given, it was officially approved by the county council as highway and planning authority and the proposal to widen was a firm proposal. At the re-opened inquiry the borough council had stated that in recent years any proposals for development within the "improvement line" had been resisted. No improvement line, strictly so-called, had been prescribed under the relevant statutory power for road widening, viz., s. 72 of the Highways Act, 1959. Under that enactment a person whose land was injuriously affected by the prescribing of an improvement line would become entitled to compensation. Under the course adopted, viz., the refusal of planning permission, a right to compensation would not arise. On application by the bank for certiorari to quash the Minister's decision, the court found that the actual prejudice to the proposed widening of the street lay in the question of compensation; in short, that to proceed by refusal of planning permission was administratively the cheaper route.

**Held:** the decision to withhold planning permission under the Town and



**A** Country Planning Act, 1962, for proposed development so as, in effect, to achieve the same result as would be achieved by prescribing an improvement line under s. 72 of the Highways Act, 1959, and at the same time to exclude the right to compensation which s. 72 would confer, was invalid and the decision of the Minister would accordingly be quashed, for the following reasons—

**B** (i) since the town and country planning legislation provided a general control of development, and s. 72 of the Highways Act, 1959, (and the enactments preceding it) provided a special control relating to highway problems, it was not the intention of the legislature that the general control should be operated within the limited sphere of the special control so as to exclude rights conferred under the special control, in particular, the right to compensation (see p. 114, letter A, post).

**C** *Minister of Housing and Local Government v. Hartnell* ([1965] 1 All E.R. 490) applied.

(ii) where, owing to a multiplicity of legislative controls limiting the freedom of the individual to deal with his property, the controlling authority had two alternative controls, one of which carried a right of the individual to compensation and the other of which did not, the control carrying the right to compensation was the one that, for the maintenance of a reasonable balance between the interests of the community and the interests of the individual, should be exercised (see p. 114, letter C, post).

**D** Per CURIAM: the obligation imposed on the Minister under r. 13 (1)\* of the Town and Country Planning (Inquiries Procedure) Rules, 1965, viz., to notify his reasons for his decision, is by necessary implication an obligation to notify them fully and sufficiently, and to identify expressly or by reference the factors of which he has taken account in exercising his discretion (see p. 111, letter A, post, and p. 114, letter E, post).

**E** [Editorial Note. Though the maxim *generalalia specialibus non derogant* (cf., 36 HALSBURY'S LAWS, 3rd Edn., 467, para. 711) is generally cited in regard to questions of repeal of enactments, yet the maxim may have analogy to the ground of decision stated at (i) above.

**F** As to the presumption against interference by statute with private rights, see 36 HALSBURY'S LAWS (3rd Edn.) 413, para. 627; for cases on the subject, see 44 DIGEST (Repl.) 294-298, 1236-1283.

**G** As to the Minister's duty to give the reasons for his decision, see 37 HALSBURY'S LAWS (3rd Edn.) 198, para. 311, note (s) and SUPPLEMENT thereto, para. 311A, 3; and for cases concerning the giving of reasons, see 45 DIGEST (Repl.) 341, 56 and DIGEST (Cont. Vol. B) 691, 556.

For the Highways Act, 1959, s. 72, s. 73, see 39 HALSBURY'S STATUTES (2nd Edn.) 491, 494.

**H** For the Town and Country Planning Act, 1962, s. 176 (3), s. 179, see 42 HALSBURY'S STATUTES (2nd Edn.) 1142, 1145.]

Cases referred to:

*Associated Provincial Picture Houses, Ltd. v. Wednesbury Corpn.*, [1947] 2 All E.R. 680; [1948] 1 K.B. 223; [1948] L.J.R. 190; 177 L.T. 641; 112 J.P. 55; 45 Digest (Repl.) 215, 189.

**I** *Colonial Sugar Refining Co., Ltd. v. Melbourne Harbour Trust Comrs.*, [1927] A.C. 343; 96 L.J.P.C. 74; 136 L.T. 709; 44 Digest (Repl.) 297, 1276.

*Minister of Housing and Local Government v. Hartnell*, [1965] 1 All E.R. 490; [1965] A.C. 1134; [1965] 2 W.L.R. 474; 129 J.P. 234; Digest (Cont. Vol. B) 694, 124.

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\* S.I. 1965 No. 473. Rule 13 (1) provides as follows: "The Minister shall notify his decisions, and his reasons therefor, in writing to the applicant . . . ; and, where a copy of the appointed person's report is not sent with the notification of the decision, the notification shall be accompanied by a summary of the appointed person's conclusions and recommendations."

**Motion.**

This was a motion, by notice dated Mar. 9, 1967, by the applicant, Westminster Bank, Ltd., pursuant to s. 179 of the Town and Country Planning Act, 1962, for an order quashing the decision of the second respondent, the Minister of Housing and Local Government, notified by letter of decision dated Jan. 31, 1967, whereby he dismissed an appeal by the bank against the refusal of the first respondents, the Beverley Borough Council (acting as the local planning authority under delegated powers) to grant planning permission for alterations and extensions at the bank's premises at 60, Saturday Market, Beverley, in the East Riding of Yorkshire. The grounds of the application were:—1. That the action of the Minister was not within the powers of the Town and Country Planning Act, 1962, in that—(a) he failed to have regard in his decision to material considerations, viz. (i) the failure of the borough council to prescribe an improvement line or a building line in respect of Lairgate (the street which would be affected by the bank's proposed alterations at the rear of its premises) under the provisions of s. 72 and s. 73 of the Highways Act, 1959; and (ii) the fact that the refusal of planning permission involved the payment of compensation under s. 123 of the Town and Country Planning Act, 1962; (b) the dismissal of the bank's appeal to the Minister had the effect of prescribing an improvement line or building line while depriving the applicants of the compensation provided for by the said s. 72 and s. 73 of the Highways Act, 1959. 2. That the interests of the bank had been substantially prejudiced by—(a) the Minister's failure to have regard to the material considerations set out at 1. (a) above contrary to s. 17 of the Town and Country Planning Act, 1962, (b)\* the failure of the second appointed inspector to give a good reason for not making any recommendation contrary to r. 10 of the Town and Country Planning Appeals (Inquiries Procedure) Rules, 1962†; and (c) the Minister's failure to give good and sufficient reasons for his decision, contrary to r. 11 of the Town and Country Planning Appeals (Inquiries Procedure) Rules, 1962. The relevant facts are set out in the judgment.

The cases noted below‡ were cited during the argument in addition to those referred to in the judgment.

*D. P. Kerrigan, Q.C.*, and *A. B. Dawson* for the applicants, the bank.

*Nigel Bridge* for the Minister.

The first respondents, Beverley Borough Council, did not appear and were not represented.

*Cur. adv. vult.*

Feb. 29. **DONALDSON, J.**, read the following judgment: Westminster Bank, Ltd., to which I will refer as "the bank", has a branch which backs on to the street known as "Lairgate" in Beverley in the East Riding of Yorkshire. In April, 1962, the bank was minded to alter and extend the back of its premises by constructing a new office for the manager, a waiting-room and a strong-room and by altering the lavatory accommodation. This development could not lawfully be effected without planning permission, and application for such permission was duly made to and refused by the Beverley Borough Council, which was the local planning authority under delegated powers. The reason for the refusal was that, and I quote:

\* The contentions of the bank set out at 1 (a) (ii) and 2 (b) were abandoned during the hearing; see p. 109, letter F, post.

† S.I. 1962 No. 1425. The Rules of 1962 were revoked and replaced by the Town and Country Planning (Inquiries Procedure) Rules 1965, S.I. 1965 No. 473, which came into operation on Apr. 1, 1965. Rule 13 (1) of the latter rules, reproducing in substantially identical terms r. 11 (1) of the earlier rules, is set out at p. 105, footnote \*.

‡ *Re Poyser and Mills' Arbitration*, Re, [1963] 1 All E.R. 612; [1964] 2 Q.B. 467; *Hall & Co., Ltd. v. Shoreham-by-Sea U.D.C.*, [1964] 1 All E.R. 1; *Givaudan & Co., Ltd. v. Minister of Housing and Local Government*, [1966] 3 All E.R. 696; *Padfield v. Minister of Agriculture, Fisheries and Food*, [1968] 1 All E.R. 694.

A "The proposed development might prejudice the possible future widening of Lairgate which it is intended should have an ultimate overall width of forty feet."

The bank did not appeal from this refusal, but contented itself with exploring the possibility of an underground strong-room which would not affect any road widening scheme. Eventually in April, 1964, it decided to renew its application for planning permission. Predictably this application was refused and equally predictably the bank appealed to the Minister of Housing and Local Government, who directed a local inquiry, which was conducted in March, 1965, by a Mr. Deans. In the course of that inquiry, the issues between the bank and the planning authority were clarified and may be summarised as follows:

C 1. Whether there was more than a speculative intention to widen Lairgate, in the light of the fact that such a widening had been mooted for many years but no action had been taken and, in particular, the local authority as the highway authority had failed to prescribe an improvement line or a building line under s. 72 or s. 73 of the Highways Act, 1959, or previous similar statutory provisions (1).

D 2. Whether planning powers could properly be used to produce the same effect as the prescription of an improvement or building line under the Highways Act, 1959, without the necessity for paying compensation for injurious affection which would follow from the exercise of the powers conferred by that Act.

E Mr. Deans made a report dated Apr. 22, 1965, in which he made findings of fact, reached conclusions and made a recommendation. The findings of fact included the following:—

(vi) For about twenty years the council have, through planning control, projected a scheme for the widening of Lairgate along its eastern side;

F (x) To provide a new strong-room within that part of the site not to be affected by the proposed widening scheme would involve the appellants in a considerably increased expenditure;

(xi) The increase in usable floor space that would result from the present proposal would be within ten per cent. of the area now occupied by the appellants.

G Mr. Deans made no finding of fact whether the increase in the cubic capacity of the bank's premises would exceed ten per cent. of its existing cubic capacity. Mr. Deans' conclusions may be summarised as that (a) it was uncertain whether or when Lairgate would be widened, and (b) should this course ever be adopted, the cost of demolishing the proposed strong-room would have comparatively little financial impact on the overall costs of the scheme. He accordingly recommended that the appeal be allowed.

H This report was not communicated to the bank, and silence reigned for nearly a year until a decision letter emerged from the Ministry of Housing and Local Government on Mar. 10, 1966. This letter quoted Mr. Deans' conclusions and recommendations, and added that the Minister had been advised by the Minister of Transport that

I "The future widening of Lairgate is a firm proposal which is part of a long-term road improvement scheme essential for the relief of traffic congestion in Beverley. The appeal site will definitely be required for the widening of Lairgate and whilst there are no plans for the immediate

(1) For s. 72 and s. 73 of the Highways Act, 1959, see 39 HALSBURY'S STATUTES (2nd Edn.) 491-494. An improvement line (under s. 72) is designed to prevent the erection of buildings on land which will ultimately be required for street widening. It is distinct from a building line (under s. 73), which is a frontage line beyond which buildings in a street may not project irrespective of any question of street widening and which may be prescribed under s. 73.



implementation of this proposal it is essential that it should not be prejudiced by the development of land which will be needed for the road widening.”

The letter concluded by informing the bank that the Minister proposed to dismiss the appeal unless the bank wished the inquiry to be re-opened for the limited purpose of examining the new evidence adduced by the Minister of Transport and any rebutting evidence adduced by the bank.

The bank asked that the inquiry be re-opened and this was done on Nov. 1, 1966, the inspector on this occasion being a Mr. Jackson. At the hearing the representative of the Ministry of Transport supported his Minister's view to which I have already referred and in addition suggested that if planning permission were granted to the bank similar permissions would have to be granted to the owners of other premises along Lairgate, as a result of which the cost of widening the road would be increased by an exorbitant amount. The Beverley Borough Council supported the Minister of Transport and added that

“in recent years any proposals for development within the improvement line have been resisted; consequently several building proposals have not been carried out and others have been amended so as to stand behind the improvement line.”

This “improvement line” is not one prescribed under the Highways Act, 1959 (2), but is one which was variously referred to in the local authority's observations at the first inquiry as an “intended improvement line” and an “improvement line” and was marked on the plans used in the appeal. Whether it ever received wider publicity prior to the publication of the Beverley Town Centre map (redevelopment and road proposals) at some time between the two inquiries, I know not. The bank reiterated its previous contention.

Mr. Jackson's report, dated Nov. 23, 1966, contained the following conclusions:

“33. The road proposals shown on the town centre map are of the utmost importance to the realisation of the town centre scheme as a whole. The proposal to use Lairgate as part of the perimeter road around the town centre seems to be sound. Although no date can be given for the carrying out of the widening of Lairgate, it is obvious that due to its very restricted width it would have to be widened in order to function effectively as part of this perimeter route.

“34. It seems possible that, following the realisation of other road proposals in the central area, the increased use of Lairgate would then make it essential for the widening to be carried out within the foreseeable future.

“35. The construction of the new strong-room in the position proposed by the [bank] would involve substantial works in advance of the proposed road improvement line; this could prejudice the carrying out of the widening and would therefore be against the public interest.”

He ended his report by saying

“Because the re-opened inquiry and my report on it relate only to one aspect of the matters considered at the previous inquiry, I do not feel able to make a firm recommendation as to the determination of this appeal.”

The decision letter of the Minister of Housing and Local Government, dated Jan. 31, 1967, so far as is material, was in the following terms:

“The Minister has considered the reports of the inspectors, Mr. R. W. Deans, G.M., A.R.I.B.A., who held a local inquiry on Mar. 30, 1965, and Mr. J. P. Jackson, A.R.I.B.A., Dip.Arch., A.M.T.P.I., Dip.T.I., who re-opened the inquiry on Nov. 1, 1966. Copies of both reports are enclosed.

“The local planning authority's reason for refusing planning permission, as given in the notice of their decision, was that ‘the proposed development might prejudice the possible future widening of Lairgate’; and the question

(2) I.e., under s. 72 of the Act of 1959. See note (1) at p. 107, ante.

A of whether this is a proper or sufficient reason for refusing the planning permission sought is the only matter in dispute in the appeal."

The letter then set out Mr. Deans' conclusions, the history of the appeal between the two inquiries and a summary of Mr. Jackson's conclusions. The letter ended as follows:

B "It is considered that the evidence given at the re-opened inquiry by the representatives of the Ministry of Transport and the local planning authority made it clear that, as a result of proposals for the town centre generally, Lairgate would become a main internal traffic road and would require to be widened. On the information at present available, it appears to the Minister that the authority's policy for the town centre is a reasonable one. Though  
C no date can be given for the road-widening, it is accepted that it is a proposal which the county council have officially approved, as both the highway and planning authority, and that the proposal is a firm one. There seems to be no doubt that the appeal site will eventually be required for road widening, and it is considered that it would not be right to prejudice the local planning authority's scheme by permitting further development in front of their improvement line. The Minister is therefore unable to accept Mr. Deans' recommendation that the appeal should be allowed.

"Accordingly, he hereby dismisses the appeal."

The bank now moves the court to quash the Minister's decision under the powers conferred by s. 179 of the Town and Country Planning Act, 1962. Subsection  
E (4) (b) of that section entitles the court to quash the "action" of the Minister, which includes his decision on an appeal to him (3) under s. 23 (see s. 176 (3) (b)), if either of two conditions is satisfied, namely, that the court is satisfied that (i) the decision is not within the powers conferred on the Minister by the Act of 1962, or (ii) the interests of the [bank] have been substantially prejudiced by a failure to comply with any of the relevant requirements in relation thereto. The expression "relevant requirements" is defined in s. 179 (7) as any require-  
F ment of the Act of 1962 or of the Tribunals and Inquiries Act, 1958, or of any order, regulations or rules made under the Acts of 1962 or 1958 which are applicable to the decision. Counsel for the bank abandoned the contentions set out in sub-para. 1 (a) (ii) and sub-para. 2 (b) of the notice of motion (4) but relied on the remaining grounds as entitling the bank to relief under both heads. Essentially the bank puts forward two contentions, namely, that

G (a) if the local planning authority or the Minister refuses permission for development for no other reason than that of thereby creating an improvement or building line for highway purposes, the refusal is ultra vires.

(b) The Minister, being under an admitted obligation to give sufficient reasons for his decision, failed to give such reasons and the bank's interests have been substantially prejudiced thereby.

H The first of these two contentions raises an issue of the highest importance, since it appears that for nearly fourteen years, under differing national and local administrations, successive Ministers and local planning authorities throughout the country have been refusing permission to develop for just this reason. Further-  
I more, since the alternative method of achieving the same result involves the payment of compensation to the landowners affected, considerable sums of money are involved.

The starting point of the bank's argument is the principle of law formulated by LORD WARRINGTON OF CLYFFE in *Colonial Sugar Refining Co., Ltd. v. Melbourne Harbour Trust Comrs.* (5) that

"... a statute should not be held to take away private rights of property

(3) For s. 23 of the Act of 1962, see 42 HALSBURY'S STATUTES (2nd Edn.), p. 991.

(4) The two sub-paragraphs referred to are set out at p. 106, letters C and E, ante.

(5) [1927] A.C. 343 at p. 359.

without compensation unless the intention to do so is expressed in clear and unambiguous terms.”

That this principle forms part of English as well as of Australian law appears from the decision of the House of Lords in *Minister of Housing and Local Government v. Hartnell* (6). An alternative approach lies in the application of the principle stated at the end of the judgment of LORD GREENE, M.R., in *Associated Provincial Picture Houses, Ltd. v. Wednesbury Corpn.* (7). In the application of this principle the courts acknowledge that it is no part of their duty to substitute their discretion for that of the Minister. On the other hand they have both the right and the duty to intervene if the Minister in exercising his undoubted discretion has omitted to take account of relevant matters or has taken into account irrelevant matters; if, in other words, he has misdirected himself. Since those who are entrusted by Parliament with discretionary powers are to be assumed to be reasonable men and women, it follows that a wholly unreasonable exercise of discretion gives rise to an inference that he who took the decision misdirected himself. If so, the decision is *ultra vires*.

If a public street is narrow or inconvenient or it is necessary or desirable that such a street should be widened, the highway authority acting under s. 72 of the Highways Act, 1959 (8), may prescribe an improvement line and thereupon it becomes unlawful to erect any building on the street side of that line without the consent of the highway authority. Owners of land have a right of appeal to a court of quarter sessions if they are aggrieved by the decision to prescribe the line or by a refusal of consent to build in front of the line. Furthermore by sub-s. (8):

“Any person whose property is injuriously affected by the prescribing of an improvement line under this section shall . . . be entitled to recover from the authority which prescribed the line compensation for the injury sustained.”

Similar provisions in s. 73 of the Act of 1959 enable a highway authority to prescribe a building line (8), and make provision for the payment of compensation.

Counsel for the bank submits that the action of the Minister in refusing permission to develop the land solely on the ground that it is necessary or desirable that a street be widened, thereby rendering it unnecessary for the highway authority to prescribe an improvement line and pay compensation under the Highways Act, 1959, amounts to taking away private rights of property without compensation and that the intention to empower him so to act is not expressed in the Town and Country Planning Acts in clear or unambiguous terms or at all. Alternatively, it is said that the action is a wholly unreasonable use of planning powers to achieve the prescribing of an improvement line for highway purposes without paying compensation when Parliament has expressly provided a special procedure for attaining this object which gives aggrieved persons a right to compensation and, incidentally, to have the decision reviewed on its merits by a court of law. I confess that I find the second approach more attractive, but both are open to the bank.

The second ground relied on by the bank is that the Minister

“failed to give good and sufficient reasons for his decision contrary to r. 11 (1) of the Town and Country Planning Appeals (Inquiries Procedure) Rules, 1962 (9),”

to quote the notice of motion. I think that the relevant rule is now r. 13 (1) of the Rules of 1965 (10), but, it being admitted that there was a statutory obligation to give reasons, it was unnecessary to explore the matter in argument.

(6) [1965] 1 All E.R. 490; [1965] A.C. 1134.

(7) [1947] 2 All E.R. 680 at p. 685; [1948] 1 K.B. 223 at p. 231.

(8) See footnote (1) at p. 107, ante.

(9) S.I. 1962 No. 1425. See footnote † at p. 106, ante.

(10) Town and Country Planning (Inquiries Procedure) Rules, 1965 (S.I. 1965 No. 473). The material terms of r. 13 (1) are set out in footnote \* at p. 105, ante.



- A I refer to the source of the obligation only because I think that the obligation is to notify the reasons for a decision and, by necessary implication, to notify them fully and sufficiently. It is not an obligation to give sufficient reasons, which is a totally different conception going directly to the merits of the decision. This obligation is of the greatest importance as compliance enables an applicant to place before a court the materials which will or may enable it to determine
- B whether the Minister has acted within his powers. If therefore reasons are not stated or are stated inadequately, it will follow almost as of course that the applicant has been substantially prejudiced. This is not to say that the reasons need be set out with the complexity which so often flows from a determined search for the ultimate in precision, but rather that so far as possible they shall be couched in language which is really intelligible to those who have been
- C spared a lawyer's training. The Minister, as I have said, propounds the issue in these terms:

"The local planning authority's reason for refusing planning permission, as given in the notice of their decision, was that 'the proposed development might prejudice the possible future widening of Lairgate'; and the question of whether this is a proper or sufficient reason for refusing the planning permission sought is the only matter in dispute in the appeal."

- D He answers this question by saying that:

"There seems to be no doubt that the appeal site will eventually be required for road widening, and it is considered that it would not be right to prejudice the local planning authority's scheme by permitting further

E development in front of their improvement line."

The court must accept the conclusion that the appeal site will eventually be required for road widening and, in the context of Mr. Jackson's conclusions which the Minister quoted in the preceding paragraph of this letter, it seems that "eventually" means "within the foreseeable future" (11). What, however, is meant by prejudicing the scheme? In the light of the Minister's earlier reference

F to the reports of Mr. Deans and Mr. Jackson and his quotation of Mr. Jackson's conclusions (12), I have little doubt that the Minister was considering the financial implications.

What were the financial implications? They fall under three heads:

- (a) *The cost of removing the new buildings in front of the improvement line when Lairgate came to be widened.*

- G This would equally be avoided if the local authority, acting as a highway authority, prescribed an improvement line under s. 72 of the Highways Act, 1959.

(b) *The cost of acquiring the land when Lairgate came to be widened.*

- H It does not appear that the sum payable on a negotiated or a compulsory purchase would differ according to whether further development were prevented by the prescribing of an improvement line under the Act of 1959 or by the refusal of planning permission under the Town and Country Planning Act, 1962.

(c) *The cost of compensating the bank for the injurious affection suffered by its property.*

- I If the Minister dismissed the appeal no such compensation would be payable. If he allowed the appeal, the local authority would be obliged (i) to exercise its powers under the Highways Act, 1959, and pay such compensation, or (ii) to do nothing and face eventual increased costs of acquiring and clearing the site, or (iii) to abandon the scheme.

It is clear that the prejudice lies in the compensation element. If this were not clear from a perusal of the decision letter and the reports therein referred to, it is made clear beyond a peradventure by a Circular, No. 696 dated Aug. 27,

(11) See para. 34 of the inspector's report, at p. 108, letter G, ante.

(12) See in particular para. 35 of Mr. Jackson's report, at p. 108, letter G, ante.

1954, issued by the Ministry of Transport and Civil Aviation, which has never been superseded or withdrawn. Paragraph 8 provides as follows:—

*“Prescription of Building and Improvement Lines*

“In view of the powers now available to local authorities as planning authorities for the control of development it is no longer necessary for councils to safeguard future road improvement schemes by using their powers under s. 5 of the Road Improvement Act 1925, or s. 33 of the Public Health Act, 1925, to prescribe building and improvement lines. Accordingly the Minister will no longer entertain applications for grants in respect of expenditure incurred by councils in meeting claims for compensation payable in consequence of the prescription of building and improvement lines.”

The powers referred to in the two Acts of 1925 are now to be found in s. 73 and s. 72 of the Highways Act, 1959 (13). The message is clear: the planning route is cheaper.

Counsel for the Minister does not suggest that I have misunderstood the position or have failed to appreciate the Minister's reasons. What he submits—and he does it with characteristic persuasiveness—is that one must approach the matter from an historical point of view, and that so approached the Minister's action is wholly justified. The argument, as I understand it, and if I do not, it is certainly my fault rather than his, runs as follows:—(a) Before the days of planning legislation the fortunate freeholder could do what he liked with his own, subject only to the law of nuisance. (b) Between 1925 and 1947 if any owner was deprived of his common law freedom, he was entitled to compensation. (c) Under the Town and Country Planning Act, 1947, every owner was deprived of his common law right to develop his land (14) and became entitled to compensation for his loss, if any. Thereafter any owner who obtained permission to develop had to pay a development charge designed to equate his position with that of those who could not develop. (d) Under the Town and Country Planning Act, 1954, the scheme was revised (15), development charges were abolished and so was the universal right to immediate compensation. Instead it was provided that compensation was payable to those landowners who would have qualified for compensation under the Act of 1947 and whose applications for permission to develop were refused. (e) Under the Town and Country Planning Act, 1959, the scheme was further revised (16). No provision was made for additional compensation, save in cases of minor development. Such development was exempted from control by Sch. 3 to the Act of 1947 and accordingly at that time no question of compensation arose. It was brought under control by the Act of 1962 which by s. 123 provided that compensation should be payable (17) if permission to develop was refused in such cases. The bank at one time sought to contend that its proposed development was in this category, but the contention was not pursued before me. In any event I have no evidence or finding that the proposed development would have added not more than ten per cent. to the cubic capacity of the bank's building (see Pt. II of Sch. 2 to the Act of 1962).

Against this background, counsel for the Minister submits that at all times between 1947 and 1953, there existed two parallel codes each capable of producing the same result, namely the prescription of an improvement line. In that period, he submits, it would have been impossible to challenge the power to refuse planning permission on the ground that there had been no resort to the

(13) See footnote (1) at p. 107, ante.

(14) For the Town and Country Planning Act, 1947, see 25 HALSBURY'S STATUTES (2nd Edn.) 489.

(15) For the Town and Country Planning Act, 1954, see 34 HALSBURY'S STATUTES (2nd Edn.) 911.

(16) For the Act of 1959, see 39 HALSBURY'S STATUTES (2nd Edn.) 39.

(17) For s. 123 of the Act of 1962, see 42 HALSBURY'S STATUTES (2nd Edn.) 1092.

A procedure under s. 33 of the Public Health Act, 1925 (18), since both codes provided for compensation. The Town and Country Planning Acts of 1954, 1959 and 1962 have not, he submits, changed the position.

I am by no means satisfied that this is right. The Town and Country Planning Act, 1947, was general in its terms and application and it provided compensation for the general control which it imposed. In passing this Act, the legislature did not repeal s. 33 of the Public Health Act, 1925 (18), which was concerned with control in particular circumstances and for a particular purpose. Furthermore, the measure of compensation under the Public Health Act, 1925, was different from that under the Town and Country Planning Act, 1947. The prescribing of an improvement line under the Public Health Act, 1925, in the period 1947 to 1953 would have enabled the aggrieved owner to obtain greater compensation, although the amount would no doubt have taken account of his entitlement to compensation under the Town and Country Planning Act, 1947, if no development took place and of his liability to development charge if it did. It is, perhaps, significant that the prescribing of improvement lines did not in fact cease in 1947, and that the central government continued to make grants towards the compensation payable by local highway authorities (see Circular No. 696 of 1954 (19)).

Whatever may have been the position in the period 1947 to 1953, I have to consider the position in 1968 in the light of the re-enactment of s. 33 of the Public Health Act, 1925, in s. 72 of the Highways Act, 1959 (20). In the course of argument, I asked counsel for the Minister what, in his submission, the legislature intended when enacting s. 72 of the Act of 1959, since, if his argument for the Minister was right, ample power to prescribe improvement lines was available under the Town and Country Planning Act, 1947. Counsel replied that there were two cases in which the section served a useful purpose. First, if consent had already been given to development of an area which lay both in front of and behind the improvement line, action under the Highways Act, 1959, obviated the necessity for revoking the whole consent and granting a fresh and more limited consent with considerable complications as to the compensation payable to the aggrieved landowner. In the light of the provisions of s. 21 and s. 22 of the Act of 1947, and s. 118 of the Act of 1962, which enable planning permissions to be revoked or modified and specify the conditions on which compensation is payable (21), I am not persuaded that this consideration could explain the enactment of s. 72 of the Highways Act in 1959 or its retention when the Act of 1962 was passed. Secondly, if the planning authority took the view that no improvement line was required, but the highway authority disagreed, the Highways Act, 1959, enabled the views of the latter to prevail, subject to the result of an appeal to quarter sessions. Of course, the landowner suffers precisely the same loss if he is unable to develop his land, whether the embargo is created by a decision of the planning authority or that of the highway authority. It follows that, in the submission of counsel for the Minister, Parliament intended a landowner to be compensated if, but only if, (a) the local authority qua planning authority could not agree with the local authority qua highway authority and (b) the planners did *not* want to restrict development and those concerned with highways did. Compensation would not, however, be payable if the disagreement took the form of the local authority as highway authority not wishing to restrict development and the local authority as planning authority, or the Minister on appeal, taking the view that development should be restricted for highway purposes. This must surely be nonsense.

The Town and Country Planning Act, 1962, and the legislation which preceded

(18) For s. 33 of the Public Health Act, 1925, see 19 HALSBURY'S STATUTES (2nd Edn.) 255.

(19) Paragraph 8 of this Circular is set out at p. 112, letter B, ante.

(20) See p. 110, letters D to F, ante.

(21) For s. 21 and s. 22 of the Act of 1947, see 25 HALSBURY'S STATUTES (2nd Edn.) 521, 522; and for s. 118 of the Act of 1962, see 42 *ibid.*, p. 1087.



it provided a completely general control of development. If, as is the case, Parliament has seen fit not only to retain but to re-enact special provisions for control in relation to particular problems with associated special rights of appeal and to compensation, it cannot, in my judgment, have intended the general legislation to operate in these limited spheres, so as to exclude those rights. Accordingly I accept the bank's contention in so far as it is based on construction of the Act of 1962. A

The bank is also, in my view, entitled to succeed on the alternative ground based on unreasonableness. The complexity of modern society necessitates a multiplicity of controls whereby the interests of the individual are subordinated to those of the community. We remain, however, members of a free society. In such a society a reasonable man faced with the need to restrict the freedom of the individual for the benefit of the community and faced with two possible courses of action, only one of which involves compensating the individual, must surely adopt that course. The Minister, or more accurately the lady who was his alter ego for the purposes of this appeal, has adopted the other course. I do not infer from this that he or she is in any way unreasonable, but I do infer that there has been a misdirection and that due account was not taken of the material matters to which I have referred. B

In these circumstances I can deal succinctly with the bank's further contention that the Minister failed to comply with r. 13 (1) of the Town and Country Planning (Inquiries Procedure) Rules 1965. It is not suggested that the Minister has insufficiently stated the factual basis of the reasoning which led him to dismiss the appeal, and I do not consider that the rules require the Minister to state that he has considered whether or not he has jurisdiction and has concluded that he has. This is probably implicit in the decision itself. They do, however, require him to identify expressly or by reference the factors of which he has taken account in exercising his discretion, since this must be of the essence of his reasons. Counsel for the Minister submits that the availability of the alternative course of action was clearly canvassed in the first and main inquiry and that the Minister has referred to the report of that inquiry which recorded the bank's submission on the point and clearly had the point in mind. I am inclined to accept this submission. If I am wrong, however, and there is no reference to this point having been considered, I should not conclude that the Minister had failed to give his reasons, but that those reasons did not include a consideration of this point, thus making good the bank's submission that the Minister misdirected himself. C

For the reasons which I have given, I shall make an order quashing the Minister's decision. It may well be that the Minister will consider that the novelty of my decision, which disapproves of the planning practice of years, and its potentially far reaching financial consequences render it desirable that he should bring the matter before the Court of Appeal. This is entirely a matter for him. I think that I should, however, point out that uncertainty in this matter can produce grave administrative difficulties. Local planning authorities will not know whether they are entitled to use their powers for purely highway purposes in accordance with the existing practice. Local highway authorities will not know whether they ought to prescribe improvement lines, but will be loath to do so as a purely precautionary measure because of the irreversible financial consequences. I hope, therefore, that the Minister will feel able to reach a prompt decision on whether or not to appeal. If he decides to appeal, I consider that it would be reasonable to make application to the Court of Appeal with a view to securing an early date for the hearing. D

*Minister's decision quashed.* E

Solicitors: *Baylis, Pearce, McMillan & Mott* (for the applicants); *Solicitor, Ministry of Housing and Local Government.* F

[Reported by K. DIANA PHILLIPS, *Barrister-at-Law.*] G

A

## R. v. SMITH (JOAN).

[COURT OF APPEAL, CRIMINAL DIVISION (Davies, L.J., Roskill and Cusack, J.J.),  
March 5, 1968.]

B

*Criminal Law—Practice—Evidence—Witnesses—Accused, if called, should give evidence before any other witness for the defence—Witnesses as to fact should remain outside the court until required to give evidence.*

C

At a trial of a criminal charge the accused, if he gives evidence, should be called before any of his witnesses, and thus should give his evidence before he has heard the testimony of his witnesses; it is also the general rule and practice in criminal cases that witnesses as to fact on each side should remain out of court until they are required to give their evidence (see p. 115, letter H, and p. 116, letter C, post).

D

[As to calling the prosecution's witnesses, and witnesses being ordered out of court, see 10 HALSBURY'S LAWS (3rd Edn.) 416, 417, paras. 762, 763; and as to calling of the accused as a witness, see *ibid.*, p. 421, para. 773; and for cases on the subject, see 14 DIGEST (Repl.) 295, 2726-2741; 319, 3072.]

Cases referred to:

*Briscoe v. Briscoe*, [1966] 1 All E.R. 465; [1966] 2 W.L.R. 205; 130 J.P. 124; Digest (Cont. Vol. B) 50, 421a.

*R. v. Morrison*, (1911), 6 Cr. App. Rep. 159; 75 J.P. 272; 14 Digest (Repl.) 319, 3072.

E

*R. v. Olsen*, (1898), 62 J.P. 777.

### Application.

This was an application by Joan Smith for leave to appeal against her conviction on Sept. 28, 1967, at Inner London Quarter Sessions before the deputy chairman (O. S. MACLEAY, Esq.) and a jury, of driving a motor vehicle when unfit to drive through drink or drugs. She also applied for leave to appeal against her sentence to a fine of £75 and disqualification for holding a driving licence for three years. The main ground of appeal was that the deputy chairman erred in law in insisting that she gave evidence first, before calling any of her defence witnesses (three witnesses being in fact called on her behalf).

F

The authority noted below\* was cited during the argument in addition to the cases referred to in the judgment of the court.

G

*J. J. Smyth* for the applicant.

The Crown was not represented.

H

CUSACK, J., delivered the following judgment of the court: Only one ground for applying for leave to appeal against conviction is relied on by counsel who appears for the applicant in this court. That ground, as set out in the notice of application, is that

"The learned deputy chairman erred in law in refusing to allow defending counsel to call what witnesses he chose in what sequence he chose; the deputy chairman insisted that the accused should be called first."

I

The general rule and practice in criminal cases is that witnesses as to fact on each side should remain out of court until they are required to give their evidence. The reason for this is obvious. It is that if they are permitted to hear the evidence of other witnesses they may be tempted to trim their own evidence. It is certainly the general practice in the experience of all the members of this court that where an accused person is to give evidence he gives evidence before other witnesses who may be called on his behalf. There are, of course, rare exceptions, such as when a formal witness, or a witness about whom there is no controversy, is interposed before the accused person with the consent of the

\*ARCHBOLD'S CRIMINAL PLEADING, EVIDENCE AND PRACTICE (36th Edn.), para. 1329.

court in the special circumstances then prevailing. In the view of this court the general practice to which I have referred is the correct practice which ought to be observed.

The matter was dealt with succinctly as long ago as 1911 when, during the course of the argument in *R. v. Morrison*, LORD ALVERSTONE, C.J., interposed to enquire (1)—“How was it that you called these witnesses before you called the prisoner?” To that counsel replied with engaging frankness—“... Before calling the appellant I wished to know myself what these witnesses had to say.” In response LORD ALVERSTONE, C.J., then said (2):

“In all cases I consider it most important for the prisoner to be called before any of his witnesses. He ought to give his evidence before he has heard the evidence and cross-examination of any witness he is going to call.”

That observation was interposed in the course of argument and was obiter, but it is an authoritative statement which this court reiterates and endorses as correctly stating the law.

We have been referred in the course of argument to two cases. One was *R. v. Olsen* (3), in which the facts were different. It is to be noted also that the Criminal Evidence Act, 1898, had then only recently come in force. The other was a much more recent case, *Briscoe v. Briscoe* (4), which dealt with matters arising from matrimonial proceedings in the magistrates’ court. It is to be observed that in the course of his judgment there KARMINSKI, J., expressly stated (5) that he was not dealing with the practice in criminal cases.

For the reasons that I have indicated the application for leave to appeal against conviction is dismissed.

As this is a question which is still raised from time to time in the course of criminal proceedings, with which alone the court is dealing, it is hoped that the statement which I have read from LORD ALVERSTONE, which is now endorsed by this court, will settle the matter and be accepted as setting out the correct procedure which ought to be followed in future cases. [HIS LORDSHIP then considered the application for leave to appeal against sentence and intimated that the fine and disqualification were appropriate, and that the application for leave to appeal against sentence was dismissed.]

*Applications refused.*

Solicitors: *Wallace, Marsh & Co.* (for the applicant).

[Reported by N. P. METCALFE, Esq, Barrister-at-Law.]

## PRACTICE DIRECTION.

### PROBATE, DIVORCE AND ADMIRALTY DIVISION (DIVORCE)

*Husband and Wife Property—Summary proceedings Application—Procedure by originating summons—Married Women’s Property Act, 1882 (45 & 46 Vict. c. 75), s. 17.*

On and after Apr. 11, 1968, all proceedings under s. 17 of the Married Women’s Property Act, 1882, in the divorce registry will be commenced by an originating summons (fee £4) and will be proceedings in the High Court.

Apr. 11, 1968.

COMPTON MILLER,  
Senior Registrar.

(1) (1911), 6 Cr. App. Rep. 159 at p. 165.

(2) (1911), 6 Cr. App. Rep. at p. 165.

(3) (1898), 62 J.P. 777.

(4) [1966] 1 All E.R. 465.

(5) [1966] 1 All E.R. at p. 466.



# A OAK CO-OPERATIVE BUILDING SOCIETY v. BLACKBURN AND OTHERS.

[COURT OF APPEAL, CIVIL DIVISION (HARMAN, RUSSELL AND SACHS, L.JJ.), December 20, 1967, February 14, 1968.]

B *Land Charge—Estate contract—Registration Name of estate owner—Registration of estate contract in name of "Frank David Blackburn" when true name of estate owner was "Francis David Blackburn"—Registration not a nullity, but effective against purchaser who did not search or searched in wrong name—Search by subsequent intending mortgagee in name that was not estate owner's full correct name—Whether mortgagee deemed to have notice of estate contract—Law of Property Act, 1925 (15 & 16 Geo. 5 c. 20), s. 198 (1) —Land Charges Act, 1925 (15 & 16 Geo. 5 c. 22), s. 10 (2).*

C *Land Charge—Search—Official certificate of search—Conclusiveness—Search in name that was a version of estate owner's name but not his full correct name—Search in name "Francis Davis Blackburn", when true name was "Francis David Blackburn"—Estate contract registered in name "Frank David Blackburn" not revealed by search—Effect of certificate of search—Land Charges Act, 1925 (15 & 16 Geo. 5 c. 22), s. 17 (3).*

D If a land charge is registered in a version of the full name of the estate owner, albeit not a version which is bound to be discovered on search in his correct full names, the registration is not a nullity as against someone who does not search at all or who searches in a name that is not the estate owner's correct full name (see p. 122, letter H, post.)

E *Dunn v. Chapman* ([1920] 2 Ch. 474) considered.

F In 1957 an estate agent, whose true name was "Francis David Blackburn" but who was generally known as "Frank", bought a house, 34 Union Street, Southport. In 1958 he agreed to sell the house to a purchaser; she paid a deposit, entered into possession and thereafter paid agreed instalments on account of the purchase price. She had no copy of the contract. In August, 1959, he executed a second mortgage of the property. At about the end of 1959 an estate contract was registered under the Land Charges Act, 1925, s. 10 (2)\* on her behalf against the name of "Frank David Blackburn", which was intended to refer to her vendor, the estate agent. He applied subsequently to the plaintiff mortgagee for a mortgage. The mortgagee obtained an official certificate of search in the land charges register, applying for search against the name "Francis Davis Blackburn" and giving the proper description of the house. The official certificate bore a note—"No subsisting entries clearly affecting but the following entries which may or may not relate thereto appear". Then it mentioned the name and address "Blackburn, Francis David, 26 Crescent Road, Southport" and gave details of the second mortgage; and a note was added saying "Please note name is as given in the registration". The mortgagee made the advance on mortgage of the house. On appeal from an order for possession made in favour of the mortgagee as against both the vendor and the purchaser,

H **Held:** since the mortgagee had not searched in the correct full names of the vendor (the estate owner) the registration of the land charge (viz., the estate contract) by the purchaser was not a nullity as against the mortgagee; accordingly the mortgagee was deemed to have had actual notice of the estate contract by virtue of s. 198 (1) of the Law of Property Act, 1925, and was not entitled to possession (see p. 122, letters F and H, post).

I Per CURIAM: if a search had been requested by a purchaser in the correct full names of the estate owner the purchaser would have got a clean certificate

\* Section 10 (2), so far as material, is set out at p. 120, letter H, post.

and a clean title by virtue of s. 17 (3)\* of the Land Charges Act, 1925; and a person registering a land charge who was not in a position to satisfy himself what were the correct full names of the estate owner ran that risk (see p. 122, letter G, post).

Decision of *UNGOED-THOMAS, J.* ([1967] 2 All E.R. 340) reversed.

[**Editorial Note.** A personal search in an estate owner's correct full names will not lead necessarily to discovery of a land charge registered in an incorrect version of those names, and the searcher in such a case will not have the protection afforded by s. 17 (3) of the Land Charges Act, 1925; a moral of the present decision is, therefore, that personal search of the register of land charges, though lawful, is unwise, for it does not give as complete protection as an official search (see p. 122, letter I, to p. 123, letter A, post).

As to registration of land charges being effected in the name of the estate owner, see 23 *HALSBURY'S LAWS* (3rd Edn.) 57, para. 106; and as to registration constituting notice, see *ibid.*, pp. 60, 61, para. 113; and as to the conclusiveness of an official certificate of search, see *ibid.*, p. 98, para. 205; and for cases on that subject, see 35 *DIGEST* (Repl.) 312, 285, and ante, p. 25.

For the Law of Property Act, 1925, s. 198, see 20 *HALSBURY'S STATUTES* (2nd Edn.) 821.

For the Land Charges Act, 1925, s. 10 (2), s. 17 (3), see 20 *HALSBURY'S STATUTES* (2nd Edn.) 1077, 1094.]

Case referred to:

*Dunn v. Chapman*, [1920] 2 Ch. 474; 89 L.J.Ch. 385; 123 L.T. 415; 40 *Digest* (Repl.) 180, 1431.

### Appeal.

This was an appeal by the third defendant, Mrs. Phyllis Cairnwen Caines, from an order of *UNGOED-THOMAS, J.*, dated Jan. 19, 1967, for possession of 34 Union Street, Southport, suspended for six weeks as mentioned at [1967] 2 All E.R. p. 344, letter H. The order was made in an action (reported [1967] 2 All E.R. 340) begun by originating summons issued by the plaintiff mortgagee, Oak Co-operative Building Society, against (i) Francis David Blackburn, the mortgagor of the property, (ii) Southport Mortgage Co., Ltd., the second defendant and a second mortgagee of the property, and (iii) the third defendant, the purchaser. In that action the mortgagee claimed, among other relief, delivery of possession of the property, 34 Union Street, Southport, being premises comprised in a mortgage by way of legal charge made on Dec. 4, 1962, between the first defendant of the one part and the plaintiff mortgagee of the other part.

Neither the first defendant, who was bankrupt, nor the second defendant, who as second mortgagee was not concerned with the proceedings, appeared or were represented.

*B. C. Maddocks* for the third defendant, the appellant purchaser.

*D. M. Burton* for the plaintiff mortgagee.

*Cur. adv. vult.*

Feb. 14. **RUSSELL, L.J.**, read the following judgment of the court: The mortgagor, an estate agent, lived in Southport. His full names were Francis David Blackburn. In the conveyance and mortgage later mentioned he was so described. He carried on business in Southport as Frank D. Blackburn or Frank David Blackburn or Frank Blackburn and he was generally known as "Frank" and not as "Francis". He owned a freehold house, No. 34 Union Street, Southport, Lanes., which was conveyed to him on sale in December, 1957, by a Mrs. Allinson, and which he simultaneously mortgaged to a building society. On Jan. 10, 1958, he agreed in writing to sell the house to Mrs. Caines (the appellant purchaser) for £2,000 payable by instalments consisting of capital

\* Section 17 (3), so far as material, is set out at p. 121, letter A, post.

- A** and interest payable over a period of fifteen years with a deposit of £100. No solicitor acted; and the purchaser received no copy of the agreement. The purchaser moved into occupation and has lived there ever since, paying the instalments up to April, 1965. She has paid in all £700 and has saved the instalments due since then. No copy of the contract is available. It is not known in what version of his name the mortgagor figured in the contract.
- B** It was not then registered as a land charge. In August, 1959, the mortgagor executed a puisne second mortgage of the property. In December, 1959, the purchaser for some reason visited a solicitor. The solicitor applied to register the contract as an estate contract, a land charge of Class C (iv), against the property 34 Union Street. In this application the name of the estate owner was given as "Surname—Blackburn: Christian names—Frank David". In that name the
- C** land charge was registered: nothing was said to the mortgagor, who was not asked for a copy of the contract.

In December, 1962, the mortgagor mortgaged the property to the Oak Co-operative Building Society (the respondent mortgagee), paying off the existing first and second mortgages. He paid only two instalments in February and May, 1963, and in June, 1965, the mortgagee roused itself from torpor and started

**D** proceedings claiming payment, possession, foreclosure and sale, including a claim for possession against the purchaser. Possession was ordered against her (1) and she appeals.

The question is whether her estate contract is valid against the subsequent legal charge to the mortgagee as being effectively registered as an estate contract, or whether the use of the name "Frank" rather than "Francis" invalidates it.

- E** As a matter of law it has been held that the respondent mortgagee's attempt to search the register before completing the mortgage was ineffective, and there is no respondent's notice on this point, so that the situation is as if there had been no attempt to search. The facts of the attempt are not however without interest. The application for an official search certificate was against the name "Francis Davis Blackburn". The application and the official certificate
- F** were in the following form so far as material. The application is Form L.C.11:

"We hereby apply for an official search to be made in the alphabetical index to the registers kept under the above Acts for any subsisting entries therein under the undermentioned names, addresses and descriptions affecting land in the county of Lanes. . . . place or district of Southport, known as 34 Union Street, Southport [then, in the appropriate spaces]

**G** Surname (in block letters) BLACKBURN. Christian names (in block letters) FRANCIS DAVIS. All addresses, title, trade or profession to be set out below: 34 UNION STREET, SOUTHPORT, LANCs."

34 Union Street, Southport, was not, of course, Blackburn's address. That was signed by the mortgagee's solicitor, Marcus Davis, on Dec. 1, 1962. The

**H** official certificate was in the following form:

"It is hereby certified that the official search applied for has been made up to the closing of the office on the date given on the official stamp below [which was Dec. 3, 1962]. The result is as follows [then a rubber stamp] No subsisting entries clearly affecting but the following entries which may or may not relate thereto appear":

- I** and there appears in the form "Name and address, Blackburn, Francis David, 26 Crescent Road, Southport, Lanes." There follow then details of the second puisne mortgage to which we have already referred, and a note saying "Please note name is as given in the registration"—that being a reference to the difference between "David" and "Davis".

The whole system of registration of this class of land charge is initially dependent on an index of names arranged in alphabetical order. The inspecting

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(1) See [1967] 2 All E.R. 340; [1967] Ch. 1169.



official might have given a nil certificate having regard to the name submitted: but clearly he noticed this other name in going through the relevant index and thought it appropriate to turn up the register and to refer to the other entry in the manner indicated. It was, of course, as we have said, the puisne second mortgage already referred to of which the mortgagee, we are told, was already aware. The official did not read further in the index: had he moved on a bit from "Blackburn, Francis David"—how far we know not—he would have reached "Blackburn, Frank David" and might have turned up the register and noticed that the property in question was subject to a land charge and would have referred to it also in the certificate. That would have blown the proposed transaction sky-high. It is we think clear that the official did not read further and that if the solicitor applying for search had not written "Davis" instead of "David" (his own name, incidentally, was Davis) the official certificate would not have noticed the purchaser's estate contract, and the purchaser would be out of court by virtue of s. 17 (3) of the Land Charges Act, 1925. We say that the transaction would have been blown sky-high because even the respondent mortgagee would not have ignored the patent defect in the mortgagor's title; and we say even the respondent mortgagee, because it was made manifest that the mortgagor's application form was a pack of lies. It stated that he was proposing to buy 34 Union Street with vacant possession (intending to occupy the property) from Mrs. Allinson of that address, for £2,000 of which he was finding £500 from his own resources. But it was from Mrs. Allinson that he took the conveyance *five years before*: and that fact is stated in the mortgage on which the mortgagee relies: moreover the puisne mortgage by the mortgagor was dated three years before, as appeared from the official search certificate. These discrepancies however the mortgagee and its then solicitor (also we are told the mortgagor's solicitor) took in their stride.

The question therefore is whether there was a valid registration of the estate contract. If it was such, then under s. 198 (1) of the Law of Property Act, 1925, the mortgagee had deemed actual notice of the estate contract and of its registration, whether or not it had on the facts actual or constructive notice of the purchaser's rights. If it was not such, then under s. 199 (1) (i) of the Law of Property Act, 1925, it is provided that the mortgagee should not be prejudicially affected by notice of the estate contract (even if it had it) and under s. 13 (2) of the Land Charges Act, 1925, the estate contract was void as against the mortgagee.

Section 10 (1) of the Land Charges Act, 1925, provides that the following classes of charges on or obligations affecting land may be registered as land charges in the register, and Class C (iv) is that now relevant. Section 1 (1) requires the registrar to keep a register of land charges, and s. 1 (2) requires that an alphabetical index in the prescribed form shall be kept of all entries in the register: this, as indicated, is an alphabetical index of the names of estate owners, and (see later) contains against the name *inter alia* a reference to the appropriate place in the register where particulars of land charges are noted. Section 10 (2) requires that

"A land charge shall be registered *in the name* of the estate owner whose estate is intended to be affected . . ."

and this really is the crux of the present case. Section 13 (2) we have already mentioned. Section 16 enables anyone to search in any register or index for himself. Section 17 provides for an official search. A proposing purchaser (for example) may lodge a requisition for such search and thereupon, by s. 17 (2) the registrar shall

"make the search required, and shall issue a certificate setting forth the result thereof."

Subsection (3) provides that in favour of the intending purchaser as against the person interested under the instrument (here the estate contract)—

- A "the certificate, according to the tenor thereof, shall be conclusive, affirmatively or negatively, as the case may be."

Subsection (4) provides that every such requisition shall be in writing

- B "specifying the name against which he desires search to be made, or in relation to which he requires a certificate of result of search, and other sufficient particulars."

Section 19 (1) authorises the Lord Chancellor to make general rules for carrying the Act of 1925 into effect, and in particular

- C "(a) as to forms and contents of applications for registration . . . requisitions for and certificates of official searches, and regulating the practice of the registry in connexion therewith . . ."

The rules require applications for registration and searches to be made on, and to furnish the particulars set forth in, such forms as the registrar may determine. They also require (2) the register of land charges to contain "*the name*, address, and description of the estate owner whose estate is intended to be affected". As has been noticed, the form of application for registration requires the "*Surname and Christian names*" of the estate owner to be stated; and the form of requisition for a search requires the same particulars.

- E It might be convenient to set out the result of enquiry made by us as to the mechanics of the land charges register. The alphabetical index is contained in about ten thousand loose-leaf binders covering the whole country, arranged in alphabetical order. Special provision is made in the case of very common names such as Smith, in that this section is broken down by counties: and indeed there is even further such breakdown among for example John Smiths. Each binder contains about 250 names. Each entry in a binder besides the name (and we think address) indicates the class of charge, a reference number to the register, the date of registration, the county and parish where the land is situate, and a short description of the land. On turning up the reference number in the register itself the full details of the land charge are revealed. If a person wishes to search individually—without an official search—he attends, fills in the name against which he wishes to search, and a messenger brings him the appropriate binder or binders. We assume in the case of a common name such as is mentioned above he would also have to state the county in question. If a person searches personally, and misses a charge properly registered against the land in question, he does not of course have the benefit that is conferred by a nil official search certificate under s. 17 (3).

The real problem is, what is meant by the name or the names of the estate owner in this legislation?

- H As a matter of theoretical approach it is obvious that it is intended or hoped by the legislation that every registered land charge will be safeguarded by registration because due diligence in search will reveal it: and correspondingly that every duly diligent search will reveal every registered land charge affecting the land to be purchased. It is realised that if an official search certificate is issued there may be a blunder for which some innocent person must suffer, and s. 17 (3) provides, for example, that if a nil certificate is given the owner of the land charge suffers, however valid his registration. It would be supposed, I however, that it would be intended to reduce error to a minimum. What then is meant by the requirement that the name—surname and Christian names—of the estate owner be given when requisitioning a search? People use different names at different times and for different purposes; but the matter now under consideration relates to two things: first, the investigation into the soundness of the paper title of a proposed vendor by a proposed purchaser: second, the attempt to prevent by registration the disposal by the owner of that paper title

of the legal estate in a manner which will override the interest of the owner of the land charge. A

In the case of a request for an official search, which of course takes place before completion after title examined, we can only think that the name or names referred to in the request should be that or those appearing on the title. A nil certificate here as to Francis Davis Blackburn would not have served to override the purchaser's land charge had it been registered in the name Francis David Blackburn, though it *could* have been issued. B

In most cases of contracts to purchase land nowadays many of the formalities precede exchange of contracts, and indeed those acting for the vendor would have used in the contract the name of the proposed vendor as appearing on the title. There are other cases, however, such as the present, where the contract is much less formally arrived at, and the purchaser has no ready means of ascertaining the "title" names of the vendor. It would seem to be a great hardship on a purchaser registering in the name by which the vendor ordinarily passed that his registration should be entirely without operation, which is of course the submission of the mortgagee in this case. We have said earlier that if in this case the search had been against "Francis David Blackburn" and the certificate had referred to the fact that an estate contract was registered against "Frank David Blackburn" in respect of this property, the proposed mortgage transaction would have been blown sky-high. If, however, the mortgagee's contention is correct the registration would be no registration at all, and by force of s. 199, of the Law of Property Act, 1925, and s. 13 (2) of the Land Charges Act, 1925, the mortgagee could have carried through the mortgage ignoring the estate contract though in fact aware of its existence. Indeed, if the mortgagee had contracted to grant a mortgage loan subject to getting good title, he would have been in breach of his contract by refusing to grant it. C

We have come to the conclusion that the registration on this occasion ought not to be regarded as a nullity simply because the formal name of Blackburn was Francis and not Frank, and notwithstanding that Frank as a name is not merely an abbreviation or version of Francis, but also a name in its own right, as are also for example Harry and Willie. We are not led to this conclusion by the fact that initials would seem to suffice for registration of a *lis pendens* (see *Dunn v. Chapman* (3)), at least under the then legislation and rules: for presumably a request for search under a full name having the same initials should throw up all entries under those initials. We take a broader view that so far as possible the system should be made to work in favour of those who seek to make use of it in a sensible and practical way. If a proposing purchaser here had requested a search in the correct full names he would have got a clean certificate and a clear title under s. 17 (3) of the Land Charges Act, 1925, and would have suffered no harm from the fact that the registration was not in such names: and a person registering who is not in a position to satisfy himself what are the correct full names runs that risk. If, however, there be registration in what may be fairly described as a version of the full names of the vendor, albeit not a version which is bound to be discovered on a search in the correct full names, we would not hold it a nullity against someone who does not search at all, or who (as here) searches in the wrong name. D

There is one objection to this approach, and that is that provision is made for personal as distinct from official search: a personal searcher in the full correct name in the present case would, it seems, not have encountered the registration in the present case: he would not have had the benefit of an official certificate under s. 17 (3) and on the contrary would have been affected by a deemed actual notice of the estate contract under s. 198 of the Law of Property Act, 1925. We think, however, that anyone who nowadays is foolish enough to search personally deserves what he gets: and if the aim of the statute is to E



A arrive at a sensible working system that aim is better furthered by upholding a registration such as this than by protecting a personal searcher from his folly.

We do not feel we need shed any tears for the respondent mortgagee, which could easily have protected itself by a proper official search but which owing to the error of its solicitor it never made. It could indeed have taken the precaution of investigating the discrepancy between the proposed mortgage and the application which the mortgagor filled in for it, to which we have already drawn attention; or it could without great trouble have caused somebody to visit the property in question, when they would have found the purchaser living there.

We allow the appeal.

C *Appeal allowed. Declaration and order for possession discharged; in lieu thereof, declaration that registration effective. Leave to appeal to House of Lords refused.*

Solicitors: *Jaques & Co.*, agents for *Brighouses*, Southport (for the purchaser); *Brown, Turner, Compton, Carr & Co.* (for the mortgagee).

[*Reported by HENRY SUMMERFIELD, Esq., Barrister-at-Law.*]

D

E

### PRACTICE DIRECTION.

#### PROBATE, DIVORCE AND ADMIRALTY DIVISION (DIVORCE).

F *Divorce—Practice—Trial—County court list—Date for hearing—Notice of setting down—Subsequent change of date needing good cause and consent of all parties.*

A date for the hearing of a case set down in the county court list for hearing at the Royal Courts of Justice will be fixed by the clerk of the rules on presentation of the notice of setting down either personally or by post to Room 772, Probate, Divorce and Admiralty Division, Royal Courts of Justice, Strand London, W.C.2.

G If within fourteen days of the appearance of the cause in the printed list a date for hearing has not been fixed, the cause will be listed as soon as time is available unless the clerk of the rules is informed of a valid reason why a date for hearing should not be fixed.

H As notice of the date of hearing must be given to all parties no subsequent change of date can be made except upon good cause being shown and with the consent of all parties.

I Cases listed for hearing before Oct. 2, 1967, in the undefended list and not yet heard have been transferred to the reserve list and may be restored to the appropriate current list on filing a notice to restore.

COMPTON MILLER,  
Senior Registrar.

Apr. 10, 1968.

## JACOBS v. CHAUDHURI.

A

[COURT OF APPEAL, CIVIL DIVISION (Harman, Davies and Winn, L.J.J.), January 12, 15, 16, February 2, 1968.]

*Landlord and Tenant—New tenancy—Business premises—Application—Joint tenants—One joint tenant only applying—Applicant in sole occupation, carrying on former partnership business—Whether applicant “the tenant” and so entitled to apply for grant of new tenancy—Landlord and Tenant Act, 1954 (2 & 3 Eliz. 2 c. 56), s. 24 (1), s. 41.*

B

Premises were let to two tenants, J. and W., jointly for the purposes of the business which they began to carry on there in partnership. The partnership was dissolved; J. continued to carry on the business and a sum was paid by J. to W. in satisfaction of all W.'s rights in the business. The landlord served notice terminating the tenancy under s. 25 of the Landlord and Tenant Act, 1954. J., alone, applied under s. 24 (1)\* of the Act of 1954 for a new tenancy. On appeal from dismissal of the application,

C

**Held** (DAVIES, L.J., dissenting): there was no jurisdiction to entertain an application by one only of two joint tenants, because the words “the tenant under such tenancy” in s. 24 (1) of the Landlord and Tenant Act, 1954, referred to the persons to whom the tenancy was granted or their successors in title, viz., the joint tenants; accordingly J.'s application had been rightly dismissed (see p. 128, letter I, and p. 135, letter C, post).

D

*Howson v. Buxton* ([1928] All E.R. Rep. 434) distinguished.

Per HARMAN, L.J.: even if s. 41 of the Landlord and Tenant Act, 1954, applied on the footing that J. and W. were trustees of the tenancy for J., it did not enable J. alone to apply for a new tenancy, but only the trustees could so apply (see p. 129, letter C, post).

E

Appeal dismissed.

[As to right to apply for a new tenancy of business premises, see 23 HALSBURY'S LAWS (3rd Edn.) 891, para. 1714; and for cases on the subject, see DIGEST (Cont. Vol. A) 7417**jb**, et seq.]

F

For the Landlord and Tenant Act, 1954, s. 24 (1), s. 41, see 34 HALSBURY'S STATUTES (2nd Edn.) 409, 424.]

Cases referred to:

*Brandling v. Barrington*, (1827), 6 B. & C. 467; 5 L.J.O.S.K.B. 181; 108 E.R. 523; 44 Digest (Repl.) 272, 992.

G

*Fairclough (T. M.) & Sons, Ltd. v. Berliner*, [1930] All E.R. Rep. 170; [1931] 1 Ch. 60; 100 L.J.Ch. 29; 144 L.T. 175; 31 Digest (Repl.) 545, 6666.

*Heydon's Case*, (1584), 3 Co. Rep. 7a; 76 E.R. 637; 44 Digest (Repl.) 203, 149.

*Howson v. Buxton*, [1928] All E.R. Rep. 434; 97 L.J.K.B. 749; 139 L.T. 504; 2 Digest (Repl.) 80, 452.

*River Wear Comrs. v. Adamson*, [1874-80] All E.R. Rep. 1; (1877), 2 App. Cas. 743; 47 L.J.Q.B. 193; 37 L.T. 543; 42 J.P. 244; 42 Digest (Repl.) 1135, 9450.

H

*Woodward v. Earl of Dudley*, [1954] 1 All E.R. 559; [1954] Ch. 283; [1954] 1 W.L.R. 476; 2 Digest (Repl.) 15, 66.

## Appeal.

Harry Jacobs, one of two joint tenants of the Theatre Royal, Margate, Kent, appealed against the decision of Her Honour DEPUTY JUDGE DEBORAH ROWLAND, at Margate county court on Apr. 28, 1967, refusing his application under s. 24 (1) of the Landlord and Tenant Act, 1954, for a new lease of the premises. The other joint tenant, a Mr. Wootton, did not join in the application, which was opposed by the landlord, Dhurjati Prasad Chaudhuri, who in his notice to terminate the tenancy had stated that he would not oppose the grant of a new

I

\* Section 24 (1), so far as material, is printed at p. 126, letter A, post.

A tenancy, but contended that the court could not grant a new tenancy to only one of the joint tenants.

*M. O'Connell Stranders, Q.C., and B. T. Buckle for the applicant.*  
*J. S. Colyer for the landlord.*

*Cur. adv. vult.*

B Feb. 2. The following judgments were read.

HARMAN, L.J.: This is an appeal from the decision of the deputy county court judge at Margate county court under the Landlord and Tenant Act, 1954, whereby Her Honour DEPUTY JUDGE DEBORAH ROWLAND refused an application by the applicant Harry Jacobs for a new tenancy of an extremely dilapidated building at Margate which he had been conducting as a bingo hall. The deputy judge delivered a most careful and lucid judgment for which this court is much obliged to her, and the case has been very well argued here and raises a point of some difficulty on which I confess my mind has wavered from time to time.

The applicant, a man with apparently some experience of running clubs, became friendly in 1964 with a Mr. Wootton and the two decided to embark on a joint adventure in running a bingo hall in this theatre, and for that purpose they entered into a lease dated Nov. 8, 1965, the respondent being the landlord, whereby he demised to Messrs. Jacobs and Wootton (there defined as the tenants, which expression should include their successors in title) the Theatre Royal, Margate, for a term of one year from Michaelmas, 1965, at a rent of £1,500 a year plus an insurance covenant. The lease contained joint and several covenants by the tenants to keep the demised premises in repair (which of course would include the obligation to put them in repair) and other covenants usual in a repairing lease: further to use the property as a bingo hall only and not to assign, underlet, charge or part with possession, this last being an absolute prohibition. The lease also contained the usual power of re-entry, a special right to terminate the lease if the roof of the building proved to be beyond repair, and an option to "the tenants" to take a further lease at the expiration of the current term for a period of two years at the same rent and on the same terms except for the option.

The tenants apparently entered into possession at the beginning of October, 1965, or thereabouts and carried on the bingo hall with some success, but towards the end of November they fell out and Mr. Wootton left and handed over the property and the conduct of the business to the applicant, who has carried it on ever since and has apparently performed all the tenants' obligations under the lease.

There have been comparatively lengthy negotiations for the winding-up of the partnership, but that was completed in January, 1967, when the accounts were agreed on the footing that the partnership was dissolved as from Nov. 26, 1965, and in February, 1967, a sum of over £1,300 was paid to Mr. Wootton in satisfaction of all his rights in the business, whether to share the capital or profits. From that time on, anyhow, Mr. Wootton had no beneficial interest in the business but would be entitled to indemnity from the applicant against liability under the lease, for that is still subsisting, although only granted for a year from Michaelmas, 1965, having regard to Part 2 of the Landlord and Tenant Act, 1954. The long title of the Act of 1954 reads (so far as relevant):

I "An Act . . . to enable tenants occupying property for business, professional or certain other purposes to obtain new tenancies in certain cases . . ."

This is brought about by Part 2, which begins, in s. 23 (1),

"Subject to the provisions of this Act, this Part of this Act applies to any tenancy where the property comprised in the tenancy is or includes premises which are occupied by the tenant and are so occupied for the purposes of a business carried on by him or for those and other purposes."



Section 24 provides:

“(1) A tenancy to which this Part of this Act applies shall not come to an end unless terminated in accordance with the provisions of this Part of this Act; and, subject to the provisions of s. 29 of this Act, the tenant under such a tenancy may apply to the court for a new tenancy—(a) if the landlord has given notice under the next following section to terminate the tenancy, ...”

Section 25 allows the landlord to terminate the tenancy. It provides:

“(1) The landlord may terminate a tenancy to which this Part of this Act applies by a notice given to the tenant in the prescribed form specifying the date at which the tenancy is to come to an end (hereinafter referred to as ‘the date of termination’): Provided that this subsection has effect subject to the provisions of Part 4 of this Act as to the interim continuation of tenancies pending the disposal of applications to the court.”

It is under that Part of the Act that this tenancy is at present going on. Section 29 provides:

“(1) Subject to the provisions of this Act, on an application under sub-s. (1) of s. 24 of this Act for a new tenancy the court shall make an order for the grant of a tenancy comprising such property, at such rent and on such other terms, as are hereinafter provided.”

Section 41 provides:

“(1) Where a tenancy is held on trust, occupation by all or any of the beneficiaries under the trust and the carrying on of a business by all or any of the beneficiaries, shall be treated for the purposes of s. 23 of this Act as equivalent to occupation or the carrying on of a business by the tenant; ...”

Now the landlord here did serve a notice to terminate under s. 25 which is to be taken as good notice, the date of termination being Feb. 27, 1967. This notice stated that the landlord would not oppose an application for a new tenancy. It was served on both tenants, but they had by this time fallen out and Mr. Wootton was not willing, as afterwards appeared, to join in an application for a new tenancy. This was not unnatural as he had no interest in the business, subject to his share of the assets being paid out to him. The applicant however was desirous of obtaining a new lease, and on Oct. 18, 1966, he served on the landlord what purported to be a counter-notice under s. 29 and followed this with an application to the court applying for a new tenancy for himself for a term of two years from February, 1967, the date on which the landlord's notice expired. The applicant's notice was accompanied by a letter in these terms:

“Oct. 18, 1966. The Theatre Royal, Margate. As solicitors for one of your tenants [the applicant] we enclose herewith notice under the Landlord and Tenant Act, 1954, in answer to your notice dated Aug. 23, 1966. This notice is sent by registered post . . .”

and so forth. It is to be observed that the solicitors describe the applicant as “one of your tenants”. The question is whether the applicant as one of the two joint tenants to whom the lease was granted in 1965 is a person entitled within the Act of 1954 to apply for and obtain a new tenancy.

The landlord objects to the grant of a new tenancy to the applicant, according to his answer, on the ground that the court has no jurisdiction to entertain the application because it is not made by the tenants under the lease but by only one of them. It appeared however in the course of the hearing that this was not the landlord's real reason, but that he is desirous of granting a tenancy to Mr. Wootton for a longer term and at a higher rent than would be exigible under the Act of 1954, and the applicant's grievance is that he who has built up the business and created the goodwill and has been ever since November, 1965, the sole occupier is in fact being edged out by his former partner, who

A admittedly has no rights at all under the statute, so that the applicant who has borne the burden and heat of the day as well as paying the rent and complying with covenants of the lease is being defrauded of his just reward. It is, says the applicant, the object of the Act of 1954, as its long title shows, to grant security of tenure to those who have built up businesses on leasehold property and this object is being frustrated by the machinations of the landlord and  
B Mr. Wootton. I cannot help sympathising with this view, but the question remains whether the statute entitles the applicant to a new lease or no: it is not a question of discretion of the court, having regard to the form of s. 29 (1).

The applicant bases his case on the fact that he, and he alone, is the beneficial owner of what was formerly the partnership property and that Mr. Wootton has no beneficial interest at all and is merely a bare trustee of the lease which  
C would have been assigned to the applicant but for the prohibition against assignment contained in it. Under these circumstances, says the applicant, he does or should be held to come within s. 23 (1) as being "the tenant" occupying the premises for the purposes of a business carried on by him. He also says that he satisfies s. 24 (1) as being "the tenant under such a tenancy", that is to say a tenancy within Part 2 of the Act of 1954. He calls in aid the decision of  
D SCRUTTON, L.J., in *Howson v. Buxton* (1). That was a case under s. 12 of the Agricultural Holdings Act, 1923, under which "tenants" may have compensation for disturbance in respect of the removal of goods and chattels or agricultural machinery. The tenancy there was in favour of two people, B. and W., as joint tenants, but W. had no interest in the goods and chattels or the agricultural machinery which was the subject of compensation, having merely been joined  
E at the request of the landlord as a surety for the rent. B., who alone was entitled to the subject-matter of compensation, gave notice to the landlord as the Act of 1923 required that he was about to make a claim, and this was rejected by the landlord as W. had not joined in the notice. It was held by SCRUTTON, L.J., that to avoid the injustice of depriving B. of his compensation a notice by one tenant was good, it being the object of the Act of 1923 to provide a remedy for  
F the person suffering the loss and in that case B. alone was the sufferer. SCRUTTON, L.J., said this (2):

"What is now said is that when the Act uses the word 'tenant', and says that the tenant must give notice, if the tenancy is a joint tenancy, the notice must be given by all the tenants, and that notice by one of two  
G joint tenants will not do. I have looked through the Act carefully, and I think there is a good deal to be said for the view that the legislature had not definitely present to its mind the fact that there might be joint tenants, and that it has continually used the phrase 'tenant' without any nice consideration of what would happen if there were more than one tenant. It did apparently, on one occasion, realise in s. 18 that there might be more than  
H one landlord, i.e., when there had been one letting of a whole piece of land and the holding had become divided into different parcels by different people, but it does not show any particular appreciation of the fact that there might be two joint tenants. I can quite see that on future occasions on other sections of the Act, difficult questions might arise. For instance, s. 12 does not apply where the tenant who gave the notice is a person who has become  
I bankrupt. I am not at all clear as to what is to happen in the case of two joint tenants, one of whom becomes bankrupt: see s. 12 (1) (d). There is another clause about the death of the tenant [he discusses that] . . . But the provisions in sub-s. (6) of s. 12, and sub-s. (2) of s. 13, do show that Parliament had present to its mind that the compensation to be given was to a person who had household goods or implements which he had to remove owing to the termination of the tenancy, and by the removal or

(1) [1928] All E.R. Rep. 434; 139 L.T. 504.

(2) 139 L.T. at p. 506; [1928] All E.R. Rep. at p. 437.

sale of which he suffered damage. It is clear that one mischief which it was intended to avoid was the loss caused to people who had to remove their household goods or sell their agricultural implements at the termination of the tenancy, and it would be an extremely common thing that one tenant might own the household goods and the agricultural implements and might suffer loss by having to remove them, and that a joint tenant might suffer no loss at all. That is the mischief which Parliament intended to deal with and to provide a remedy for, and I think I am justified in adopting the construction that where a tenant suffers damage by having to move his household furniture and his agricultural implements, that tenant, though one of two or more joint tenants, can recover by giving a notice for arbitration and proving damage caused to him . . . The argument of counsel for the landlord would, I think, logically be that when the Act talks about the tenant and his household goods, that, in the case of a joint tenancy, must mean the goods of the joint tenants, and that the goods of one joint tenant would not be sufficient to support a claim. That argument seems to me so contrary to the mischief which the Act intends to remedy that I am justified in considering, as I do, that the Act avoids it."

In effect he decided that, in order to prevent the injustice which would otherwise ensue, notice by one tenant was sufficient. GREER, L.J., expressed grave doubts about this view and decided the case on another ground, namely that B. was the agent of himself and his co-tenant. SANKEY, L.J., decided the case on the ground that W. was a mere surety and was not in a position, therefore, to make a claim having no interest in the goods. He did, however, say that he agreed with the reasons SCRUTTON, L.J., gave. I am far from saying that this decision is wrong, but it is clearly distinguishable from the present case because there the subject-matter of the compensation was the property of one of the tenants only and he had a several right to it, whereas here the tenancy which had the right to a new lease was jointly owned by the two. I do not feel constrained by the decision in that case to decide in favour of the applicant.

The landlord on the other hand argued that the tenant must be the person or persons to whom the lease was granted or their successors in title. The landlord admits that the applicant is beneficially the sole owner of the business and all its assets, including the lease, but he says that this is irrelevant as Part 2 of the Act of 1954 is dealing with the legal estate and not the equities behind it. The Act of 1954 made an inroad, so to speak, on the common law rights of landlords to resume possession of their property when a lease expired and this ought not to be stretched. The landlord knew, when he made the demise, that the persons to whom it was made might acquire statutory rights of renewal but not that one of them severally might have such a right. The landlord points out that the wide definition of the word "tenant" contained by reference in s. 50 of the Act of 1954 does not apply to Part 2 but only to Part 3, and argues from this that only a person who can legally be described as tenant and not "any person entitled in possession to the holding under any contract of tenancy" under the extended definition applying to Part 3 can be entitled. In my view it is significant that this wide definition is not imported into Part 2 of the Act of 1954. The landlord also relies on MAUGHAM, J.'s decision in *T. M. Fairclough & Sons, Ltd. v. Berliner* (3) which certainly does support his submission by way of illustration.

On the whole I conclude that the landlord's argument must prevail. It is to my mind supported when one considers the option clause. It is admitted that one of the two joint tenants could not alone exercise that option, and if the word "tenants" there means both the joint tenants in connexion with the granting of a new lease it is illogical that one of them should be entitled to exercise a statutory right likewise given to "the tenant", which word, of course, includes the plural. I would therefore dismiss the appeal.



A I ought perhaps to add that there was a deal of discussion in the county court on a point taken by the applicant on s. 41 of the Act of 1954. This was rejected by the judge, rightly in my opinion, and in fact no such point was taken before us, nor was it suggested here, as it was below, that the fact that the applicant alone had paid the rent and the landlord had accepted it created a new tenancy in the applicant.

B There is a possible alternative view, namely, that s. 41 does apply to this case on the footing that the applicant and Mr. Wootton hold the lease as trustees for the applicant. In such a case that section provides that the carrying on of the business by the beneficiary (the applicant) under the trust is equivalent to a carrying on by the tenant (the trustees) who may therefore exercise the statutory right. If so, this does not enable the beneficiary to apply for a new tenancy: only the trustees can do this. This view therefore will not enable the applicant alone to succeed.

DAVIES, L.J.: In this case I have the misfortune to differ from the conclusion reached by my lords, and by the deputy county court judge in her full and careful judgment.

D The purpose of Part 2 of the Landlord and Tenant Act, 1954, is, as its long title states,

“...to enable tenants occupying property for business... purposes to obtain new tenancies in certain cases...”

It applies (by s. 23 (1))

E “...to any tenancy where the property comprised in the tenancy is or includes premises which are occupied by the tenant and are so occupied for the purpose of a business carried on by him...”

It is only if the tenancy is such a one that the provisions of the Act of 1954 come into effect: continuation of the tenancy and application for a new tenancy (s. 24 (1)); notice of termination by the landlord (s. 25); counter-notice by the tenant (s. 29 (2)); grant of a new tenancy (s. 29 (1)).

F I would venture respectfully to point out in the first place that the determination of this appeal in favour of the landlord would on the facts appear to amount to a decision not merely that the applicant had no locus standi to serve a counter-notice or to apply for a new tenancy but that the Act of 1954 had no application at all to the tenancy as from Nov. 26, 1965. For from that date Mr. Wootton, though a tenant, was not a tenant in occupation for the purposes of a business carried on by him or at all; and on the construction of the Act of 1954 which has found favour with my lords it seems to me inescapable that s. 23 (1) applies only where the premises are occupied by the tenants for the purposes of a business carried on by them. This would mean in the present case that even if Mr. Wootton had been prepared to join with the applicant in applying for a new tenancy the court would have had no jurisdiction since only one of the tenants was in business occupation. This result is so surprising as, in my view, to raise doubts as to its correctness.

H The facts of the present case are very special. The applicant was one of two joint tenants but as a result of the dissolution of the partnership he was the only person beneficially interested in the tenancy and was, in effect, one of two trustees for himself. He was the only occupant; and his occupation was for the purposes of a business carried on by himself.

I The Act of 1954, like the Agricultural Holdings Act, 1923, with which *Howson v. Buxton* (4) was concerned, does not deal expressly with joint tenants. In that case SCRUTTON, L.J., pointed out that fact in the first passage read by HARMAN, L.J., in his judgment, which I will forbear to read again. The facts in *Howson v. Buxton* (4) were of course entirely different from those in the present case, and the judgment of GREER, L.J., was based on a much narrower ground

than were the judgments of SCRUTTON and SANKEY, L.J.J., but, as I think, the majority judgments are directly in point here as to the principles to be applied in construing the words "the tenant" in their application to a joint tenancy. A

In considering the observations in that case, one should, I think, look first at the argument of counsel for the unsuccessful landlord (5):

"The word 'tenant' must mean the two tenants, so that if a claim for compensation is made, both tenants must be party to it... [The Act] only speaks of 'the tenant', and Parliament appears to have failed to make provision for the case of joint tenants. The scheme of the Act is self-contained and depends for its enforcement on a literal and strict obedience to its provisions. The expression 'tenant' can in a case of a joint tenancy only be satisfied by comprising all the joint tenants." B

So there we see that precisely the same point was argued as that with which we are here concerned. SCRUTTON, L.J., said this (6): C

"That turns on the construction of the Agricultural Holdings Act. I take it that in construing an Act of Parliament, besides looking at the words used, one is entitled to know the mischief which the Act was intended to remedy and to construe the words used, if possible, in such a way as shall suppress the mischief and advance the remedy. There is no doubt that one of the objects of the Agricultural Holdings Act was to give to tenants who were turned out of the tenancy of their farm, except for certain specific reasons, compensation for disturbance, and to award as damages compensation to the person who had actually suffered. That principle of suppressing the mischief and advancing the remedy has been carried to a very considerable extent by the courts, whether rightly or wrongly." D

In a passage (7) which HARMAN, L.J., has already read but which I think, as I am basing my judgment on this decision, I should read again, he says: [His LORDSHIP then read the passage which is printed at p. 128, letters A and B, ante.] Then there is the other passage (7) that HARMAN, L.J., read from SCRUTTON, L.J.: [His LORDSHIP then read the passage which is printed at p. 128, letter C, ante.] SANKEY, L.J., who agreed with SCRUTTON, L.J., said (8): E

"In a court of law or equity, what the legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact, either in express words or by reasonable and necessary implication." F

That passage which I have just read is a quotation by SANKEY, L.J., from LORD WATSON (9). Then SANKEY, L.J., went on (8): G

"I do not think it is possible in this case to say that there is anything in the legislation which in express words deals with the provision of joint tenants and, therefore, I confine myself to the consideration of whether it is possible to give effect to the argument advanced on behalf of Mr. Buxton by reasonable and necessary implication to be derived from the Act of Parliament itself. In my view, the object of this part of the Act of Parliament was to give to a tenant who had suffered loss from being disturbed by his landlord, compensation for such disturbance. That appears clearly in the section which is under discussion. As I have already pointed out, Mr. Buxton had clearly suffered loss from the disturbance of his tenancy by the landlord. On the other hand, Mr. Walker [the other joint tenant] had not suffered H

(5) (1928), 97 L.J.K.B. 749 at p. 751.

(6) [1928] All E.R. Rep. at p. 436; 139 L.T. at p. 505.

(7) [1926] All E.R. Rep. at p. 437; 139 L.T. at p. 506.

(8) [1928] All E.R. Rep. at p. 440; 139 L.T. at p. 508.

(9) In *Salomon v. Salomon & Co., Ltd.*, [1895-99] All E.R. Rep. 33 at p. 41; [1897] A.C. 22 at p. 38. I

A any such loss, because, as already pointed out also, he had not any household goods, implements of husbandry, fixtures, farm produce or farm stock, to use the words of s. 12 (6), and he could not make a claim. The words are 'his household goods and implements of husbandry', and it would be a strange result of the Act of Parliament that, because Mr. Walker could not make a claim and would not have been justified in making a claim, therefore a just claim for disturbance by Mr. Buxton should be defeated, when the object of the Act is that the tenant who has suffered loss from disturbance should be compensated."

To apply those principles to the present case. The object of the Landlord and Tenant Act, 1954, was to preserve to business tenants in occupation, to the extent given and by the procedure laid down by the Act of 1954, the benefit of the goodwill created by their efforts. It would entirely defeat that object if one were to say in the present case that because Mr. Wootton, being out of occupation and not carrying on business on the premises, has no right to apply for a new tenancy and in any event is unwilling so to do, therefore the applicant is deprived of the rights which he would otherwise have enjoyed under the Act of 1954. The more one considers *Howson v. Buxton* (10), the more close in principle does it appear to the present case; and, therefore, one is entitled on the special facts of this case to interpret the words "the tenant" as including the applicant. I do not consider that *T. M. Fairclough & Sons, Ltd. v. Berliner* (11) on different words in a different Act is an obstacle to this interpretation.

It would be idle, of course, to pretend that there are not powerful arguments to the contrary, as is apparent from the judgment which has been delivered by HARMAN, L.J., and that which is about to be delivered by WINN, L.J. Little purpose would, I think, be served if I were to attempt to deal with them all. I can see the force of the point that in s. 41 the legislature has dealt with the case of a trustee tenant and a beneficiary occupant, and in s. 42 with groups of companies, and could have, had it been so minded, dealt expressly with joint tenants; but it might, I suppose, be said in reply that they were aware of the decision in *Howson v. Buxton* (10).

Again there is the point that, if the applicant be right, the landlord will be forced to accept the liability of one tenant instead of two and to have a tenant different from the tenant to whom he originally let. With regard to the first matter I should myself be disposed to think that the court could safeguard the landlord under s. 35 by insisting on a suitable guarantor for the performance of the tenant's covenants. As to the second matter, counsel for the applicant points out that as a result of s. 40 and s. 44 a landlord may find himself saddled with a sub-tenant as an immediate tenant in the place of the original tenant.

For my part, therefore, I would allow the appeal.

WINN, L.J.: The question raised by this appeal is one of construction of Part 2 of the Landlord and Tenant Act, 1954. It may, I think, be stated in the form: can the relevant statutory provisions be so construed as to afford jurisdiction to grant to the applicant, against the will of the landlord, the further tenancy which he desires?

In the course of the argument I have made it abundantly clear that I would willingly answer that question affirmatively in the present case, to avoid the injustice which I recognise that the particular circumstances of the instant case may produce for the applicant, were I not oppressed by (a) apprehension that in other quite different hypothetical cases the construction contended for by the applicant might produce different injustices, and (b) the conviction that it is the duty of this court to leave the function of legislation to the legislature.

I recognise that when a statute is construed by the court it may thereafter have an effect different from that which it has formerly been recognised as

(10) [1928] All E.R. Rep. 434; 139 L.T. 504.

(11) [1930] All E.R. Rep. 170; [1931] 1 Ch. 60.



having: such a change will not have been legitimately brought about unless the new effect is one comprised in, as distinct from being consistent with, the enacting intention of Parliament, properly ascertained. The court must be able to found its construction on the proposition: this is what Parliament has shown that it intended. It is not sufficient for it to be able to say: it would be consistent with the general revealed intention of Parliament to add to or vary its express enactment in such and such a way.

Accepting fully what was said to be a proper approach to such a construction problem by SCRUTTON, L.J., in *Houson v. Burton* (12), I have directed myself to consider the statute relevant in the instant case in the light of those observations:

"I take it that in construing an Act of Parliament, besides looking at the words used, one is entitled to know the mischief which the Act was intended to remedy and to construe the words used, if possible, in such a way as shall suppress the mischief and advance the remedy."

The same approach to the construction of statutes is to be found in the fourth heading of the statement of the Barons of the Court of Exchequer in *Heydon's case* (13):

"The true reason of the remedy [which Parliament hath resolved]; and then the office of all the judges is always to make such constructions as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and pro privato commodo, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, pro bono publico."

COKE himself expressed it in the following language in his INSTITUTES ((1) Inst. 24 (b)):

"Equity is a construction made by the judges, that cases out of the letter of a statute, yet being within the same mischief or cause of the making of the same, shall be within the same remedy that the statute provideth; and the reason hereof is, for that the lawmakers could not possibly set down all cases in express terms."

However, by the nineteenth century a more guarded approach had been adopted by the courts and in 1827 LORD TENTERDEN, C.J., observed in *Brandling v. Barrington* (14) that

"... there is always danger in giving effect to what is called the equity of the statute, and that it is much better and safer to rely on and abide by the plain words, although the legislature might possibly have provided for other cases had their attention been directed to them."

LORD BLACKBURN'S test as stated in *River Wear Comrs. v. Adamson* (15) was:

"... we are to take the whole statute together, and construe it all together, giving the words their ordinary signification, unless when so applied they produce an inconsistency, or an absurdity or inconvenience so great as to convince the court that the intention could not have been to use them in their ordinary signification, and to justify the court in putting on them some other signification, which, though less proper, is one which the court thinks the words will bear."

The Act of 1954 to which this appeal relates is described in its long title as *inter alia*:

"An Act... to enable tenants occupying property for business, professional or certain other purposes to obtain new tenancies in certain cases..."

(12) [1928] All E.R. Rep. at p. 436; 139 L.T. at p. 505.

(13) (1584), 3 Co. Rep. 7a at p. 7b.

(14) (1827), 6 B. & C. 467 at p. 475.

(15) [1874-80] All E.R. Rep. 1 at p. 12; (1877), 2 App. Cas. 743 at p. 764.

**A** Part 2 of the Act of 1954 is headed "Security of tenure for Business, Professional and other Tenants": s. 23 is headed "Tenancies to which Part 2 applies": s. 24 is in the section headed "Continuation and renewal of tenancies": s. 29, which comes most directly in question, is in the sections headed "Application to court for new tenancies". The sections contained in Part 2 of the Act of 1954 which require to be construed are:

**B** "23 (1) . . . this Part of this Act applies to any tenancy where the property comprised in the tenancy is or includes premises which are occupied by the tenant and are so occupied for the purposes of a business carried on by him or for those and other purposes.

**C** "(3) . . . the expression 'the holding' . . . means the property comprised in the tenancy, there being excluded any part thereof which is occupied neither by the tenant nor . . .

"(4) Where the tenant is carrying on a business . . .

**D** "24 (1) A tenancy to which this Part of this Act applies shall not come to an end unless terminated in accordance with the provisions of this Part of this Act; and . . . the tenant under such a tenancy may apply to the court for a new tenancy—(a) . . . or (b) if the tenant has made a request for a new tenancy in accordance with s. 26 of this Act.

"25 (5) A notice under this section shall not have effect unless it requires the tenant . . . to notify the landlord . . . whether or not . . . the tenant will be willing to give up possession . . .

**E** "26 (1) A tenant's request for a new tenancy may be made where the tenancy under which he holds for the time being . . . is a tenancy granted for . . .

"(3) A tenant's request for a new tenancy shall not have effect unless . . .

"(4) A tenant's request for a new tenancy shall not be made if . . .

"(5) Where the tenant makes a request for a new tenancy . . .

**F** "27 (1) Where the tenant under a tenancy . . . gives to the immediate landlord . . . a notice . . .

"29 (1) . . . on an application under sub-s. (1) of s. 24 of this Act for a new tenancy the court shall make an order for the grant . . .

**G** "41 (1) Where a tenancy is held on trust, occupation by all or any of the beneficiaries under the trust, and the carrying on of a business by all or any of the beneficiaries, shall be treated . . . as equivalent to occupation or the carrying on of a business by the tenant . . . (c) . . . a change in the persons of the trustees shall not be treated as a change in the person of the tenant.

**H** "42 (2) Where a tenancy is held by a member of a group [of companies] occupation by another member of the group, and the carrying on of a business by another member of the group, shall be treated . . . as equivalent to occupation or the carrying on of a business by the members of the group holding the tenancy . . . (c) . . . an assignment of the tenancy from one member of the group to another shall not be treated as a change in the person of the tenant.

**I** "44 (1) . . . the expression 'the landlord', in relation to a tenancy (in this section referred to as 'the relevant tenancy'), means the person (whether or not he is the immediate landlord) who is the owner of that interest in the property comprised in the relevant tenancy which for the time being fulfils the following conditions . . ."

It is said by counsel for the applicant, rightly, I think, that the object of Parliament in enacting Part 2 of the Act of 1954 is revealed by the whole tenor of Part 2 to have been to afford occupiers of business premises, using them for business purposes, a right to new tenancies of such premises in derogation of the common law right of their landlord to enjoy his reversion without such a fetter; put alternatively, the mischief at which Parliament aimed, openly, was the

vulnerability of such occupiers to disturbance and loss of goodwill against which the Landlord and Tenant Act, 1927, had been found to afford no sufficient protection. The question remains whether Parliament has revealed an intention or should on a proper construction be regarded as having intended, to grant such a right to all such occupiers—a proposition wider than counsel for the applicant needed in the instant case and for this reason or other reasons not contended for by him—or only for such occupiers as are also tenants within the meaning of the word as used in this Part of the Act of 1954. Conceding, for the purposes of the present case, that the latter, narrower proposition is all that he could sustain, counsel for the applicant has contended that it is satisfied where such an occupier is a tenant within a wide sense of the word, there being no relevant narrower definition of it in Part 2 of the Act of 1954. More pertinently, for present purposes, he maintains that one of two joint tenants *is a tenant*, and that where the statute gives any right to a new tenancy to the joint tenants it is to be understood to have given that right to him.

It is clear, and is common ground in the appeal, that on a literal reading these provisions do not give to one of two or more joint tenants, albeit he is the only one occupying and using the premises for business purposes, any right to require, subject to the exclusions set out in s. 30, that the court shall grant him a further tenancy. This statement is none the less true even where in a given case, and the instant case is such a case, the sole beneficial interest in the former or “current” tenancy belongs in equity to the would-be applicant. He is not “the tenant” (which may, of course, be read as including the plural “tenants”) referred to in the relevant sections: he is, as his own statutory notice accurately stated “one of the tenants”.

In substance the argument for the applicant is that the beneficial effect intended to be produced by the Act of 1954 is wide enough to comprise and assist all occupiers of business premises under the tenancy: the argument for the landlord is that there is no indication in the statute of an intention on the part of Parliament to restrict the landlord’s freedom of contract to any greater extent or in favour of any wider category of persons than those to whom express reference is made in the sections to which I have referred. These sections expressly comprise certain persons who are not tenants *stricto sensu*. The landlord’s contention receives some rather indirect support from the decision of MAUGHAM, J., in *T. M. Fairclough & Sons, Ltd. v. Berliner* (16). The decision of DANCEWERTS, J., in *Woodward v. Earl of Dudley* (17) does not assist a solution of the present case since the phrase which there required to be construed was much more precise, videlicet “the tenant with whom the contract of tenancy was made”. It is, however, to be observed as relevant that in his judgment the judge referred to *Howson v. Buxton* (18), which I have already mentioned, and said of it

“A liberal construction was given in the circumstances of the case by SCRUTTON, L.J., but the other members of the court decided the case on somewhat different grounds.”

In my judgment *Howson v. Buxton* (18) is to be distinguished from the present case on several grounds, of which the most important are the following:

First, the statute which was construed, the Agricultural Holdings Act, 1923, imposed a general obligation on landlords of agricultural holdings to pay compensation of the kind to which it referred, and the provision that compensation should not be payable “unless the tenant has . . . given notice” represents an exception from this general provision and therefore requires to be strictly construed.

(16) [1930] All E.R. Rep. 170; [1931] 1 Ch. 60.

(17) [1954] 1 All E.R. 559; [1954] Ch. 283.

(18) [1928] All E.R. Rep. 434; 139 L.T. 504.



A Second, the subject-matter of the right granted to the "tenant" was his personal belongings in the form of household goods, farm produce, etc., and not the tenancy; it follows that he was entitled to compensation qua owner of those goods, not qua owner of the tenancy.

Third, no continuing or bilateral set of obligations were involved; only a single unilateral obligation to pay money.

B Fourth, as SCRUTTON, L.J., recognised, one of several tenants could effectively claim only in respect of his own separate property and any notice given by any tenant would refer only to *his* property. To my mind this is not inconsistent with the provision that "compensation shall be payable to the tenant", which, by force of the Interpretation Act, 1889 is equivalent to: "payable to the tenants"; and, I would add: or to any of them who has sustained loss.

C For the reasons which I have endeavoured to indicate, whilst I recognise that the problem raised by this appeal is of great general importance, and express my appreciation of the cogency of the submissions made on behalf of the applicant, I feel constrained to say that in my judgment this appeal fails because on its proper construction the statute does not grant the right asserted by the applicant. I only desire to add that in all relevant respects I adopt the most carefully argued

D and lucid judgment of the learned deputy county court judge.

*Appeal dismissed. Leave to appeal to House of Lords granted on condition that appeal prosecuted diligently.*

Solicitors: *Boxall & Boxall*, agents for *Boys & Maughan*, Margate, Kent, (for the applicant); *Robinson & Allfree*, Broadstairs, Kent (for the landlord).

E [Reported by HENRY SUMMERFIELD, ESQ., Barrister-at-Law.]

F

### PRACTICE DIRECTION.

#### PROBATE, DIVORCE AND ADMIRALTY DIVISION (DIVORCE).

G *Husband and Wife—Property—Matrimonial home—Protection against eviction*  
—Procedure—Application may be heard by registrar—R.S.C., Ord. 32, r. 11  
—R.S.C., Ord. 89, r. 1, r. 3—Matrimonial Homes Act 1967 (c. 75), s. 1.

Any application to the court under s. 1 of the Matrimonial Homes Act 1967 can be heard by a registrar in accordance with R.S.C., Ord. 32, r. 11.

H By R.S.C., Ord. 89, r. 3, the procedure laid down in R.S.C., Ord. 89, r. 1 for proceedings under s. 17 of the Married Women's Property Act, 1882, is applied (1) so far as is necessary to applications under s. 1 of the Matrimonial Homes Act 1967. It is unnecessary to invoke R.S.C., Ord. 89, r. 1 (2), which is required in relation to proceedings under s. 17 of the Married Women's Property Act, 1882, only, because that section expressly provides that applications under it should be made to a judge.

I By direction of the President.

Apr. 2, 1968.

COMPTON MILLER,  
Senior Registrar.

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(1) Rule 3 of R.S.C., Ord. 89 was added by R.S.C. (Amendment No. 2) 1967 r. 6.

# LOPES v. VALLIAPPA CHETTIAR.

[PRIVY COUNCIL (Viscount Dilhorne, Lord Hodson, Lord Upjohn, Lord Pearson and Sir Frederick Sellers), January 24, March 20, 1968.]

*Privy Council—Malaysia—Appeal—Right to appeal to Judicial Committee—Where appeal lies as of right and where it is discretionary—Courts of Judicature Act 1964 s. 74.*

An appeal from the Federal Court of Malaysia to the Judicial Committee lies as of right in cases coming within s. 74 (1) (a) (i)\* and (ii) of the Courts of Judicature Act 1964, and the court's discretion to refuse leave to appeal is confined to cases that are within s. 74 (1) (a) (iii) and (b) (see p. 138, letter G, post).

*Ratnam v. Cumarasamy* ([1964] 3 All E.R. 933) approved.

The granting of special leave by the Judicial Committee is a matter of discretion and not of right; and in the present case special leave to appeal would be refused, although the case fell within s. 74 (1) (a) (i) and (ii) of the Act of 1964 and the appeal was wrongly treated by the Federal Court as one in which that court had a discretion (see p. 138, letters E and I, post).

[As to leave to appeal from courts of Far East territories, and as to special leave to appeal to the Privy Council, see 5 HALSBURY'S LAWS (3rd Edn.) 687-690, paras. 1469, 1474; and for a case on the subject, see 8 DIGEST (Repl.) 829, 814.]

Cases referred to:

*Chikwkwata v. Bosman*, [1965] S.A.L.R. 57.

*Davis (Lady) v. Lord Shaughnessy*, [1932] A.C. 106; 101 L.J.P.C. 37; 146 L.T. 289; 8 Digest (Repl.) 834, 853.

*Ratnam v. Cumarasamy*, (1962), 28 M.L.J. 330; *on appeal*, P.C., [1964] 3 All E.R. 933; sub nom. *Thambro Ratnam v. Thambro Cumarasamy*, [1965] 1 W.L.R. 8; Digest (Cont. Vol. B) 211, 673a.

## Petition.

This was a petition by Rudolph Santiago Lopes for leave (or alternatively special leave) to appeal against the decision of the Federal Court of Malaysia (SYED SHEH BARAKBAH Lord President, AZMI, C.J., and ONG HOCK THYE, F.J.), dated Apr. 12, 1967, dismissing his appeal from the judgment of GILL, J., in the High Court at Kuala Lumpur, dated Sept. 20, 1966, whereby the High Court dismissed the petitioner's claim for specific performance of an oral agreement for the sale of land. The Federal Court by an order dated June 28, 1967, had refused an application of the petitioner by motion for leave to appeal to the Privy Council against the decision of Apr. 12, 1967. The facts are set out in the opinion of VISCOUNT DILHORNE.

*Sir Dingle Foot, Q.C.*, and *L. J. Blom-Cooper* for the petitioner.

*E. F. N. Gratiaen, Q.C.*, and *John A. Baker* for the respondent.

**VISCOUNT DILHORNE:** The petitioner sought special leave to appeal from the decision of the Federal Court of Malaysia dismissing his appeal from a judgment in the High Court at Kuala Lumpur dismissing his claim for specific performance of an oral agreement for the sale of land. The petitioner's application to the Federal Court for conditional leave to appeal was unanimously dismissed by that court. On Dec. 9, 1967, ONG HOCK THYE, F.J., gave his reasons for doing so. He clearly thought that the Federal Court had discretion to refuse leave to appeal and that the appeal did not lie as of right. He said that it would not be right to put the respondent to further heavy expense and inconvenience by giving leave as the appeal appeared likely to receive short shrift in the Privy Council.

Counsel for the petitioner argued that the Federal Court were wrong in holding that it had a discretion in the matter, that the appeal lay as of right and that the

\* Section 74 (1) (a) is set out at p. 138, letter C, post.

A Federal Court by their decision had deprived the appellant of a right that he had under statute. He urged that the Judicial Committee by giving special leave should restore to the petitioner the right of which he had been deprived.

The Courts of Judicature Act 1964 was the Act under which application was made to the Federal Court, but before referring to the terms of that Act it will be convenient to refer to, and to consider, the terms of two Ordinances which preceded it. The Appeals to His Majesty in Council Ordinance, 1949 (F.M. No. 50 of 1949) provided *inter alia* as follows:

“Section 3 (1). Subject to such rules as may, from time to time, be made by His Majesty in Council regarding appeals from the courts of the Federation, an appeal shall lie from the court to His Majesty in Council—

(a) from any final judgment or order, provided that—

- (i) the matter in dispute on appeal to His Majesty in Council amounts to or is of the value of 4,500 dollars or upwards; or
- (ii) the appeal to His Majesty in Council involves, directly or indirectly, some claim or question to or respecting property or some civil right of like amount or value; or
- (iii) the case is from its nature a fit one for appeal, and

(b) from any interlocutory judgment or order which the court considers a fit one for appeal to His Majesty in Council.”

From this provision it is clear that under this Ordinance an appeal lay as of right from any final judgment or order in cases coming within s. 3 (1) (a) (i) and (ii) and that the court had discretion to grant or refuse leave in cases coming within s. 3 (1) (a) (iii) and (b). Section 3 (2) of the Ordinance provided that:

“Application for leave to appeal to His Majesty in Council shall be made to the court within six weeks from the date on which the decision appealed against was given, or within such further time as may be allowed by the court:

“ . . . ”

and s. 3 (3) was as follows:

“Where the judgment appealed from requires the appellant to pay money or perform a duty, the court shall have power, when granting leave to appeal, either to direct that such judgment shall be carried into execution or that the execution thereof shall be suspended pending the appeal, as to the court shall seem just; and in case the court shall direct such judgment to be carried into execution, the person in whose favour it was given shall, before the execution thereof, enter into good and sufficient security, to the satisfaction of the court, for the due performance of such order as His Majesty in Council shall see fit to make thereon.”

The application for leave to appeal, it thus appears, is for the purpose of enabling the court to exercise its powers under s. 3 (3). An application to the court for leave is also necessary to enable the court to fix security for the appeal.

This Ordinance of 1949 was repealed and replaced by the Appeals from the Supreme Court Ordinance 1958 (No. 16 of 1958). Section 3 (1) of this Ordinance provided that an appeal should lie from the Supreme Court to the Yang di-Pertuan Agong “with the leave of the court granted in accordance with the provisions of s. 4” *inter alia* in the cases covered by s. 3 (1) (a) and (b) of the Ordinance of 1949. Section 4 was similar in all material respects to s. 3 (2) and (3) of the Ordinance of 1949. The omission to refer to leave to appeal in s. 3 (1) of the Ordinance of 1949 when s. 3 (2) began with referring to an application for leave to appeal may have appeared to the draftsman as somewhat untidy, and may have led to the insertion of the words “with the leave of the court granted in accordance with the provisions of s. 4” in s. 3 (1) of the Ordinance of 1958. Whatever the reason for this change may have been, it would not have been sufficient to justify the conclusion that it converted an appeal as of right into an appeal only with the leave of the court granted in the exercise of its discretion.



In *Ratnam v. Cumarasamy* (1), a decision on the Ordinance of 1958, it was held by the Court of Appeal that an order made by that court which barred the appellant from appealing to that court was a final order and consequently an appeal lay as of right to the Judicial Committee in a case coming within s. 3 (1) (a) (i) of that Ordinance. It was not suggested in that case that the reference to leave to appeal in s. 3 (1) meant that the court had a discretion to refuse leave to appeal against a final order coming within s. 3 (1) (a) (i).

The Ordinance of 1958 was replaced by the Courts of Judicature Act 1964. Section 74 and s. 75 of that Act were similar in all respects material to this case to the Ordinance of 1958. Section 74 (1) provided that an appeal should lie from the Federal Court to the Yang di-Pertuan Agong with the leave of the court granted in accordance with the provisions of s. 75:

“(a) from any final judgment or order in any civil matter where—

- (i) the matter in dispute in the appeal amounts to or is of the value of five thousand dollars upwards; or
- (ii) the appeal involves, directly or indirectly, some claim or question to or respecting property or some civil right of like amount or value; or
- (iii) the case is from its nature a fit one for appeal; and

“(b) from any interlocutory judgment or order which the Federal Court considers a fit one for appeal; and . . .”

Section 75 corresponded in all material respects to s. 4 of the Ordinance of 1958 and s. 3 (2) and (3) of the Ordinance of 1949.

The judgment of the Federal Court dismissing the appellant's appeal was a final judgment where the matter in dispute was of a value in excess of \$5,000 and the appeal involved property worth more than that amount. The petitioner's claim therefore came within s. 74 (1) (a) (i) and (ii). It does not appear from the grounds stated by ONG HOCK THYE, F.J., for refusing leave to appeal that the attention of the Federal Court was drawn to *Ratnam v. Cumarasamy* (1). That decision was on the basis that an appeal lay as of right from a final order coming within s. 74 (1) (a) (i). If so, the same must apply in relation to a final judgment or order coming within s. 74 (1) (a) (ii).

As the question raised on this application for leave may arise on other applications before the Federal Court, their lordships think that it is desirable that they should express their views on it. In their opinion *Ratnam v. Cumarasamy* (1) was decided on the right basis and an appeal lies as of right in cases which come within s. 74 (1) (a) (i) and (ii), provided of course that the appellant complies with any order that the court may make under s. 75 or in relation to security. It appears to the Board that the Federal Court only has discretion to refuse leave to appeal in cases which come within s. 74 (1) (a) (iii) and (b).

Although as BEADLE, C.J., pointed out in *Chikwakuata v. Bosman* (2), the word “leave” normally implies a discretion to give or withhold permission, the reference to leave in s. 74 is a reference to s. 75 and does not in the context imply such a discretion.

The granting of special leave to appeal by the Judicial Committee is a matter of discretion and not a right (*Lady Davis v. Lord Shaughnessy* (3), per VISCOUNT DUNEDIN). Their lordships agree with the Federal Court in their conclusion that this case is not a fit one for appeal to the Judicial Committee and they do not consider that they should exercise their discretion by granting leave solely on account of the fact that the appeal was wrongly treated by the Federal Court as one in which that court had a discretion. Whether or not it is desirable that the Federal Court should be given a discretion to refuse leave to appeal in cases which come within s. 74 (1) (a) (i) and (ii) in order to protect respondents

(1) (1962), 28 M.L.J. 330; *on appeal*, [1964] 3 All E.R. 933.

(2) [1965] S.A.L.R. 57 at p. 60.

(3) [1932] A.C. 106 at p. 112.

A from having to incur heavy expense and suffer inconvenience when in the words of ONG HOCK THYE, F.J., "the appeal appears likely to receive short shrift in the Privy Council" is not a matter for their lordships but for the legislature.

For the reasons stated their lordships have reported to the Head of Malaysia their opinion that the application for special leave be refused.

*Petition dismissed.*

B Solicitors: *Graham Page & Co.* (for the petitioner); *T. L. Wilson & Co.* (for the respondent).

[*Reported by S. A. HATTEEA, Esq., Barrister-at-Law.*]

## C KEATING v. ELVAN REINFORCED CONCRETE CO., LTD. AND ANOTHER.

[COURT OF APPEAL, CIVIL DIVISION (Lord Pearson, Danekwerts and Widgery, L.JJ.), February 19, 20, 1968.]

D Highway—Street—Street works—Safety requirements—Statutory duty to fence and guard street that is broken up—Trench dug for sewer, but not fenced guarded nor lighted during hour of darkness—Injury to pedestrian—No negligence by undertakers—Whether civil action for breach of statutory duty lay—Public Utilities Street Works Act, 1950 (14 Geo. 6 c. 39), s. 8 (1) (a).

E A pedestrian fell into a trench excavated in a street by contractors as agents of the local authority. Neither the contractors nor the local authority had been negligent, and the fall was due to the removal, by a wrongdoer, of the protective barrier erected by the contractors. In an action by the pedestrian he claimed damages against the local authority for breach of statutory duty, under s. 8 (1)\* of the Public Utilities Street Works Act, 1950, to "secure ... (a) that, so long as the street ... is broken up ... it is adequately fenced and guarded".

F Held: on the true construction of the Act of 1950, s. 8 (1) did not confer on the pedestrian a right of action for breach of the duty that it imposed, because s. 1 and sub-ss. (3) and (4) of s. 8, among other provisions, showed that s. 8 was not enacted for the protection of individuals who might suffer injury owing to the defective state of the street or defective precautions regarding holes or excavations in the street (see p. 142, letters F and I, and p. 143, letters B, C, E and I, post).

G Principle stated by LORD NORMAND in *Cutler v. Wandsworth Stadium, Ltd.* ([1949] 1 All E.R. at p. 550) applied.

Decision of WALLER, J. ([1967] 3 All E.R. 611) affirmed.

H [As to matters to be considered in determining whether a common law action lies in respect of breach of a statutory duty, see 36 HALSBURY'S LAWS (3rd Edn.) 451, 452, para. 487.

As to the precautions to be observed by undertakers of code-regulated street works, see 19 HALSBURY'S LAWS (3rd Edn.) 342, 343, para. 548; and for cases on subject, see 26 DIGEST (Repl.) 530-532, 2062-2080.

I As to negligence in the execution of statutory works in highways, see 19 HALSBURY'S LAWS (3rd Edn.) 313, 314, para. 498, as to safety precautions by undertakers of such works see *ibid.*, 342, para. 548, and for cases on negligence in relation to statutory works, see 26 DIGEST (Repl.) 533, 534, 2081-2091.

For the Public Utilities Street Works Act, 1950, s. 8, see 29 HALSBURY'S STATUTES (2nd Edn.) 330.]

Cases referred to:

*Clark and wife v. Brims*, [1947] 1 All E.R. 242; [1947] K.B. 497; [1947] L.J.R. 853; 45 Digest (Repl.) 28, 89.

\* Section 8 (1) so far as material, is printed at p. 141, letter A, post.

- Outler v. Wandsworth Stadium, Ltd. (in Liquidation)*, [1947] 2 All E.R. 815; A  
 [1948] 1 K.B. 291; *affd.* H.L., [1949] 1 All E.R. 544; [1949] A.C. 398;  
 [1949] L.J.R. 824; 25 Digest (Repl.) 504, 582.
- Haley v. London Electricity Board*, [1964] 3 All E.R. 185; [1965] A.C. 778;  
 [1964] 3 W.L.R. 479; 129 J.P. 14; Digest (Cont. Vol. B) 241, 77a.
- Phillips v. Britania Hygienic Laundry Co., Ltd.*, [1923] All E.R. Rep. 127; [1923]  
 2 K.B. 832; 93 L.J.K.B. 5; 129 L.T. 777; 45 Digest (Repl.) 144, 553. B

### Appeal.

This was an appeal by Thomas Patrick Keating from the decision of WALLER, J., given on July 5, 1967, and reported [1967] 3 All E.R. 611, dismissing the appellant's action for damages for negligence and breach of statutory duty against the first defendants, Elvan Reinforced Concrete Co., Ltd. ("the contractors") and the second defendants, London Borough of Richmond upon Thames ("the local authority"). The contractors had dug, as agents for the local authority, a trench in a street in the course of the execution of street works to connect a sewer with the drains of premises on which building work was being done. The appellant fell into the trench at about 5 p.m. on Jan. 7, 1965, while walking along a street. According to the evidence there were proper barriers on either side of the trench at about 4.45 p.m. on that day. Work finished at about 4.55 p.m. The barrier consisted of three large empty drums with scaffold boards laid over them and lighted lamps placed on them and between them. There was no direct evidence what happened next, but it was inferred that very shortly afterwards a person or persons unknown demolished the barriers and pushed over the drums and threw the planks and some of the lamps into the trench, most of the lamps being put out. At about 5.15 p.m. the contractors' foreman and two other men found that the barriers had been demolished and, according to their evidence, re-erected them in the same positions as before. The trial judge (WALLER, J.) accepted the evidence of the contractors' witnesses that the barrier had been properly erected. The appeal is reported only on the question whether the appellant had a right of action for breach of statutory duty under s. 8 (1) of the Public Utilities Street Works Act, 1950. C D E F

*C. Lawson, Q.C.*, and *P. V. Crocker* for the plaintiff.

*A. de Piro, Q.C.*, and *W. H. E. James* for the defendants, the contractors and the local authority.

**LORD PEARSON:** The plaintiff, who is the appellant, was on his way home at about 5 p.m. on Jan. 7, 1965. He walked along Kew Road, which was brightly lit, and round the bend into Broomfield Road, which was not so well lit, and he fell into a trench. The trench had been dug by Elvan Reinforced Concrete Co., Ltd., the first defendants, who are contractors, as agents for the second defendants, the London Borough of Richmond upon Thames ("the local authority"). The contractors had been doing building work in the corner premises at the junction of Kew Road and Broomfield Road, and the trench was required for taking drains from the premises to connect with the local authority's sewers in the centre of Broomfield Road. The trench was dug across the pavement and across half the roadway. The plaintiff sued both defendants for damages for negligence and breach of statutory duty. The judge found that there was no negligence or breach of statutory duty. G H

The plaintiff has appealed on two grounds. First he asked for a new trial on the issue of negligence on the ground that the learned judge's findings are inconsistent. [His LORDSHIP reviewed the evidence, considered the plaintiff's contentions and concluded:] In my view it has not been shown that there was any inconsistency or error in the findings of the judge, and the first ground of appeal fails. I

The second ground of appeal is that the plaintiff is entitled to recover damages from the local authority for breach of their statutory duty under s. 8 (1) of



A the Public Utilities Street Works Act, 1950. That provision, so far as it is material for the present case, is as follows:

B “Undertakers who are executing or have executed any code-regulated works shall secure at their expense that the following requirements are observed during and in connection with the execution of the works and of reinstatement and making good thereafter under the provisions of this Act in that behalf, that is to say—(a) that, so long as the street or controlled land is open or broken up (except in a place to which the public have no right of access and are not permitted to have access), it is adequately fenced and guarded, and lighted in such manner as to give proper warning to the public during the hours of darkness for the purpose of s. 1 of the Road Transport Lighting Act, 1927 (1) . . .”

C Counsel has contended on behalf of the plaintiff, first, that this provision imposes an absolute obligation independently of negligence. The obligation is not merely to take proper steps but to achieve certain results and if these results are not achieved there is a breach of the obligation. He says: be it assumed that there was no negligence on the part of the defendants because they erected a proper barrier and the accident happened because a person or persons unknown wrong-  
D fully demolished the barrier before the plaintiff arrived, nevertheless the street where the trench had been dug was not adequately fenced or guarded or lighted at the time of the accident, and thus there was a breach of the obligation and it caused the accident to the plaintiff. So far, I think, counsel for the plaintiff has a strong argument; but it is not necessary to decide the point, because  
E he has to show not only that there is an absolute duty but also that the plaintiff has a right of action for damages for the breach of it.

For these purposes it is necessary to consider what intention is manifested by the Act of 1950. There are numerous authorities but I will only read two very short passages from the two cases that were cited to us as showing what principles are applicable. In *Cutler v. Wandsworth Stadium, Ltd. (in Liquidation)*,  
F (2), LORD NORMAND said

“In particular, I respectfully agree with [Lord GREENE, M.R. (3)] that the proper approach to the case is to consider whether, on a true construction of the statute as a whole, a right of action by an individual aggrieved by the breach of one of the statutory duties ought to be implied.”

G There was also cited to us *Clarke and wife v. Brims* (4), where MORRIS, J., cited a passage from the judgment of ATKIN, L.J., in *Phillips v. Britania Hygienic Laundry Co., Ltd.* (5). This is the passage:

H “. . . when a statute imposes a duty of commission or omission upon an individual, the question whether a person aggrieved by a breach of the duty has a right of action depends on the intention of the statute. Was it intended that a duty should be owed to the individual aggrieved as well as to the State, or is it a public duty only? That depends upon the construction of the statute as a whole, and the circumstances in which it was made, and to which it relates. One of the matters to be taken into consideration is this: Does the statute on the face of it contain a reference to a remedy for the breach of it? If so, it would, *prima facie*, be the only remedy, but that is not conclusive. One must still look to the intention of the legisla-  
I ture to be derived from the words used, and one may come to the conclusion that, although the statute creates a duty and imposes a penalty for the breach of that duty, it may still intend that the duty should be owed to individuals.”

(1) See now the Road Transport Lighting Act, 1957, s. 17.

(2) [1949] 1 All E.R. 544 at pp. 550, 551; [1949] A.C. 398 at p. 412.

(3) [1947] 1 All E.R. 815; [1948] 1 K.B. 291.

(4) [1947] 1 All E.R. 242 at p. 245; [1947] K.B. 497 at p. 507.

(5) [1923] All E.R. Rep. 127 at p. 132; [1923] 2 K.B. 832 at pp. 840, 841.

I should mention, for the sake of completeness, that reference was also made to the comparatively recent case of *Haley v. London Electricity Board*, (6). Reference was made in the argument to the question which we are considering. The argument was mainly directed to saying that that section established the standard for the duty of care to be observed in fencing and guarding holes in streets. That is how I read the report of the argument (7). On the other hand (8), counsel for the respondents was arguing against any suggestion that this section imposes a statutory duty for breach of which an individual would have a cause of action. Then LORD REID referred to this point. He said (9):

"... the respondents argue that there is no civil liability under that Act for breach of a statutory duty. I need not consider that question because I am of opinion that the appellant is entitled to succeed at common law."

I think that in the other speeches there was no expression of opinion on that question. At any rate, certainly there was no decision on that question in that case, and so it has to be considered now.

It is important to observe s. 1 (1) of the Act of 1950. It shows that s. 8 is a section included in what is called the street works code. The street works code consists of s. 3 to s. 14 of the Act of 1950 and, Schs. 1, 2, and 3 to the Act of 1950. This street works code is to have effect in relation to statutory powers to execute undertakers' works in a street

"... with a view to (a) providing a uniform set of provisions for the protection of authorities, bodies and persons concerned in the mode of exercise of such powers as having the control or management of streets, or of sewers, drains or tunnels, transport undertakings or bridges ...".

Thus those sections, including s. 8, are enacted for the purpose of providing protection for certain authorities, especially highway authorities, sewer authorities, and so on, concerned with streets. There is no suggestion there that the Act of 1950 is enacted, or that any part of it is enacted, for the protection of individuals who may suffer injury owing to the defective state of the streets or defective precautions taken with regard to holes or excavations in the streets.

One has to note, also, certain other provisions. There are in addition to sub-s. (1) two further provisions of s. 8 which are of importance. Subsections (3) and (4) provide

"(3) If undertakers fail to satisfy an obligation to which they are subject by virtue of sub-s. (1) of this section they shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding £10 in respect of each day of such failure.

"(4) If undertakers fail to satisfy an obligation to which they are subject by virtue of sub-s. (1) of this section as regards any requirement mentioned in para. (a), (b) or (c) thereof, the street authority or managers may do anything needed for securing observance of that requirement and the undertakers shall pay to the authorities or managers an amount equal to any cost reasonably incurred by them of so doing."

I think that sub-s. (4) is important when taken in conjunction with sub-s. (3), because here you have in the section itself two remedies being provided for breach of it, a criminal remedy and a civil remedy, and the civil remedy is one which would apply as between different authorities, or as between the undertakers and the street authority, or some other authority, and there is no mention or suggestion that any private individual would have any remedy or any right of action under this section.

The point is also of interest in relation to s. 30, of which sub-s. (1) provides:

"Any provision of this Act creating a liability to a fine for breach of any obligation shall be without prejudice to any liability in civil proceedings for that breach."

(6) [1964] 3 All E.R. 185; [1965] A.C. 778.

(7) [1965] A.C. at pp. 780, 781.

(8) [1965] A.C. at p. 784. (9) [1964] 3 All E.R. at pp. 186, 187; [1965] A.C. at p. 789.

**A** Counsel for the defendants called our attention to a number of provisions in the Act of 1950 which create civil liabilities. They are quite numerous. There are several in s. 7, and there are some in s. 8. Then he went on to show in the following sections up to s. 14 quite a considerable number of express provisions for civil liability of undertakers to public authorities, but there is no suggestion anywhere of any right of action being conferred on a private individual. Having regard to those considerations, it seems to me clear that the Act of 1950, or at any rate s. 8 of it, is not to be construed as providing a right of action for any individual who suffers particular damage from breach of any of the statutory requirements. The object of the Act of 1950 is to regulate the relations between undertakers who exercise statutory powers to break up streets and the highway authorities and other authorities who are, by virtue of their functions, concerned with the way in which those operations are carried out by the undertakers.

**C** In my view the plaintiff has no right of action for the alleged breach, which may be a breach of the alleged absolute statutory obligation under s. 8. In my view the plaintiff has no cause of action, and therefore the appeal fails on the second ground also.

**D** **DANCKWERTS, L.J.:** I agree with the judgment of LORD PEARSON and I would add only a few words. In the first place I think that the judge reached the right conclusion on the facts of the case, and that there really was no evidence of negligence by the contractors. They took all reasonable precautions, indeed, those that were laid down in the Public Utilities Street Works Act, 1950, and it was not their fault that some ill-disposed person or persons threw down the barriers and removed most of the lamps.

**E** In the second place I agree with the construction which LORD PEARSON has put on the Act of 1950.

Much as I sympathise with the unfortunate plaintiff, it would be an injustice if the defendants were held liable for the acts of a third person for which they were in no way responsible.

**F** I also would dismiss the appeal.

**G** **WIDGERY, L.J.:** I agree with my lords and find nothing inconsistent, or even vaguely unsatisfactory, in the judge's finding of fact. [HIS LORDSHIP gave his reasons for upholding this finding and continued:] In regard to construction of the Public Utilities Street Works Act, 1950, it is in my judgment, as LORD PEARSON has said, abundantly clear that the purpose of s. 3 to s. 14 of the Act of 1950 is to provide provision for protection for authorities having control or management of streets. When one looks at some of the earlier provisions in that group of sections it is manifest that they are designed to protect the authorities concerned, and one could cite as an example s. 4 which provides for the preparation of plans, and s. 6 which provides for the giving of notice before work is done. When one comes to s. 8, the obligation is somewhat different, because on its face the section does seem to create an obligation which will benefit the public, but it would be quite false to suppose that it did not also benefit the street authority. The street authority is intensely interested in the presence of a dangerous hole in the street and it is of the greatest importance to it that it should have the protection of s. 8 whereby the undertaker has to fence, guard and light at his own expense. It would be, I think, a remarkable thing if such a provision, by a side wind, permitted a pedestrian to sue for damages in a case where no claim in negligence existed.

I accordingly agree that the appeal should be dismissed.

*Appeal dismissed.*

Solicitors: *Calvert Smith & Sutcliffe* (for the plaintiff); *Wilkinson, Kimbers & Staddon* (for the defendants, the contractors and the local authority).

[Reported by HENRY SUMMERFIELD, ESQ., Barrister-at-Law.]



## PRACTICE DIRECTION.

[COURT OF APPEAL, CRIMINAL DIVISION (Lord Parker, C.J., Ashworth and Blain JJ.), April 1, 1968.]

*Criminal Law—Trial—Plea—Plea of guilty—Statement of facts in open court by prosecution where no committal proceedings or committal proceedings which could not be fully reported—Criminal Justice Act 1967 (c. 80) s. 1.*

**LORD PARKER, C.J.**, at the sitting of the court read the following practice direction: In the opinion of this court it would be regrettable if, as a result of the Criminal Justice Act 1967 (1), the press and the public were deprived of the right inherent in our system of the administration of criminal justice, to know the circumstances of the crime for which an accused is convicted and sentenced.

This can only occur in cases in which under that Act, either there have been no committal proceedings or committal proceedings which cannot be fully reported, and in which in either event the accused pleads guilty at the trial. However, even in such cases the prosecution state the facts in open court at the trial and this they should continue to do though in somewhat more detail than heretofore.

The only exception is the comparatively rare case when an accused pleads guilty at the trial to murder, in which case there is only one sentence, life imprisonment, which can be imposed (2). There is then, so far as the judge is concerned, no need for any reference to the circumstances of the crime, since whatever the circumstances the sentence must be the same. The judge will have read the depositions; the accused will inevitably be advised and represented by counsel, and often by leading counsel, and the accused will have chosen to plead guilty. Moreover, so far as the public was concerned until the changes effected by the Criminal Justice Act 1967 (3) the committal proceedings were held in public.

This court however recognises that if this should be the practice for the future there may be rare cases in which the circumstances of the murder are never publicly revealed (4). That is clearly wrong. Accordingly, this court directs that the prosecution, following a plea of guilty to murder, should, as in cases of pleas of guilty to other offences, state the facts in open court before sentence is imposed.

[Reported by N. P. METCALFE, Esq., Barrister-at-Law.]

(1) See Criminal Justice Act 1967 (c. 80) s. 1, s. 3.

(2) See Murder (Abolition of Death Penalty) Act 1965 s. 1 (1): 45 HALSBURY'S STATUTES (2nd Edn.) 238.

(3) Cf. Criminal Justice Act 1967 s. 6.

(4) This Practice Direction is a sequel to the lack of publicity exemplified in *R. v. Sokol*, "The Times" Mar. 29, 1968.

A

Re A. (an infant).

HANIF *v.* THE SECRETARY OF STATE FOR HOME AFFAIRS.

Re S. (N.) (an infant).

B

SINGH *v.* THE SECRETARY OF STATE FOR HOME AFFAIRS.

[CHANCERY DIVISION (Cross, J.), February 21, 22, 23, 1968.]

[COURT OF APPEAL, CIVIL DIVISION (Lord Denning, M.R., Russell, L.J., and Cumming-Bruce, J.), March 11, 12, 1968.]

C

*Commonwealth Immigrant—Admission to United Kingdom—Refusal of admission—Application to make an infant seeking admission a ward of court—Wardship jurisdiction not exercisable so as to interfere with statutory control of immigration—Commonwealth Immigrants Act, 1962 (10 & 11 Eliz. 2 c. 21), s. 2 (1).*

D

A boy, who was aged about eleven and was a citizen of Pakistan but not of the United Kingdom, arrived at London airport from Pakistan. If the boy was under sixteen years of age and was, as the plaintiff Hanif claimed, his son, the boy was entitled to admission to England, as Hanif was resident there. The immigration officer was not satisfied, after questioning the boy and the plaintiff, that the boy was the plaintiff's son; and the boy was refused admission under s. 2 (1) of the Commonwealth Immigrants Act, 1962, and arrangements were made for him to be returned to Pakistan.

E

N.S., who was an Indian and seventeen years of age, arrived at London airport. He came with a lady and a girl, said to be his mother and sister. H.S. who was resident in England alleged that N.S. was his son. The immigration officer, after inquiry, was not satisfied that N.S. was the son of H.S., but was satisfied that the lady and girl were the wife and daughter of H.S. In the case of N.S. there was discretion over his admission if he was the son of H.S. N.S. was refused admission and arrangements were made for his return to India.

F

The plaintiffs, Hanif and H.S., each issued an originating summons, to which the Home Secretary was made defendant, seeking to make the boy and N.S. respectively a ward of court pursuant to s. 9 of the Law Reform (Miscellaneous Provisions) Act, 1949. On motions to strike out the originating summonses,

G

**Held:** the provisions of the Commonwealth Immigrants Act, 1962\*, were a comprehensive code governing the entry or removal of Commonwealth immigrants and entrusted the administration of it to immigration officers, with which, so long as the statutory control was honestly and fairly exercised, the court would not interfere; accordingly the court would not exercise wardship jurisdiction so as to interfere with the statutory immigration

H

\* The Commonwealth Immigrants Act, 1962, provides—"S. 1 (1) The provisions of this Part of this Act shall have effect for controlling the immigration into the United Kingdom of Commonwealth citizens to whom this section applies.

I

"Section 2 (1) Subject to the following provisions of this section, an immigration officer may, on the examination under this Part of this Act of any Commonwealth citizen to whom s. 1 of this Act applies who enters or who seeks to enter the United Kingdom—(a) refuse him admission into the United Kingdom; . . . (2) The power to refuse admission . . . under this section shall not be exercised, except as provided by sub-s. (5), in the case of any person who satisfies an immigration officer that he or she—(a) . . . or (b) is the wife, or child under sixteen years of age, of a Commonwealth citizen who is resident in the United Kingdom . . ."

Schedule 1, para. 3, so far as material, provides—" (1) Where an immigrant is refused admission into the United Kingdom an immigration officer may, . . . give directions—(a) to the . . . commander of the aircraft in which the immigrant arrived in the United Kingdom requiring him to remove the immigrant from the United Kingdom in that . . . aircraft; or (b) to the owners or agents of the . . . aircraft, requiring them to remove the immigrant from the United Kingdom in any . . . aircraft specified in the direction . . ."

control in the present case, and the originating summonses would be struck out (see p. 148, letter F, p. 149, letters A, B and C, p. 151, letter H, p. 152, letters A and E, p. 153, letter E, and p. 154, letter A, post).

*Re K. (H.) (an infant)* ([1967] 1 All E.R. 226) considered.

[As to the control of immigration of Commonwealth citizens and examination of immigrants, see SUPPLEMENT to 5 HALSBURY'S LAWS (3rd Edn.) paras. 1513, 1514; and as to the powers of immigration officers, see 1 HALSBURY'S LAWS (3rd Edn.) 513, 514, para. 992.]

As to the court's jurisdiction over wards of court, see 21 HALSBURY'S LAWS (3rd Edn.) 217, para. 479.

For the Law Reform (Miscellaneous Provisions) Act, 1949, s. 8, see 28 HALSBURY'S STATUTES (2nd Edn.) 777, and for the Commonwealth Immigrants Act, 1962, s. 2 and Sch. 1, see 42 HALSBURY'S STATUTES (2nd Edn.) 5, 21.]

Cases referred to:

*K. (H.) (an infant)*, *Re*, [1967] 1 All E.R. 226; [1967] 2 Q.B. 617; [1967] 2 W.L.R. 962.

*M. (an infant)*, *Re*, [1961] 1 All E.R. 788; [1961] Ch. 328; [1961] 2 W.L.R. 350; 125 J.P. 278; Digest (Cont. Vol. A) 936, 2326d.

*S. (an infant)*, *Re*, [1965] 1 All E.R. 865; [1965] 1 W.L.R. 483; 129 J.P. 228; Digest (Cont. Vol. B) 443, 2326c.

#### HANIF v. SECRETARY OF STATE FOR HOME AFFAIRS

##### Motion.

By originating summons dated Feb. 8, 1968, under the Law Reform (Miscellaneous Provisions) Act, 1949, s. 9, the plaintiff, Mohamed Hanif, who was born on Aug. 20, 1942, and claimed to be the father of a boy\* born on Mar. 2, 1956, applied to the court for an order (i) that the boy be made a ward of court; (ii) that the care and control of the boy be vested in the plaintiff; (iii) that directions be given as to the place of residence of the boy, and (iv) that a declaration be made as to the legitimacy and the paternity of the boy. The Secretary of State for Home Affairs was made the defendant to the summons. By notice of motion dated Feb. 15, 1968, the defendant moved for an order, under R.S.C., Ord. 18, r. 19, and under the inherent jurisdiction of the court, and, alternatively, under s. 9 (3) of the Law Reform (Miscellaneous Provisions) Act, 1949, that the originating summons be struck out on the ground that (a) it was frivolous and/or vexatious, (b) it was an abuse of the process of the court, and that the proceedings be dismissed accordingly; alternatively, for an order that the boy cease to be a ward of court. The hearing of the motion in the case of the plaintiff Hanif was begun in camera; later, at the direction of the judge (Cross, J.), argument was heard and judgment was given in open court.

The cases noted below† were cited during the argument before Cross, J., in addition to those referred to in the judgment.

*P. A. W. Merriton* and *M. A. A. Bashiri* for the plaintiff.

*J. P. Warner* for the Crown.

\* The boy's passport, exhibited to an affidavit, was issued by order of the President of Pakistan. It stated that the boy was born at Jadda on Mar. 2, 1956, and that he was a native of the former state of Jammu and Kashmir. Jadda was in the part of Kashmir occupied by Pakistan, and the authorities in England regard people in the position of the boy as being citizens of Pakistan for the purposes of the Commonwealth Immigrants Act, 1962.

On account of representations the boy was not sent back to Karachi on Jan. 27, in accordance with arrangements and instructions made and given by the immigration authorities, but an order was made for his detention in a remand home under para. 4 (1) of Pt. 1 of Sch. 1 to the Commonwealth Immigrants Act, 1962. The trial judge, Cross, J., was informed that the boy was being well cared for there.

† *Re A. B. (an infant)*, [1954] 2 All E.R. 287; [1954] 2 Q.B. 385; *Re M. (an infant)*, [1961] 1 All E.R. 201; [1961] Ch. 81; *Re Baker (infants)*, [1961] 2 All E.R. 250; [1961] Ch. 303; *on appeal*, [1961] 3 All E.R. 276; [1962] Ch. 201; *Re R. (K.) (an infant)*, [1963] 3 All E.R. 337; [1964] Ch. 455; *Re G. (infants)*, [1963] 3 All E.R. 370; *Re P. (G. E.) (an infant)*, [1964] 3 All E.R. 977; [1965] Ch. 568.



- A** Feb. 23. **CROSS, J.**, having stated the nature of the proceedings, having referred to the relevant statutory provisions (s. 1, s. 2, s. 3, s. 4, s. 13 and s. 16 of, and Sch. 1, paras. 1-4 to the Commonwealth Immigrants Act, 1962), and having reviewed the facts and the discrepancies revealed on investigation by the immigration officer continued:] The position of immigration officers carrying out their duties under the Act of 1962 was recently considered by the Divisional Court in
- B** *Re K. (H.) (an infant)* (1). Counsel for the Crown submitted that that case establishes the following propositions: (i) That s. 2 (1) of the Act of 1962 gives the immigration officer an unfettered discretion to grant or refuse admission unless he is satisfied that the conditions in s. 2 (2) are fulfilled. (ii) That the burden is on the would-be immigrant to satisfy the officer that the conditions of s. 2 (2) are fulfilled. (iii) That the officer must act in good faith and conduct his enquiry
- C** in a manner which is fair to the would-be immigrant, though in considering whether or not he has acted fairly one must bear in mind the general framework of the Act of 1962, and, in particular, the time limits imposed. (iv) That if the officer has not acted in good faith or fairly, his decision may be quashed by certiorari, but that there is no other way in which it can be called in question. (v) That, if fresh evidence is received before the decision to send him back has been implemented, the officer must consider it and can be forced to do so by
- D** *mandamus*.

That appears to me to be a substantially accurate summary, and counsel for the plaintiff did not dissent from it. He did not suggest that Mr. Cooper (2) had acted in bad faith and he did not suggest that the conclusion at which he had arrived, namely, that he was not satisfied that the plaintiff was the father of the

**E** infant, was one which, on the evidence as he understood it, he could not reasonably reach; but he said that the plaintiff hoped to show, by further evidence and, in particular, by the employment of an interpreter who was conversant with the dialect spoken by the boy, that the boy was his son and that he intended to bring the appropriate proceedings in this country to establish the boy's status. His argument on this motion, however, did not involve any

**F** attack on the decision of the immigration officer, but was directed to establishing that in the case of an infant who was a ward of court any decision of the authorities, whether to send him out of the jurisdiction or to detain him here in any particular place, was necessarily subject to and conditional on the approval of this court.

This argument, as I see it, raises two questions:—(a) Did the issue of the

**G** summons make the boy a ward of court? (b) Assuming that it did, ought the court to allow the wardship to continue?

As I have reached a conclusion adverse to the plaintiff on the second question, I do not propose to express any concluded view on the first, which has indeed not been fully argued before me. It will be sufficient if I indicate the general nature of the problem as I see it.

**H** The wardship jurisdiction is founded on the conception that the infant in question owes allegiance to the Sovereign and that the Sovereign owes to the infant a corresponding duty to take it under her wing if required so to do. In this case the boy is not a citizen of the United Kingdom but a citizen of Pakistan. He had never been in this country before his arrival here on Jan. 26, and though he was physically present in this country when the wardship summons was

**I** issued on Feb. 8 by the plaintiff, the Sovereign, acting through the immigration officer appointed by the Home Secretary, had already decided that he should be sent back to Pakistan. In such circumstances, it appears to me to be at least arguable that the child did not owe such a degree of "local allegiance" to the Sovereign as would entitle anyone to force the Sovereign to accept him as her ward.

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(1) [1967] 1 All E.R. 226; [1967] 2 Q.B. 617.

(2) Mr. Cooper was the immigration officer concerned with the investigation as to admission of the boy.

I am, however, prepared to assume, for present purposes, that the boy became a ward on the issue of this summons and is a ward today. Counsel for the Crown conceded that in considering whether to continue the wardship I must proceed on the footing that it is, or at all events may be, in the interests of the boy that he should stay in this country and not be sent back to Pakistan. In that connexion, I would emphasize that the question whether the welfare of the boy will be best served by his staying here or returning to Pakistan is quite different from the question whether the plaintiff is the boy's father. Even if the plaintiff is not the boy's father, it may well be that it would be best for him to stay here and if the argument submitted by counsel for the plaintiff is right it must, as I see it, apply equally to a Pakistani boy who does not claim to be the son of anyone resident in this country but is made a ward on arrival by his grandparents or some friend of the family.

In support of his contention that, assuming the boy to be a ward, the wardship should be ended at once, even though it was not in the boy's best interests that he be sent out of the jurisdiction, counsel for the defendant submitted that the Commonwealth Immigrants Act, 1962, was a comprehensive code dealing with would-be immigrants both adults and infants, and entrusting the decision whether or not they were to be admitted to immigration officers. He said that to read the provisions of the Act of 1962 conferring powers on the relevant authorities as being subject in the case of any infants who were made wards before they were sent back, to the consent of this court would be to drive a coach and horses through the Act of 1962 and produce an intolerable conflict between the authorities and the court, since the immigration officers, in deciding whether or not to allow the child to remain here, are not concerned—or at all events, not primarily concerned—with the welfare of the individual child, but with considerations of general policy with regard to immigrants from the Commonwealth countries, whereas the court would be concerned exclusively with the welfare of the individual child. For my part, I can see no answer to this argument and I think that it is supported by the decision of the Court of Appeal in *Re M. (an infant)* (3). Counsel for the plaintiff sought to distinguish that case on the ground that under the Children Act, 1948, the local authorities were entrusted with the duty of caring for the children in question, whereas under the Commonwealth Immigrants Act, 1962, the immigration authorities were admittedly not concerned—or at least not primarily concerned—with the welfare of would-be immigrants, whether adults or infants. The Court of Appeal, however, in *Re M. (an infant)* (3), did not base its decision on the fact that the powers given to the local authorities by the Act of 1948 were powers to be exercised for the welfare of the children in question but on the fact that they were powers the proper exercise of which was inconsistent with control by the court.

Counsel for the plaintiff also placed great reliance on a sentence in the judgment of LORD DENNING, M.R., in *Re S. (an infant)*, (4) where he said,

“After all, the Court of Chancery exercises the power of a Crown as parens patriae and its jurisdiction is not to be taken away without express words: and there are none in the statute.”

There is, of course, no doubt that an infant in the care of a local authority can be made a ward, and there may be cases especially where a parent in whom the local authority has not complete confidence is seeking to have the child handed over to him in which it may be desirable that the child should be a ward. It is equally clear, however, that the scope for the exercise of the wardship jurisdiction was drastically curtailed by the Children Act, 1948, although there was no mention of it in the Act. I am sure that LORD DENNING was not intending to deny that; indeed, to do so would be contrary to *Re M. (an infant)* (3). There

(3) [1961] 1 All E.R. 788; [1961] Ch. 328.

(4) [1965] 1 All E.R. 865 at p. 868.

A is no express mention of the wardship jurisdiction in the Commonwealth Immigrants Act, 1962; but the Act of 1962, as it seems to me, has not simply drastically limited, but has in effect extinguished the scope for the exercise of the wardship jurisdiction in the case of infants to whom the Act of 1962 applies. It is a necessary incident of a wardship that the ward cannot be sent out of the jurisdiction without the consent of the court. On the other hand, the Act of 1962 provides that an infant to whom the Act of 1962 applies can be sent back if the immigration authorities in the proper exercise of their statutory powers so decide. It seems to me that the continuance of the wardship of any such infant is, therefore, of necessity an unjustifiable interference with the exercise by the authorities of their powers under the Act of 1962. For these reasons the motion succeeds.

C As I have indicated, I have some doubt whether the boy ever became a ward. I propose, therefore, not to order that the wardship shall come to an end, but to strike out the summons. I would, however, say, in justice to the plaintiff, that his application was not frivolous or vexatious or an abuse of the process of the court in any unpleasant sense of the word. It was simply, in my judgment, misconceived. The Home Secretary has said that he does not seek any order for costs. The plaintiff is legally aided, so there will be legal aid taxation.

*Order accordingly.*

[Reported by JACQUELINE METCALFE, Barrister-at-Law.]

E HANIF v. SECRETARY OF STATE FOR HOME AFFAIRS  
SINGH v. SECRETARY OF STATE FOR HOME AFFAIRS

### Appeals.

These were an appeal by the plaintiff Hanif from the decision of Cross, J., reported previously, and an appeal by a plaintiff, Hazura Singh, from a decision of Cross, J., given on Mar. 1, 1968, striking out his originating summons as being also an abuse of the process of the court.

F The grounds of appeal stated by the plaintiff Hanif, were: (i) that the judge wrongly exercised his inherent jurisdiction (if he did exercise it); (ii) that he wrongly applied R.S.C., Ord. 18, r. 19 to the case; (iii) that the defendant's motion to strike out the originating summons in the case of the boy was premature, the plaintiff having had no opportunity of taking an appointment or filing evidence; G (iv) that the originating summons was properly issued, and (v) that the boy had been and was a ward of court, and that the plaintiff, or the boy, was entitled to be heard by the court to ascertain his personal status. The defendant served a respondent's notice that the orders of Cross, J., should be affirmed on the further ground that no infant who, being a Commonwealth citizen to whom s. 1 of the Commonwealth Immigrants Act, 1962, applies, had been refused admission into the United Kingdom under s. 2 of the Act of 1962, could be made a ward of court; but this ground was not decided by the Court of Appeal. H The facts are summarised in the judgment of LORD DENNING, M.R.

I By originating summons dated Feb. 20, 1968, Mr. Hazura Singh had made an application similar to that made by Hanif, but in relation to N.S., an Indian who was seventeen years of age and who, so Mr. Hazura Singh alleged, was his son. The Secretary of State for Home Affairs moved for an order striking out the summons. On Mar. 1, 1968, Cross, J., made an order that this originating summons be struck out as an abuse of the process of the court.

The judgment of Cross, J., in the case of Singh is not reported, but the appeal from Cross, J., in that case is reported together with the appeal of the plaintiff, Hanif, in the judgments that follow at p. 150, letter A, post.

*P. A. W. Merriton and M. A. A. Bashiri for the plaintiff, Hanif.*

*A. P. Lester for the plaintiff, H.S.*

*J. P. Warner for the Crown.*



**LORD DENNING, M.R.:** The boy, A., is from Pakistan. He claims that his father is in the United Kingdom and that he is entitled to enter this country as of right by virtue of s. 2 (2) (b) of the Commonwealth Immigrants Act, 1962. That section provides that a child is not to be refused entry if he satisfies the immigration officer that he is

“... a child under sixteen years of age, of a Commonwealth citizen who is resident in the United Kingdom...”

The boy arrived at London Airport on Jan. 26, 1968, on a Pakistan International Airlines flight. He produced a Pakistani passport which showed him to have been born on Mar. 2, 1956, at Jadda, Pakistan. There was at London Airport that day a Mr. Hanif who was said to be the father of the boy. The immigration officer saw the boy and Mr. Hanif separately. He asked questions of them so as to check the claim. Mr. Hanif produced a passport showing that his date of birth was Aug. 20, 1942: whereas the boy's birthday was Mar. 2, 1956. If those dates were correct, it would mean that the man begot the child when he was twelve years of age. That was so unlikely that the immigration officer was not ready to accept the paternity without further inquiry. He asked each of them about their relatives. The boy said he had only one brother who was aged nine. Mr. Hanif said he had two sons aged twelve and one. The officer asked about the boy's uncles, aunts, grandmothers and suchlike. Each of them gave entirely different accounts. In the result the immigration officer was not satisfied that the boy was the child of Mr. Hanif. He referred the matter to the chief immigration officer. He decided that the boy could not be allowed to enter. The immigration officer handed the boy the form of refusal. It required him to return back to Karachi on the next day. Shortly afterwards a barrister made representations on behalf of the boy. In consequence he was not removed from the country at that time. An application was made to the court on Feb. 8, 1968, to make him a ward of court, with care and control to be given to the father, and directions to be given as to his residence, and that a declaration be made as to the legitimacy and the paternity of the child.

The young man, N.S., is from India. He was seventeen years of age. As he was over sixteen he was not entitled to come in as of right; but there is a discretionary power in the immigration officer to admit him. An instruction has been issued which says that children aged sixteen and under eighteen should be freely admitted if they are coming to join both parents or the only surviving parent in the United Kingdom. The young man sought to enter under that discretionary power. He arrived on Feb. 16, 1968, at London Airport on an Air India flight from India. He produced a passport showing that he was born on Feb. 27, 1960, in India. He came with a lady who was said to be his mother and a girl said to be his sister. They produced their passports. The lady claimed that she was the wife of Mr. Hazura Singh, who had come to this country in July 1967, about seven months before. He was at the airport to meet them. He was sponsoring them—his wife and two children—and bringing them into the United Kingdom. The immigration officer enquired into their relationship. He saw them each separately and he also saw Mr. Hazura Singh. He found several discrepancies. For instance, the young man said that the family home was built of mud, had only one storey and consisted of two small rooms: whereas the father, the mother and the daughter said it was built partly of bricks and the father and the daughter said that it had two storeys. The young man said that since leaving school three or four years ago he had worked as a labourer in a factory and as an electrician in a shop; whereas the mother and the daughter said that he had done no work since leaving school two years ago, apart from occasionally feeding their animals. In the result the immigration officer was satisfied that the mother and the daughter were the wife and daughter of the father, but he was not satisfied that the young man was the son of Mr. Hazura Singh. So he consulted the chief immigration officer. He refused the young man admission and gave him notice of the refusal.

A Arrangements were made for him to return to Delhi on the next day. In his case, too, representations were made. Application was made to the Court of Chancery on Feb. 20, 1968, by Mr. Hazura Singh asking that the young man be made a ward of court and for similar directions as in the case of the Pakistani boy.

B In each case the summons was served on the Secretary of State for Home Affairs. He thereupon applied to the court asking that the proceedings should be struck out on the ground that they were an abuse of the process of the court. Cross, J., struck out both summonses. The matter now comes to this court.

C The basic question is this: to what extent can the courts of law review the decisions of the immigration officers? In this case the courts are asked to do it by making the child a ward of court. A year ago the courts were asked to do it by means of habeas corpus and certiorari. It was in the case of *Re K. (H.), an infant* (5). An immigration officer was not satisfied that a Pakistani boy was under sixteen and directed that he be returned to Pakistan. An application for habeas corpus was issued to secure the boy's release. LORD PARKER, C.J., was clearly of opinion that the immigration officers were not acting in a judicial capacity or quasi-judicial capacity, but in an administrative capacity. Nevertheless he held that they must act honestly and fairly, and if they did not do so, the court could interfere. If they had acted dishonestly or unfairly, their decision could be questioned by certiorari. If they had not properly inquired into the matter, they could be compelled to do so by mandamus. None of that was shown, so the application failed.

D Now we have another attempt to gain entry for a child into England or, at least, to prevent his removal from England. The attempt is by means of the machinery for making a child a ward of court. Under the Law Reform (Miscellaneous Provisions) Act, 1949 and R.S.C., Ord. 91, r. 1 and r. 2, as soon as application is made to make a child a ward of court, he becomes a ward of court *on the making of the application*. The child does not cease to be a ward of court unless the applicant fails within three weeks to apply for an appointment; but the court may at any time order that the child shall cease to be a ward of court. So the argument runs in this fashion. Each of the children became a ward of court as soon as the application was made to make him a ward of court, and he remains a ward of court unless and until an order is made that he shall cease to be a ward of court. Meanwhile, it is said, he cannot be removed from the jurisdiction without the leave of the court because no ward can be removed from the jurisdiction without leave.

G In answer to this argument, two points are taken. First, it is said that once a child has been ordered to be removed, there is no jurisdiction to make him a ward of court. I do not think it necessary to determine that point. I can well see that there may be exceptional cases where such a jurisdiction may be desirable. Second, it is said that at any rate, even if there is jurisdiction, it ought not to be exercised in cases like the present one. I think that this second submission is correct. It seems to me that in the Commonwealth Immigrants Act, 1962, Parliament laid down a full and complete code to govern the entry or removal of immigrants from the Commonwealth and has entrusted the administration of it to the immigration officers. So much so that the courts ought not to interfere with their decisions save in the most exceptional circumstances. Take the case of the Pakistani boy. In order to gain a right of admission, he must satisfy an immigration officer "that he is a child under sixteen years of age of a Commonwealth citizen" (see s. 2 (2) (b) of the Act of 1962). It is the immigration officer who has to be satisfied, not the court. Then under Sch. 1 to the Act of 1962 it is an immigration officer who is to "examine" him as to the genuineness of his claim to enter. It is the immigration officer who can give the notice of refusal and who can afterwards cancel it, and so forth. The policy of the statute is to place immigration control in the hands of the immigration officers, trusting that

they will exercise their powers fairly and, as I believe they do, humanely also. So long as they exercise it honestly and fairly, the courts cannot and should not interfere. They will not issue a writ of habeas corpus or certiorari so as to review the decisions of the immigration officers. Nor will they allow the wardship jurisdiction to be used for a like purpose. A

There is no suggestion in these cases that the immigration officers have acted unfairly. Quite the contrary. It is clear on the evidence that they acted honestly and fairly and investigated the claims as thoroughly as the circumstances permitted. All that is said is that the plaintiffs desire a further opportunity of proving the relationship of son to father. That indeed is the whole object of the proceedings—to enable the boy and the young man to remain in England pending further investigation. In the case of the Pakistani boy, counsel agreed that the immigration officers were the people entrusted with the jurisdiction to remove the child, but he desired an opportunity of proving to the court that this boy was the son of the man who is said to be his father. He asked that the removal order should not take effect whilst he tried to prove it. In the case of the Indian youth, counsel went further. He said that the statute did not oust the jurisdiction of the court. He submitted that the court could exercise a paramount or, at any rate, a concurrent jurisdiction so as to see that the young man was the son of his father. B C D

To these contentions I think that there is the short answer. The court will not exercise its jurisdiction so as to interfere with the statutory machinery set up by Parliament. The wardship process is not to be used so as to put a clog on the decisions of the immigration officers or as a means of reviewing them. These applications are misconceived. The courts should refuse to entertain them. They should be struck out under the inherent jurisdiction of the court. I would dismiss the appeals accordingly. E

**RUSSELL, L.J.:** When an infant becomes a ward of court, control over the person of the infant is vested in the judges of the Chancery Division of the High Court. It is for the judge to say by order from time to time where the ward is to reside and with whom, and disobedience to such an order is contempt of court by anyone who knowingly breaches or is party to a breach of that order. Moreover, even without any judge's order forbidding it, it is a contempt to remove a ward outside the jurisdiction of the High Court. F

It is, however, quite obvious that there are circumstances in which control over the person of a ward is not committed or referred to the judge but is by the law of England committed or referred to another agency or person. As a simple illustration, it could not be contended that the judge would have any jurisdiction to order that a criminal ward be transferred from place of detention A. to place of detention B., however much the medical evidence before the judge suggested that the ward would be in better health at place of detention B. The reason is that the jurisdiction of the judge over the person of the ward is necessarily restricted by the fact that the law has given that aspect of control over the ward's person exclusively to another agency. Similarly, the judge would have no right to complain of or countermand a lawful posting overseas of a ward who was in the armed forces. The law refers the military control of the ward to the military authorities. Similarly, any lawful deportation order affecting a ward must be outside the normal position which I have mentioned already, that a ward must not leave the jurisdiction without permission of the judge; indeed, it would override any existing express order of the judge in the wardship proceedings that the infant was not to depart from the jurisdiction. Those are examples of the proposition that the control of the High Court over the person of a ward is not by any means absolute. G H I

The first question in these two cases is whether the Commonwealth Immigrants



**A** Act, 1962, is another sphere in which such control is taken from the guardian judge and committed to another agency. I have no doubt whatever that it is. I think that the contrary is virtually unarguable, though in one of these appeals it was attempted. The wardship of the infants, in my judgment, has not, and could not in law have, any effect on the powers and duties of the immigration authorities so as to hamper them in any way in removing the infants from the jurisdiction under the Act of 1962. Those immigration authorities have in fact, whether through uncertainty about the legal position, or from courtesy towards the judiciary and judicial processes, not yet carried out the removal of either of those infants. They have postponed that removal and have detained the infants in the meanwhile. This was, I have no doubt, the very purpose of the wardship proceedings and of making the Home Secretary a party to those proceedings. It was intended thereby to deter the authorities from implementing their at present unassailable decision to remove the immigrant infants for long enough to give the alleged fathers time to procure decisions from some courts in England that they are indeed the fathers. I cannot for a moment accept that these wardship proceedings (as distinct from proceedings in the Probate, Divorce and Admiralty Division to establish legitimate paternity) have any other purpose than to deter the immigration authorities from the present execution of their duty under the Act of 1962, the officer not being satisfied on the point of paternity.

I in no way impugn the genuine wish of the alleged fathers to establish by some means to the satisfaction of the relevant officials their paternity; but to take the step of wardship proceedings to that end, with the Home Secretary as **E** party, can in my judgment only be described as an abuse of the wardship process. It is in point of law a bluff which has worked so far, and a bluff is, I think, an abuse. Cross, J. in my view rightly so held.

I should add that in the second appeal a special point was argued, and, as I understand it, it was this: that because in the case of an infant over the age of sixteen, the immigration officer, not only requires to be satisfied of paternity, **F** but in addition has a discretion in the exercise of which he may or may not consider the welfare of the proposed immigrant, the implementation of his adverse decision must await the expression of the court's view on the welfare aspect in order that he, the immigration officer, may reconsider his discretion in the light of that expression of view. I cannot accede to that argument which, it seems to me, only amounts to a particular assertion that the statutory provisions for the control of immigration under the Act of 1962 are somehow qualified **G** in the case of a ward of court.

I am conscious that this decision is flat contrary to a submission made in another case by the then Solicitor-General to the European Commission for Human Rights (6); but I cannot help that.

**H** I have thus far assumed that the issue of the summons did in each case make the infant a ward of court. I prefer not to decide whether in the particular circumstances of these cases the Law Reform (Miscellaneous Provisions) Act, 1949, and the Rules of the Supreme Court had or had not that effect. It is possible that it would be held to have that effect if, for example, two parents of the infant already in England were in dispute as to the infant's future in England **I** should the immigration officer decide to cancel the removal order or to cancel the refusal to permit entry. In such case it might be held that a summons issued before that cancellation would, so to speak, as between the parents of the child have effect from its date. I too would dismiss both appeals.

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(6) See *Mohamed Alam and Mohamed Khan v. United Kingdom*, Application No. 2991/66, heard on July 13 and 14, 1967; cf. Vol. 24 of the Collection of Decisions of the European Commission for Human Rights.

CUMMING-BRUCE, J.: I agree.

*Appeals dismissed* (7). *Leave to appeal to the House of Lords refused.*

Solicitors: *P. Halberstam* (for the plaintiff Hanif); *Lawford & Co.* (for the plaintiff Singh); *Treasury Solicitor.*

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

## TICKLE v. TICKLE.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sir Jocelyn Simon, P. and Willmer, L.J.), December 12, 13, 1967.]

*Evidence—Res gestae—Health—Belief of patient regarding his health—Whether evidence of what doctor told patient as to his state of health admissible.*

*Magistrates—Desertion—Intention—Medical advice that separation or temporary separation from wife required by husband's health—Intention on part of husband to make separation permanent.*

*Magistrates—Husband and wife—Appeal—Divisional Court—Procedure—Notice of appeal, not case stated—Matrimonial Proceedings (Magistrates' Courts) Act, 1960 (8 & 9 Eliz. 2 c. 48), s. 11—Matrimonial Causes Rules, 1957 (S.I. 1957 No. 619), r. 73 (2).*

An appeal under the Matrimonial Proceedings (Magistrates' Courts) Act, 1960, to the Divisional Court of the Probate, Divorce and Admiralty Division ought to be by notice of motion, exhibiting the notes of evidence and the justices reasons, and not by way of Case Stated (see p. 157, letter G, and p. 162, letter F, post).

Evidence as to what a doctor says to a patient about his state of health is admissible as part of the *res gestae* where the matter savouring of a *res* is what the patient believes as to his state of health (see p. 158, letter E, and p. 162, letter F, post).

*Aveson v. Lord Kinnaird* ((1805), 6 East. 188) applied.

The parties were married in 1958, three children being born between 1959 and 1965. After the first year of marriage they got into financial trouble and the husband began to suffer in his nervous health, and was unable to maintain a consistent working record. In 1966, the husband went into a mental hospital as an in-patient. At first he intended, when he was discharged, to return to the wife; but towards the end of his period as an in-patient he was given certain advice by his doctor in consequence of which he told the wife that, on his discharge, he proposed to live permanently with his mother instead of returning home. The wife did not accept that suggestion. On his discharge, the husband went home and, again acting, it seems, in accordance with his doctor's advice suggested to the wife that he should go and live with his mother for a period of three months, taking the children with him, but the wife refused that proposal as well. The husband left for a short time, returning afterwards and telling the wife that he was going and in fact going to live with his mother. Thereafter he never provided any money for the support of the wife, although he obtained work and maintained himself in employment. On the hearing of a summons by the wife alleging that he had deserted her, the husband said in evidence that he would never go back to her. The husband's doctor said in the course of his evidence that, if the husband were to return to the wife, he would have to go back to hospital again, and that no end to that position could be seen.

(7) The young Indian, N.S., obtained admission to England; see *The Guardian* Apr. 13, 1968, p. 1.

**A** On appeal by the wife from a decision of the justices that there was justification for a temporary separation, owing to the medical advice to the husband, and that there was no intention on his part to bring co-habitation permanently to an end, and accordingly dismissing her summons,

**Held:** although the husband would have been justified, in view of the medical advice that he was given, in temporarily separating from the wife, yet on the evidence, particularly as he had taken no steps to maintain her, he had manifested an intention to bring co-habitation permanently to an end; and the husband, therefore, was in desertion, notwithstanding the medical evidence that if he were to return to the wife he would have to go back to hospital (see p. 159, letter I, to p. 160, letter A, p. 161, letter C, and p. 162, letter E, post).

**C** *Lilley v. Lilley* ([1959] 3 All E.R. 283) followed.  
Appeal allowed.

[ **Editorial Note.** Rule 73 of the Matrimonial Causes Rules, 1957, is excepted from the general revocation of those rules on Apr. 11, 1968, by the Matrimonial Causes Rules 1968 (S.I. 1968 No. 219), r. 123 (2). ]

As to appeals from magistrates' courts in summary matrimonial cases, see 12

**D** HALSBURY'S LAWS (3rd Edn.) 508, 509, para. 1115.

As to evidence of mental and physical conditions, see 15 HALSBURY'S LAWS (3rd Edn.) 281, para. 510; and for cases on the subject, see 22 DIGEST (Repl.) 65, 66, 429-432.

As to illness causing separation amounting to desertion, see 12 HALSBURY'S LAWS (3rd Edn.) 262, 263, para. 499.

**E** For the Magistrates' Courts Act, 1960, s. 11, see 40 HALSBURY'S STATUTES (2nd Edn.) 415.

For the Matrimonial Causes Rules, 1957, r. 73, see 10 HALSBURY'S STATUTORY INSTRUMENTS (Second Re-Issue) 273.]

Cases referred to:

**F** *Aveson v. Lord Kinnaird*, (1805), 6 East. 188; 102 E.R. 1258; 22 Digest (Repl.) 92, 707.

*G. v. G.*, [1964] 1 All E.R. 129; [1964] P. 133; [1964] 2 W.L.R. 250; Digest (Cont. Vol. B) 355, 3037c.

*Lilley v. Lilley*, [1959] 3 All E.R. 283; [1960] P. 158; [1959] 3 W.L.R. 306; 123 J.P. 525; Digest (Cont. Vol. A) 667, 619ba.

**Appeal.**

**G** This was an appeal by way of Case Stated from a decision of the Warrington justices given on Mar. 14, 1967, dismissing a summons by the wife alleging that the husband had deserted her on Oct. 31, 1966. The appeal was out of time, but at a sitting of the court in July, 1967, time was extended for the appeal to be brought.

The facts are set out in the judgment of SIR JOCELYN SIMON, P.

**H** *A. B. Ewbank and D. R. A. Sich* for the wife.

*J. A. Stannard* for the husband.

**SIR JOCELYN SIMON, P.:** This is an appeal by the wife against the decision of the Warrington justices, dated Mar. 14, 1967. The justices on that day dismissed a summons which she had taken out alleging that the husband had deserted her on Oct. 31, 1966. The appeal was out of time, but at the sittings of this court in July, 1967, time was extended for the appeal to be brought.

**I** The story of this marriage is an unhappy one. The parties were married in February, 1958, and have three children born between the years 1959 and 1965. At the outset of the marriage for about twelve months (a little longer probably) the parties lived with the husband's parents, and, for reasons which will be apparent, things went reasonably well during that period. However, at the end of that period, the parties moved away to a place of their own—first of all lodgings, and then their own house. They got into financial trouble, and the husband began



to suffer in his nervous health. I think that those two matters were almost certainly inter-connected. The justices were somewhat critical of the wife for her lack of sympathy with the husband in his impairment of health. On the other hand, it seems to me that she must have had a very difficult and frustrating time herself, particularly since the husband, owing to his impaired state of health, was unable—even discounting a certain amount of what the wife said as exaggeration—to maintain a consistent working record. The husband finally went into a mental hospital as an in-patient at Easter, 1966. At first he intended, when he was discharged, to return to the wife; but towards the end of his period as an in-patient he was given certain advice. In consequence of that advice, he told the wife that, on his discharge, he proposed to live with his mother instead of returning home. I think that almost certainly the initial suggestion made by the husband was that he should live permanently with his mother and also that he should take the children there, the wife returning to her mother. Not surprisingly, the wife did not accept that suggestion. On a day which is not clear—or not consistent, anyhow, in the evidence—but which, I think, was almost certainly Oct. 31, 1966, the husband was discharged from hospital. He went home, and then suggested to the wife that he should go and live with his mother for a period of three months, taking the children with him. The wife refused that modification of the original proposal as well. The husband left for a short time, returning afterwards and saying: “I am going. I have had enough.” The wife asked him where he was going, and he said: “I am going back to hospital.” However, he did not go back to hospital. He went to live with his mother, in what was clearly a more propitious environment for him. He managed to get work and maintain employment. He sent money for the support of his children, but no money for the support of his wife.

In those circumstances, on Dec. 7, 1966, the wife issued her summons making the complaint of desertion from Oct. 31, 1966. That came on for hearing before the justices on Mar. 14, 1967. At that date, the husband was still living with his mother and was still supporting the children, but giving no support to his wife. The justices, as I have said, dismissed the wife’s complaint, though they made an order for the maintenance of the children. At the hearing in March, 1967, the husband and wife both gave evidence, making allegations against each other. However, the justices found that the evidence on neither side established such grave and weighty matter as would entitle them to live apart—or, to put it another way, to constitute constructive desertion on the part of either spouse. It has not been contended before us that that decision can be questioned. It was essentially a matter for the assessment of the justices who had these parties before them, and, in my view, can clearly be supported on the notes of evidence.

The husband called the consultant psychiatrist from the mental hospital where he had been a patient between Easter and October, 1966. That was a Dr. Fleming; and his evidence seems to me to be crucial in this case. He had first seen the husband in 1961, when he was referred to Dr. Fleming by his general medical practitioner; and Dr. Fleming saw him on a number of occasions between then and 1964, in addition to having him under his care at the hospital in 1966. He described the husband as follows:

“He was suffering from personality inadequacy and depression which I regarded as reactive to the circumstances in which he was living with his wife. There was a basic personality defect which had been there from very early childhood and which is constitutional; in other words, an inborn tendency to react in this inadequate way.”

When he said “react in this inadequate way”, he meant, as I understand it, an inability to cope adequately with a situation which a normal person could handle reasonably well. The doctor said that he gave the husband advice that there were three courses open to him, as there was no doubt that living with his wife would only serve to aggravate his condition; and in no circumstances—the

A note says "would", but it probably means "should"—he return and live there. "I had to advise the patient to seek another solution"—and then unfortunately at this critical point the note is corrupt, but I think that the doctor obviously meant that to go back to the wife would cause another breakdown, because he went on to say: "A recurrence of this situation would result in him requiring further hospital treatment." As I read Dr. Fleming's evidence, it seems to me that what he was putting forward as the first alternative, and probably the preferable one considering the interests of his patient, was that there should be a permanent separation between husband and wife; but, finding that that was unacceptable to the wife, he put forward a second alternative, namely, that there should be a temporary separation of some three months, during which the husband should live with his mother. There was a third course which was evidently in Dr. Fleming's mind; but he never said what that was, because at this stage of his evidence there was an objection by the advocate for the wife that the evidence was inadmissible, presumably under the hearsay rule, since the doctor was saying what advice he gave to the husband. The evidence was, therefore, left in the form that I have stated. The final questions asked of the doctor in examination-in-chief were these:

D "Q.—In your opinion, if he were to return to the wife, what would be the result? A.—In my opinion, if he were to return to his wife I am quite sure he would have to go back to hospital. Q.—How long will you anticipate this situation on medical grounds should prevail? A.—I cannot see any end to it."

The conclusion of the justices was stated in this way:

E "In these particular circumstances there is justification for a temporary separation. The [husband] is acting on the advice of his doctor, and we accept that the health of the [husband] demands a state of separation from the [wife], although at this stage the duration is uncertain. We did not find that there was any intention on the part of the [husband] to bring the cohabitation permanently to an end, and considered that if and when his mental health is satisfactorily improved he will then be able to return to the [wife]."

Before I come to the merits of this appeal and the substantial questions of law and fact which arise, there are two preliminary matters that I wish to deal with. The first is this: the appeal is brought by way of Case Stated. That is clearly not a method of appeal which in this jurisdiction is justified by the rules. The appeal ought to be by notice of motion, exhibiting the notes of evidence and the justices' reasons. In fact, we have the notes of evidence; and we have what is in substance the justices' reasons, though couched in the form of a Case Stated. The husband relies on the justices' reasons; and his contentions are not contained or set out in the Case Stated, and he has not required his contentions to be formally stated in that way. The result is that we have before us all the material necessary for a decision, and it has been agreed that we should act on such material in order to save further delay and expense, which would be caused by an adjournment in order for the appeal to be properly constituted. However, I must not be taken as approving an appeal brought in this way, which has a number of inconveniences. It is true that we do on occasions entertain an appeal by Case Stated; but that is when the point arises under the Magistrates' Courts Act, 1952, and not under the Matrimonial Proceedings (Magistrates' Courts) Act, 1960.

I The second preliminary matter is this. As I said, an objection was taken to Dr. Fleming's evidence. The question that was posed before the justices was: did the husband have good cause for separation? Clearly, the advice that was given to him by his doctor might in circumstances such as these be of crucial significance. It is true that a doctor can be, as this doctor was, called to say what his prognosis was if the husband resumed cohabitation with the wife. But the opinion that the doctor formed is one thing, as it seems to me; what he communicated to his patient might be quite another, and it is the state of the patient's

mind and not the state of the doctor's which is in question. If, therefore, the law said that this evidence must be excluded, it would be running the risk of bringing about a miscarriage of justice; but I do not think that the law demands any such thing. A

In *Aveson v. Lord Kinnaird* (1), the court was concerned with an action on a policy of insurance which was effected by a husband on his wife's life. The defendants, the insurers, pleaded that, although the wife had been warranted to be in good health, she was not in fact at the time of the insurance, which was very shortly before her death, in good health, and that, therefore, they were not liable to pay on the policy. The husband, the plaintiff, called a surgeon who had examined the wife shortly before the policy was taken out. The defendants then called a woman, Susannah Lees, to say that, very shortly afterwards, the wife had said that she was in very impaired health and, indeed, had been so on the very day that she had been examined by the surgeon. Objection was taken to such evidence as hearsay. The trial judge, however, admitted it, and the question was whether it was rightly or improperly admitted. The court, consisting of LORD ELLENBOROUGH, C.J., GROSE and LAWRENCE, JJ., held that it was rightly admitted as part of the *res gestae*—the *res*, as I understand it, being the wife's state of health. It was pointed out that the surgeon's own opinion must have been based on information that was given to him by the wife, and that what she said to Susannah Lees was no more hearsay than what she said to the surgeon. If what a patient says about her state of health to a doctor is admissible as part of the *res gestae* notwithstanding the hearsay rule, it seems to me that what the doctor says to the patient is no less admissible when its adduction is required in order that justice should be done. In my view, therefore, the *res* here being the husband's state of health—or perhaps, to put it more accurately, the matter savouring of a *res* (to adapt words used by LORD DUNEDIN) being what the husband believed as to his state of health—what the doctor told him was admissible as part of the *res gestae*. B C D E

With those preliminary observations, I turn to the main question in dispute here. If the finding of the justices that there was no intention on the part of the husband to bring cohabitation permanently to an end can be sustained, that, in my view, is the end of this appeal for two reasons: first, because in order for there to be desertion there must be an intention to bring cohabitation permanently, and not merely temporarily, to an end; and, secondly, because on the advice of the doctor and the opinion of the doctor communicated to the husband, a temporary separation was certainly, if not called for, at least justifiable. When there is a finding of fact of that sort by justices, we in this court will normally respect it. The reason for that is partly that we are in the same position as any appellate court compared to a court of trial, namely, that we do not have the witnesses before us, and findings of fact will, in ninety-nine cases out of one hundred, depend on an assessment of the evidence of the witnesses, which can only be arrived at by the court which sees and hears the witnesses. There is, however, a second reason, and that is this: normally we in this court do not enjoy the advantage which the Court of Appeal has on appeal from the High Court in having a transcript of evidence by way of question and answer. We normally have only the clerk's note of evidence. Even when it is copious, it does not necessarily include all the matters that the justices themselves consider of significance but only those matters which the notetaker considers of significance. In the present case, however, we do have a transcript of question and answer; and we were told that it was transcribed from a tape. Moreover, I do not think that the crucial finding of the justices, "We did not find that there was any intention on the part of the [husband] to bring the cohabitation permanently to an end", was a finding which depended on assessment of differential veracity of witnesses giving oral evidence. F G H I

What the husband said in evidence was this. I will read the whole passage. It



A was being put to him that he ignored the children in the street, although he was not living very far away, and he said:

“I have not. If I could see those children it would do me right down to the ground. Q.—You’re not even treating your wife as well as you would treat an ordinary lady in Densham Avenue now are you? A.—If I could see the children once a week it would be quite sufficient for me. Q.—I’m talking about your wife, Mr. Tickle. A.—Personally I would never go back on any consideration to her.”

That piece of evidence, as it seems to me, directly contradicts the finding of the justices that I have just read. It means that, on the face of it, the finding of the justices—the crucial finding as it seems to me—is not only not supported by the evidence but is contradicted by it. It is true that that answer may have been a slip by the husband; and it was ably argued by counsel for the husband that the justices could well have had that answer in mind and yet have come to the conclusion that they did. I cannot agree. It seems to me that, if the justices did have that answer in mind, they could not properly have framed their finding in the way that they did. I would have expected them to say: “It is true that the husband said that he would never go back to his wife, but we do not think that this represents his true intention.” However, they do not say that; and I can only assume that that piece of evidence escaped their notice.

If that stood alone, I might feel that it would be unsafe to act on it, but it does not stand alone. I was impressed by the point made by counsel for the wife in reply that it stands together with the evidence that the husband, although able to hold down a quite well-paid job while living with his mother, left his wife without any support. (Incidentally, it seems to me that, on the facts established so far, the wife would have had an unanswerable case on the ground of wilful neglect to maintain. However, she framed her case in desertion.) But, if this had been a temporary separation, I would have expected the husband to support his wife until his state of health was sufficiently robust for him to return to cohabitation with her; and that he failed to do so seems to me to be consistent with his meaning what he said when he said that he would never on any consideration go back to his wife. The situation, therefore, seems to me to be this: the husband would have been justified, on the advice which he was given, in a temporary separation from his wife. If he takes advantage of a temporary separation to manifest an intention never to resume cohabitation at all, he is guilty of desertion: see *Lilley v. Lilley* (2); *G. v. G.* (3).

Counsel for the husband, however, put his argument in another way. He said that, even if the husband did manifest an intention to live apart permanently from the wife, he was justified in doing so in view of the medical advice which he had received and in view of Dr. Fleming’s evidence that he, Dr. Fleming, could not see any end to the situation. The first thing to be said about that is that Dr. Fleming’s evidence does not seem to me to differ materially from that given by the consultant in *Lilley v. Lilley* (2), where, nevertheless, the Court of Appeal held that desertion was proved. Secondly, although Dr. Fleming did initially apparently, as I read his evidence, advise that there should be a permanent separation, he in the end resiled from that in the face of the wife’s objection and advised only a temporary separation. I do not propose to investigate what would be the situation if it is indeed proved that the state of a spouse’s health does demand a permanent separation. There are some dicta in *G. v. G.* (3) which bear on the matter; but, in my view, it does not arise for necessary decision in this case.

I base my decision in this appeal on the matters which I have already referred to, namely, that the husband had been advised that there should be a temporary separation, albeit that the situation at the end of that period could not be precisely envisaged, and that he took advantage of such temporary separation to

(2) [1959] 3 All E.R. 283; [1960] P. 158.

(3) [1964] 1 All E.R. 129; [1964] P. 133.

manifest an intention to disrupt cohabitation permanently. In my judgment, if that is right, the wife proved her case of desertion and I would allow the appeal. A

**WILLMER, L.J.:** I have found this an obstinately difficult case, and it is only with some doubt and after a good deal of hesitation that I have been able to make up my mind as to what course we ought to take.

I think that the starting point must be the finding of the justices which appears in the Case Stated to the effect that, so far as the matrimonial relationship between the parties was concerned, the departure of the husband would amount to desertion. That means that, apart from the question of health, the justices were saying that the husband was no doubt in desertion. The question is whether the husband can justify his departure from the wife on the basis that this was forced on him for reasons concerning his health. The justices came to the conclusion that the mental ill-health of the husband amounted to what they described as a "super-vening cause", such as was envisaged by this court in *G. v. G.* (4), to which **SIR JOCELYN SIMON, P.**, has referred. The effect of that, they thought, was that there was justification for a temporary separation on the part of the husband, and it was that which, as my lord has pointed out, they found. In *Lilley v. Lilley* (5) also, the Court of Appeal envisaged the possibility of ill-health on the part of one of the spouses justifying a temporary separation; but in that particular case they decided on the facts that the wife was in desertion because her expressed intention went far beyond a mere temporary separation. B C D

In the present case the justices, having said that there was justification for a temporary separation, went on to find that the husband did not have any intention to bring cohabitation permanently to an end. In other words, they were treating this case as one of a temporary separation. The crux of the case to my mind is whether that finding by the justices can be justified on the evidence which was before them. In this case, somewhat unusually, we are in the fortunate position of having a full transcript of the evidence that was given, so that we can see for ourselves what the husband actually said. On behalf of the wife reliance is, of course, placed on the answer which the husband gave, and which **SIR JOCELYN SIMON, P.**, has read from the notes of evidence, in which he said: "Personally I would never go back on any consideration to her." It may, I think, be fairly remarked that that answer was in no way suggested to him by the question that was asked. It seems to have been quite gratuitously volunteered. It is said, however, on his behalf that that single answer should not necessarily be taken at its face value. It is said that we ought to have regard to the context in which the answer was given. It follows on very shortly after the husband's reference to what had been said by the wife, for a little earlier on the same page of the transcript he had said: "She's just stated that she would never have me back." In point of fact, the wife had said no such thing in evidence. It is to be presumed that what the husband was there referring to was what we are told happened at the outset of the hearing, when the justices enquired as to the possibilities of a reconciliation, and on that enquiry the wife is alleged to have said that she did not want the husband back. I pause there to remark that, if the husband was in desertion, that statement by the wife would go no distance towards terminating it; for I take it as well-established that a deserted spouse is under no duty to invite the deserter to come back. It is only when the deserting spouse makes some bona fide effort at a reconciliation that the state of mind of the deserted spouse becomes relevant. All the same, if that was in truth the attitude of the wife, it may be said that that helps to explain the husband's answer which he gave, namely, that he would never go back to his wife. I am bound to say that I see much force in the contention put forward on behalf of the husband that the justices, who after all had the advantage of seeing the husband and hearing him give his answer, may well have had good reasons for not taking that answer E F G H I

(4) [1964] 1 All E.R. 129; [1964] P. 133.

(5) [1959] 3 All E.R. 283; [1960] P. 158.

A at its face value, and for declining to find that there was any intention on his part to bring cohabitation permanently to an end.

*Lilley v. Lilley* (6), to which reference has been made, was a case in which the facts were a good deal stronger than those in the present case. It was a case which in fact resulted in a finding of desertion against the wife; but in that case the wife had not only expressed in court, in no uncertain terms, a fixed intention never to  
B return to the husband, but had also written letters in which she expressed the same intention. In the present case the only direct evidence is the single answer given by the husband to which I have referred. It might be thought that that, standing by itself and given in the context to which I have referred, was an insufficient ground on which to upset the justices' finding that there was no intention on the part of the husband to separate himself permanently from the  
C wife. In the end, however, I have come to the conclusion that the decisive factor is the point made by counsel for the wife in the course of his reply, when he drew attention to the fact that throughout the whole of the separation up to the date of the hearing the husband had never made any attempt to provide any maintenance for his wife. He argued—and argued I think with compelling force—that a husband who intended that his separation from his wife should only be temporary  
D would surely have taken steps to maintain her during the temporary separation. That consideration to my mind tips the balance, and, on the whole, I have come to the conclusion that that, taken in conjunction with the evidence which the husband gave, admits of only one possible conclusion, namely, that the husband had arrived at a fixed determination permanently to bring cohabitation to an end. In those circumstances it seems to me that the finding of the justices that there  
E was no such permanent intention is one that cannot be supported on the evidence which was actually given.

That, however, does not dispose of the case; for counsel for the husband urged that, even if the husband had arrived at such a fixed intention, that is to say, even if he did intend the separation to be permanent, that would not in all the circumstances of this case amount to desertion having regard to the medical  
F evidence. SIR JOCELYN SIMON, P., has already read the two vital answers given by Dr. Fleming at the conclusion of his evidence-in-chief, the effect of which was that, in his view, if the husband were to return to the wife, he would have to go back to hospital again, and also that he (the doctor) could not see any end to it. It is, I think, of no little significance that, on that particular aspect of the case, Dr. Fleming was not asked any question in cross-examination. Some support for  
G the submission put forward on behalf of the husband is, I think, to be found in certain observations made by SIR JOCELYN SIMON, P., in *G. v. G.* (7), where he said:

“ Similarly, it seems to me that if the health of one spouse demands a state of isolation or separation, the law would be flying in the face of good sense if it were not to recognise that as affording justification for the spouses living  
H separately. Again, if one spouse is suffering from a contagious disease of a serious nature, I can see no reason in principle why that might not justify the other spouse in living apart, so as to provide a defence to a charge of wilful separation without cause; and if the contagion is incurable that might afford justification for the other spouse to say that he or she will live apart  
I permanently, so as to provide a defence to a charge of desertion. I cannot think that where cohabitation would be dangerous to the health of a respondent, he or she is not entitled to live separate and apart, even though that danger may arise from the misfortune rather than the fault of the complainant.”

Those observations of SIR JOCELYN SIMON, P., were not in the event necessary

(6) [1959] 3 All E.R. 283; [1960] P. 158.

(7) [1964] 1 All E.R. at p. 131; [1964] P. at p. 135.



for the decision of the case; for, as he pointed out (8) later in the judgment, he could not find anywhere in the evidence in the case that the wife had declared, unequivocally and for all time, that she would not live with her husband again. In other words, the case actually concerned a mere temporary separation. Not unnaturally, however, I treat those observations with the greatest possible respect. On reflection, however, I have come to the conclusion that it is not possible to accede to this alternative argument put forward on behalf of the husband without flying in the face of the decision of the Court of Appeal in *Lilley v. Lilley* (9). In that case it was found on the medical evidence that a resumption of cohabitation would endanger the wife's health. Notwithstanding that, the Court of Appeal decided that, when she expressed her fixed intention never to return to her husband, she was to be regarded as in a state of desertion. This, I think, appears from what was said by HODSON, L.J. Having referred to the fact that what the wife said went far beyond saying, "I cannot return to you at present", but amounted to saying, "I never will", HODSON, L.J., went on (10):

"She has made a deliberate choice for all time, and she cannot properly complain of the natural consequences of her act. This is no doubt a strong case, for the neurosis of the wife is severe and may be incurable. It may appear hard, therefore, that she should be guilty of desertion if she expresses herself as unwilling ever to return to her husband, but we think that the conclusion that she is in desertion is inevitable on the evidence as it stands at present."

Doing my best loyally to follow that guidance from the Court of Appeal, I can only say that, in my judgment, the alternative argument put forward on behalf of the husband cannot, in the circumstances of this case, prevail. In the result, therefore, I have come to the same conclusion as SIR JOCELYN SIMON, P., viz., that this appeal should be allowed and an order made in favour of the wife on the ground of desertion.

I would like to add, however, two further observations. First, I have dealt only with what I regard as the essential point in the case. I have not referred to the other matters mentioned by SIR JOCELYN SIMON, P., namely, the procedural question as to the propriety of proceeding by way of Case Stated, and the question of admissibility of the evidence given by the doctor. So far as those two points are concerned, I desire to say no more than that I wholly concur with what has fallen from SIR JOCELYN SIMON, P. Secondly, I would repeat what LORD MERRIMAN, P., was never tired of saying in cases of this character, namely, to remind the parties that desertion need never be permanent; for it is always open to the husband in this case, as to any other deserting spouse, to terminate his desertion at any time by making a proper approach to the wife with a view to a resumption of cohabitation.

*Appeal allowed.*

Solicitors: *Cunliffe & Mossman*, agents for *Colin R. Watson & Co.*, Warrington (for the wife); *Forshaw, Richmond & Co.*, Warrington (for the husband).

[Reported by ALICE BLOOMFIELD, Barrister-at-Law.]

(8) [1964] 1 All E.R. at p. 136; [1964] P. at p. 143.

(9) [1959] 3 All E.R. 283; [1960] P. 158.

(10) [1959] 3 All E.R. at p. 291; [1960] P. at p. 183.

A

DAILY MIRROR NEWSPAPERS, LTD.  
v. GARDNER AND OTHERS.

[COURT OF APPEAL, CIVIL DIVISION (Lord Denning, M.R., Davies and Russell, L.JJ.), March 20, 21, 1968.]

B

*Tort—Inducement to commit breach of contract—Indirect inducement—Recommendation of federation of newsagents, a trade association of retailers, to members to stop sale of newspaper—Federation seeking to induce breach of contract between wholesalers and newspaper proprietors—Ignorance of terms of contracts between proprietors and wholesalers no defence where act done without caring whether breach of contract caused—Interlocutory injunction granted.*

C

*Tort—Interference with contractual relations—Unlawful means—Recommendation by trade association to members to stop orders of newspaper—Recommendation deemed a restriction presumed contrary to public policy—Restrictive Trade Practices Act, 1956 (4 & 5 Eliz. 2 c. 68), s. 6 (7), s. 21 (1).*

On Mar. 7, 1968, the first and second defendants, who were the president and the general secretary of the National Federation of Newsagents, Book-

D

sellers and Stationers, sent a letter to all members of the federation saying that nothing less than the complete boycott of the plaintiffs' newspaper, the Daily Mirror, for one week would be effective: viz., effective to meet a request made by the plaintiffs to wholesalers to accept a small reduction in their margins on the price of the newspaper being increased on account of increased costs, of the rise in the cost of newsprint and of devaluation. With

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their letter were sent "stop-notices", which were to be sent by retailers, members of the federation, to their wholesalers. These instructed the wholesalers to discontinue the retailers' supplies of the newspaper from Monday, Mar. 18, to Saturday, Mar. 23, inclusive; and asked for the supply of the newspaper to be restored on Mar. 25. Posters were also sent with the letter reading "Trade Dispute. No Daily Mirror". The federation objected

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to the proposed reduction in the wholesalers' margin as likely to lead to a reduction in retailers' margins on sale to the public of the newspaper through the retailers. The plaintiffs' method of sale was to sell the newspaper to wholesalers, of whom there were about one thousand, and who in turn sold it to retailers for resale to the public. There were not, in general, written

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contracts between the plaintiffs and the wholesalers. The plaintiffs, having learnt of the letter, delayed issuing a writ while they published an explanation in the newspaper. A letter in reply on behalf of the federation was also published. On Mar. 15 an ex parte injunction was obtained restraining the defendants, who were the president, the general secretary and nine committee members of the federation, from doing anything further in the proposed boycott. On appeal the Court of Appeal took the view that there

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were running contracts between the plaintiffs and the wholesalers which were determinable on reasonable notice, which might be a matter of weeks and not days, and that a wholesaler had no right to stop the order of the newspaper for one week and then start the order again.

**Held:** (i) the plaintiffs having shown *prima facie* an actionable wrong by the defendants, as set out in paras. (ii) and (iii) below, the court should exercise its discretion to grant an interlocutory injunction, as the balance of convenience was greatly in favour of preserving the present position (see p. 169, letter F, p. 170, letter G, and p. 172, letter A, post).

I

(ii) the plaintiffs had established a *prima facie* case of inducement by the defendants without lawful justification of breaches of contract by the wholesalers with the plaintiffs, for the following reasons—

(a) on the facts the defendants had sought to induce the wholesalers to reduce greatly their orders for the newspaper on only a day or two's notice (see p. 167, letter I, p. 169, letter G, and p. 170, letter H, post), and

(b) it was no defence either that the defendants did not know the terms of the plaintiffs' contract with the wholesalers, because the defendants acted without caring whether they caused a breach of contract or not, and

(c) it was no defence that the defendants did not exert pressure directly on the wholesalers but only indirectly through the retailers (see p. 168, letters A, D and G, and p. 170, letters E and H, post).

*Emerald Construction Co., Ltd. v. Lowthian* ([1966] 1 All E.R. 1013) applied.

(iii) there was a prima facie case of interference by the defendants by unlawful means with contractual relations between the wholesalers and the plaintiffs, because the recommendation to the members of the federation to stop ordering the newspaper constituted unlawful means in that, prima facie, the recommendation was equivalent to a restriction deemed contrary to the public interest by virtue of s. 21 (1)\* and s. 6 (7) of the Restrictive Trade Practices Act, 1956 (see p. 169, letter D, p. 170, letter F, and p. 171, letter I, post).

*Re National Federation of Retail Newsagents, Booksellers and Stationers' Agreement* ([1965] 2 All E.R. 417) considered.

Appeal dismissed.

[As to the tort of inducement to commit a breach of contract, see 37 HALSBURY'S LAWS (3rd Edn.) 124, para. 216, and as to conspiracy to interfere with contractual relations, see *ibid.*, 129, 130, para. 223; and for cases on the subject, see 45 DIGEST (Repl.) 303-310, 194-228.]

As to the presumption of restrictive trading agreements being contrary to the public interest and as to grounds justifying restrictions, see 38 HALSBURY'S LAWS (3rd Edn.) 113, 114, para. 149; 115-117, para. 151.

For the Restrictive Trade Practices Act, 1956, s. 6, s. 21, see 36 HALSBURY'S STATUTES (2nd Edn.) 937, 954.]

Cases referred to:

*Emerald Construction Co., Ltd. v. Lowthian*, [1966] 1 All E.R. 1013; [1966] 1 W.L.R. 691; Digest (Cont. Vol. B) 719, 1396a.

*Lumley v. Gye*, [1843-60] All E.R. Rep. 208; (1853), 2 E. & B. 216; 22 L.J.Q.B. 463; 118 E.R. 749; 45 Digest (Repl.) 304, 198.

*National Federation of Retail Newsagents, Booksellers and Stationers' Agreement, Re*, [1965] 2 All E.R. 417; L.R. 5 R.P. 236; [1965] 1 W.L.R. 826; Digest (Cont. Vol. B) 711, 211b.

*Quinn v. Leatham*, [1900-03] All E.R. Rep. 1; [1901] A.C. 495; 70 L.J.P.C. 76; 85 L.T. 289; 65 J.P. 708; 45 Digest (Repl.) 560, 1373.

*Stratford (J. T.) & Son, Ltd. v. Lindley*, [1964] 3 All E.R. 102; [1965] A.C. 269; [1964] 3 W.L.R. 541; 45 Digest (Repl.) 563, 1389.

*Thompson (D. C.) & Co., Ltd. v. Deakin*, [1952] 2 All E.R. 361; [1952] Ch. 646; 45 Digest (Repl.) 561, 1379.

### Interlocutory Appeal.

The plaintiffs were a wholly-owned subsidiary of International Publishing Corporation, Ltd., and were the proprietors of the Daily Mirror. The general course of business, subject to small exceptions, was that the plaintiffs sold the newspaper to wholesalers, who numbered about one thousand. The wholesalers sold it to retailers, who in turn sold it to the public. The plaintiffs were not in contractual relation with the retailers. On Mar. 7, 1968, the first and second defendants, who were the president and the general secretary of the National Federation of Newsagents, Booksellers and Stationers, sent to all members of the federation a letter suggesting a boycott of the Daily Mirror for a complete week from Mar. 18 to Mar. 23, 1968, inclusive, as stated at p. 165, letter I, to p. 166, letter C, post. The plaintiffs were advised that the federation was a trade association within s. 6 (8) of the Restrictive Trade Practices Act, 1956. The federation was a

\* Section 21 (1), so far as material, is set out at p. 171, letter B, post.



A registered trade union. It was deposed on behalf of the defendants, among many other matters, that all that the boycott sought to achieve was to protect the members of the federation from action which must harm their legitimate interests. By writ issued on Mar. 12, 1968, the plaintiffs sued the defendants, viz., the first and second defendants, and nine other defendants, committee members of the federation, for injunctions, damages for conspiracy and other relief arising out of the contemplated boycott of the Daily Mirror by members of the federation.

By order, made by COOKE, J., dated Mar. 15, 1968, it was ordered that the defendants by themselves, their agents or servants or otherwise, be restrained whether directly or indirectly from (a) doing any further act to procure compliance with the instructions or recommendations made by them and each of them to the members of the federation to boycott the Daily Mirror newspaper for one complete week from Mar. 15, 1968 (which instructions or recommendations were contained in a letter dated Mar. 7, 1968, headed "Official Document No. 5015"); (b) causing or permitting any other instructions or recommendations to be given or implemented for similar or like effect. The injunction was obtained ex parte and was to last until after the hearing of a summons returnable on Mar. 18, 1968. By order of PHILLIMORE, J., dated Mar. 19, 1968, it was ordered that the injunction granted on Mar. 15, 1968, be continued until the trial of the action or further order; and that the defendants should forthwith cause an official letter to be written and sent to all members of the federation instructing them that the instructions and recommendations contained in Official Document No. 5015 were withdrawn and revoked, and recommending the members to resume forthwith normal trading in the Daily Mirror newspaper. The mandatory injunction was stayed for twenty-four hours, and leave was given to appeal to the Court of Appeal.

*A. L. Figgis* for the defendants.

*C. L. Hawser, Q.C.*, and *L. Swift* for the plaintiffs.

LORD DENNING, M.R.: The Daily Mirror, of which the plaintiffs are proprietors, has a circulation of five million copies a day. It sells to wholesalers who number about one thousand. The wholesalers sell to retailers who number many thousands. Before Jan. 31, 1968, the price of sale to the public was 4d. Out of that sum the average margin for the wholesaler was thirty-five per cent., of which he retained seven per cent. and the retailer took twenty-eight per cent.

On Jan. 31, 1968, the price of the Daily Mirror was increased from 4d. to 5d. The reason was because the cost of newsprint had gone up in 1967. Then in 1968 there was a further big increase as a result of devaluation. The cost of newsprint was to go up by £7 a ton as from Mar. 18, 1968. If the margins had remained at the same percentages as before, this would have meant a considerable increase for the wholesalers and retailers. Thirty-five per cent. of 5d. is much more than thirty-five per cent. of 4d. So the Daily Mirror asked the wholesalers to take one per cent. less, that is, to take thirty-four per cent. This meant that the wholesalers would, in turn, expect the retailers also to take a somewhat lesser margin than twenty-eight per cent., say twenty-seven per cent. or 27½ per cent., instead of twenty-eight per cent.

The National Federation of Retail Newsagents, Booksellers and Stationers thought that this was just another case of "nibbling away of margins". They took strong objection to it. After long consideration, they decided to boycott the Daily Mirror for a period of one week, commencing Mar. 18, 1968. These were the steps they took. On Thursday, Mar. 7, 1968, the president and the general secretary, Mr. Gardner and Mr. Holt, the first and second defendants, wrote round to all their members, saying:

"We have . . . arrived at the conclusion that nothing less than a complete and utter boycott of the Daily Mirror for one complete week—as an initial step—will be effective."

They enclosed "stop notices" for their members to send to the wholesalers. These said:

" Please discontinue my supplies of Daily Mirror from Monday, Mar. 18, to Saturday, Mar. 23, both dates inclusive. Please resume my supply of Daily Mirror on Monday, Mar. 25."

They said in the letter:

" If your wholesaler should send you supplies of Daily Mirror in spite of your stop notice, you cannot be made to pay for them."

They also enclosed posters to be prominently displayed for customers to read, saying: " Trade Dispute. No Daily Mirror." The object of the letter was clear. The retailers, who were members of the federation, were to tell their wholesalers: " We will have no Daily Mirrors for the week commencing Mar. 18." Then the wholesalers could be expected to tell the Daily Mirror: " We don't want our usual quantity of Daily Mirrors for the week but a great many less."

When the plaintiffs got to know of that letter, they thought of issuing a writ and asking for an injunction at once; but they delayed for a few days. The reason was because they wanted to put their case before their readers: and they could not do so if a writ were issued, because it might be a contempt of court. They hoped, too, that there might be negotiations for a settlement. So on Mar. 13, in their issue of that day, they put their case. It explains it so simply that I will read it. They set out the increases in the cost of newsprint and went on to discuss the margins:

" What do these figures mean to the profit of the individual retail newsagent? When the Daily Mirror cost 4d. his profit on every one hundred copies he sold was 9s. 4d. When the Daily Mirror went up to 5d. his profit on every one hundred copies became 11s. 8d. Now that the Daily Mirror has reduced its terms to wholesalers, W. H. Smith and John Menzies are in fact apportioning the one per cent. reduction in discount between themselves and the retailers in such a way that the newsagent's profit on every one hundred copies will now be 11s. 4½d. Other wholesalers are likely to take similar action. The newsagent will, therefore, be better off by 2s. 0½d. on every one hundred copies he sells, an improvement in profit of over twenty per cent."

In answer to that case, the National Federation of Retail Newsagents wrote a letter to the plaintiffs which they published the next day, Thursday, Mar. 14, 1968. The federation pointed out that there had been no increase for them for over four years; that, when the price of the paper was increased, the sales were reduced: and that there was no reason why they should forfeit part of their earnings. They also pointed out that they had to bear the burden of selective employment tax, which the plaintiffs, as manufacturers, had not to do. Each side had, therefore, good commercial reasons for the stand it took; but that is not a matter for us to consider. We have only to consider whether the federation have acted lawfully or not.

Seeing that no settlement was reached, on Friday, Mar. 15, 1968, counsel for the plaintiffs went to COOKE, J., the judge in chambers and obtained from him, an ex parte injunction against the defendants, the chairman and general secretary and committee members of the federation. This injunction restrained them from doing anything further in the boycott. Then on Monday, Mar. 18, 1968, the matter was renewed before PHILLIMORE, J. He heard both sides, and, on Tuesday afternoon, with considerable hesitation, he continued the injunction and made a mandatory order on the defendants to send out letters to call off the boycott. They appeal to this court, and, as it was urgent, we interposed the case and have heard it yesterday and today.

The plaintiffs put their case in law in two ways. First, they say that the defendants are seeking to induce the wholesalers to break their contracts with the plaintiffs. Secondly, they say that the defendants are using unlawful means to injure the trade of the plaintiffs, namely, by means of a stop order, which is

**A** contrary to public interest laid down in the Restrictive Trade Practices Act, 1956.

The first point (on inducing breach of contract) is based on the principle stated by LORD MACNAGHTEN in *Quinn v. Leatham* (1), following *Lumley v. Gye* (2):

“... it is a violation of right to interfere with contractual relations recognised by law, if there be no sufficient justification for the interference.”

**B** The contractual relations which are here said to be interfered with are the contractual relations between the plaintiffs and wholesalers. So we have to see what those relations are. There is no written contract between them. Their contractual relations are to be derived from the course of dealing over the years. Mr. Atkins, a director of the plaintiffs, has made an affidavit, in which he states:

**C** “The plaintiffs have running contracts with their wholesalers under which they supply the Daily Mirror to their wholesalers on the basis of standing orders for a specified number of copies. A wholesaler can alter the number if he so desires but in the absence of any such specific instructions or alterations, that number is delivered automatically and the wholesaler becomes liable to pay for it.”

**D** In a later affidavit he states that the plaintiffs accept returns in special circumstances, but apart from such special circumstances

“the plaintiffs have to my knowledge always regarded the contractual relationships with their wholesalers as subject to termination on reasonable notice and on the rare occasions when it has been necessary to terminate the contractual relationship with a wholesaler, notice has always been given, the length of which has varied according to the circumstances but has certainly never been less than one week.”

It is on such meagre evidence that we have to find the terms of the contract between the plaintiffs and the wholesalers. So far as I can see, it is a running contract which is not determinable at will. It can only be determined on reasonable notice. The plaintiffs could not say to a wholesaler: “we are not going to supply you with any papers after today.” They would have to give reasonable notice, which might run into weeks, not days. Conversely, the wholesaler could not say to the plaintiffs: “I will not take any copies of your newspaper after today.” He, too, would have to give a notice of weeks, not of days. There might be room for a margin, whereby either side might, on short notice, vary the order, say ten per cent. up or down; but neither could cancel the order altogether, or greatly reduce it, without reasonable notice. Nor could either side suspend supplies for a week and still keep the contract alive. The wholesaler has no right to say to the plaintiffs: “I am stopping the order for one week but you are to start again after the week has passed.” It is rather like the case of a working man who has a contract to serve determinable at a week’s notice. He cannot say: “I am going to stay away one day”, just to please himself. If he does stay away for a day, he is guilty of a breach of contract. So *prima facie* it is a breach of contract for a wholesaler to say to the plaintiff: “I am going to stop taking any of your papers for a week—or greatly reduce the order—and then start again.”

**H** On the material before us it seems that the defendants sought to induce the wholesalers to do just that very thing—to greatly reduce their order for a week—  
**I** on a day or two’s notice only. The reduction would seem to be at least sixty per cent. and might be more. Such conduct raises a *prima facie* case that the defendants were seeking to induce the wholesalers to break their contracts with the plaintiffs.

It is said that the defendants did not know the terms of the contracts between the plaintiffs and the wholesalers, especially as the evidence is so meagre as to

(1) [1900-03] All E.R. Rep. 1 at p. 9; [1901] A.C. 495 at p. 510.

(2) [1843-60] All E.R. Rep. 208; (1853), 2 E. & B. 216.



those terms. The answer was, however, given by this court in *Emerald Construction Co., Ltd. v. Lowthian* (3). Even though the person who induces a breach does not know the precise terms of the contract, he is acting unlawfully if he says to himself: "whether it is a breach of contract or not, I care not." If he induces a breach of contract recklessly, careless whether it is a breach or not—turning a blind eye to it—he is liable for interfering with contractual relations.

Then it was said that the defendants did not directly interfere with the contracts between the wholesalers and the plaintiffs. They did not exert directly any pressure or inducement on the wholesalers: at most they only did it indirectly by recommending the retailers to give stop orders. That is true, but I do not think that it is an answer. Counsel for the defendants relied much on *D. C. Thomson & Co., Ltd. v. Deakin* (4). He said that, in order to be actionable, the interference has got to be direct, but as at present advised, I think that that is an undue restriction of the principle. I do not think that the tort is so narrowly confined as the court there stated. I associate myself with what I gather to be the view of VISCOUNT RADCLIFFE expressed in the course of his opinion in *J. T. Stratford & Son, Ltd. v. Lindley* (5), mentioned in LORD WILBERFORCE's book on RESTRICTIVE TRADE PRACTICES AND MONOPOLIES (2nd Edn.), para. 2605. It seems to me that if anyone procures or induces a breach of contract, whether by direct approach to the one who breaks the contract or by indirect influence through others, he is acting unlawfully if there be no sufficient justification for the interference.

It was said that the defendants were not doing anything unlawful because the retailers, in giving stop orders, were not breaking their contracts with the wholesalers. Reliance is placed on the affidavit of Mr. Holt in which he states: "The retailer is normally entitled to change his order for newspapers overnight." (I am not sure that is altogether correct: for I see that there is correspondence which indicates that one firm of wholesalers, Surridge Dawson, have a clause that a retailer is to give six weeks' notice of termination. As at present advised I should be inclined to think that neither side could stop all supplies on a moment's notice.) However that may be, assuming that the retailers were entitled to give these stop orders to the wholesalers—without thereby being in breach of their contracts—nevertheless, I do not think that it affords the defendants an answer to the charge of interference with the contracts between the wholesalers and the plaintiffs. They were seeking by these stop orders to induce a breach by the wholesalers of their contracts with the plaintiffs. I acknowledge that this inducement was indirect, but nevertheless, if established at the trial, it is unlawful.

I turn now to the second point. It is said that the defendants are using unlawful means to injure the trade of the plaintiffs because they are contravening the Restrictive Trade Practices Act, 1956. Under s. 6 (7) of that Act, it is plain that the recommendation by the federation to their members—recommending them to stop ordering the Daily Mirror—was a restriction which is equivalent to an agreement to which the Act of 1956 applies. Under s. 21 that restriction is deemed to be contrary to the public interest, unless the court is satisfied of one or more of some particular circumstances, and is also satisfied that it is not unreasonable. Counsel for the defendants submits to us that this restriction is freed by the gateway provided by s. 21 (1) (d). He says it is lawful because he says

"the restriction is reasonably necessary to enable the persons party to the agreement to negotiate fair terms for . . . the acquisition of goods from, any one person not party thereto who controls a preponderant part of the trade or business of acquiring or supplying such goods . . ."

(3) [1966] 1 All E.R. 1013.

(4) [1952] 2 All E.R. 361; [1952] Ch. 646.

(5) [1964] 3 All E.R. 102 at p. 110; [1965] A.C. 269 at p. 330.

**A** Counsel for the defendants distinguishes an earlier case of *Re National Federation of Retail Newsagents, Booksellers and Stationers' Agreement* (6), with which this federation was concerned. He contends that International Publishing Corporation, Ltd., control a preponderant part of the trade or business of supplying periodicals, magazines and newspapers; and that this restriction is reasonably necessary to enable the federation to negotiate fair terms.

**B** I can see the force of counsel for the defendants' submissions. I accept that it is the object of the federation to negotiate fair terms; but I find it difficult to bring this case within the gateway (*d*). The retailers are not acquiring the goods from the plaintiffs or I.P.C. They are acquiring them from the wholesalers, and it is with the wholesalers that they must negotiate. I do not, however, pursue further the question whether the defendants can bring themselves within the

**C** gateway. Suffice it that this restriction is deemed to be contrary to the public interest unless the contrary is shown. *Prima facie*, therefore, the recommendation is unlawful. No doubt the final decision will rest with the Restrictive Practices Court. But I think that it comes within the purview of this court also. If the federation make a recommendation which is unlawful, as being prohibited by the Restrictive Trade Practices Act, 1956, I think that it ranks as "unlawful means".

**D** As such this court can intervene to stop it. I have always understood that if one person interferes with the trade or business of another, and does so by unlawful means, then he is acting unlawfully, even though he does not procure or induce any actual breach of contract. Interference by unlawful means is enough. On this ground also it seems to me that the plaintiffs have made out a *prima facie* case of unlawfulness.

**E** Then, however, the question arises: should this court intervene by way of interlocutory injunction? Counsel for the defendants said that the plaintiffs obtained the *ex parte* injunction without full disclosure: and they delayed unduly because they held up their application so as to put an article in the newspaper. I do not think that those considerations are enough to debar the plaintiffs of an interlocutory injunction. They were put in a very difficult position. They had to do all

**F** that they could to try and avert a calamitous situation. The boycott of the Daily Mirror could do very great harm. Weighing the balance on one side and the other, it seems to me it would be only right to preserve the position pending the trial of the action. We should grant an interlocutory injunction rather as the House of Lords did in *J. T. Stratford & Son, Ltd. v. Lindley* (7).

**G** I would be in favour of dismissing the appeal and affirming the order of PHILLIMORE, J.

**DAVIES, L.J.:** I agree and, as this is an interlocutory matter, I propose to add very little. It seems to me that, as LORD DENNING, M.R., has said, there is a *prima facie* case here made out on behalf of the plaintiffs. The evidence as to the contractual arrangements between the plaintiffs and the wholesalers, on the one hand, and the wholesalers and the retailers, on the other, is somewhat tenuous; but it appears to be clear—and no doubt the matter will be investigated much more thoroughly if this case goes to trial—that there were running arrangements both between the newspaper and the wholesalers and between the wholesalers and the retailers. There was no doubt a leeway for minor variations or alterations on both sides, but that would not, as I think, mean that without whatever in the circumstances would be reasonable notice, which might vary in the two classes of case, either party to those contracts could put an end to them. Moreover, it seems to me clear on the evidence that the federation, no doubt with the best motives, in order to try to bring the plaintiffs to heel about these discounts, set on a course of conduct in which they really did not mind how their object was to be achieved, in the sense that they did not mind whether their members acted in breach of their contracts or terminated their contracts by whatever was the proper

(6) [1965] 2 All E.R. 417; (1965), L.R. 5 R.P. 236.

(7) [1964] 3 All E.R. 102; [1965] A.C. 269.

notice, and did not mind whether the wholesalers would act in breach of their contracts with the plaintiffs or terminate their contracts with the plaintiffs by proper notice. Indeed, what they really were contemplating was a third and different kind of hybrid animal, neither a breach nor a termination, but a suspension, which is, as LORD DENNING, M.R., has said, an odd notion. A

I think that this case at this stage is really covered by the observations that LORD DENNING, M.R., made in the case to which he himself referred, *Emerald Construction Co., Ltd. v. Lowthian* (8), where he said: B

“If the officers of the trade union knowing of the contract deliberately sought to procure a breach of it, they would do wrong: see *Lumley v. Gye* (9). Even if they did not know of the actual terms of the contract, but had the means of knowledge—which they deliberately disregarded—that would be enough. Like the man who turns a blind eye. So here, if the officers deliberately sought to get this contract terminated, heedless of its terms, regardless whether it was terminated by breach or not, they would do wrong. For it is unlawful for a third person to procure a breach of contract knowingly, or recklessly, indifferent whether it is a breach or not. Some would go further and hold that it is unlawful for a third person deliberately and directly to interfere with the execution of a contract, even though he does not cause any breach. The point was left open by LORD REID in *J. T. Stratford & Son, Ltd. v. Lindley* (10). It is unnecessary to pursue this today. Suffice it that if the intention of the defendants was to get this contract terminated at all events, breach or no breach, they were *prima facie* in the wrong.” C

In my view, those observations of LORD DENNING, M.R., apply at this stage to the facts of the present case. D

I do not propose to say anything about the point under the Restrictive Trade Practices Act, 1956, save to say that I agree with the views stated by LORD DENNING, M.R., that *prima facie*, at any rate, this agreement, this restriction, was contrary to the public interest. E

There remains the question of convenience. Obviously the overwhelming balance of convenience in this case is that the position should be preserved by granting this injunction. We were told that the daily circulation of the Daily Mirror is something over five million. I will leave out the odd hundreds or thousands and take that figure. If the federation succeeded in their attempt, it would, if my mathematics are right, mean a cut for a week in daily circulation from five million to three million; that is to say that in a six-day week, the period for which this suspension was hoped or planned to take place, it would mean a loss of eighteen million copies of this newspaper. If it turns out in the end that the plaintiffs are wrong, then they will have to compensate the defendants in damages for this injunction, but I agree that at the present stage it should be granted and that the appeal should therefore be dismissed. F

**RUSSELL, L.J.:** I felt some difficulty on the evidence on the question of breaches of contract, but I do not on the whole dissent from the views expressed by my brethren, and I will not take up time by deploying the factors that have caused me to feel that difficulty. G

I feel that a stronger *prima facie* case for the plaintiffs can be based on the argument that the recommendation to boycott is to be regarded as contrary to the public interest by virtue of the Restrictive Trade Practices Act, 1956, and that that which is to be so regarded is in this field to be regarded as the employment of unlawful means. H

The defendants rightly admit that this boycott instruction constitutes a relevant restriction under the Restrictive Trade Practices Act, 1956. It is clear I

(8) [1966] 1 All E.R. at p. 1017.

(9) [1843-60] All E.R. Rep. 208; (1853). 2 E. & B. 216.

(10) [1964] 3 All E.R. at p. 107; [1965] A.C. at p. 324.



- A** that the inevitable result of the preliminary issue in *Re National Federation of Retail Newsagents, Booksellers and Stationers' Agreement* (11) in 1965 is that that restriction is to be regarded as contrary to the public interest, although not yet formally so declared by the Restrictive Practices Court. The defendants admit that they cannot hope to save this present restriction, restrictive direction or recommendation from that same stigma unless they can escape through gateway
- B** (d) in s. 21 (1) of the Act of 1956. That in effect says that a restriction is deemed contrary to the public interest unless the court is satisfied

“ that the restriction is reasonably necessary to enable the persons party to the agreement to negotiate fair terms . . . for the acquisition of goods from, any one person . . . who controls a preponderant part of the trade or business of supplying such goods.”

- C** I have left out the words not relevant to the present case. The reason why that gateway was not open in *Re National Federation of Retail Newsagents, Booksellers and Stationers' Agreement* (11) was that there was not a trade or business in the supply of the weekly publication *Romeo* so as to constitute that publication “ goods ” within para. (d). I cannot see how, in the light of that decision, the contrary can be argued in the case of the *Daily Mirror* newspaper publication:
- D** so that it cannot be said that the plaintiffs are the one person under the paragraph with a preponderant part of the trade of supplying the *Daily Mirror*.

- The defendants seek to escape this by saying that the plaintiffs are a subsidiary of International Publishing Corporation, Ltd. (“ I.P.C.”), which itself controls a preponderant part, through subsidiary companies, of the trade or business of supplying newspapers, magazines and periodicals. I take their argument to be
- E** that I.P.C. is to be “ one person ” referred to in para. (d) and that this specific action in relation to the *Daily Mirror* is one aspect of a general campaign or defence against the increase in prices charged to them by narrowing their percentage margins or recommended retail prices. It seems to me, however, that this paragraph is concerned with the negotiation of fair terms between buyers and sellers for the acquisition by the buyers from the sellers. The members of this
- F** federation do not buy or acquire from I.P.C., or indeed from the plaintiffs. They are not in contractual relationship with either of those companies. They buy and acquire solely from wholesalers, save perhaps in a very few instances, which cannot cover or save the restriction in this case. Moreover, no-one buys the *Daily Mirror* from I.P.C. The wholesalers buy from the plaintiffs. It was argued that
- G** “ one person ” in the paragraph should be construed as including a subsidiary, but when the legislature enacted the Restrictive Trade Practices Act, 1956, they were perfectly capable of making two into one in an artificial way, as is evidenced by s. 8 (9), which provides that “ two or more persons being inter-connected bodies corporate . . . shall be treated as a single person ”; but, unfortunately for the defendants, that is for the purposes only of that and the last foregoing section, and not for the purpose of s. 21.

- H** On the view that I have formed, this restriction is one which, I think, the Restrictive Practices Court will inevitably in due course declare to be contrary to the public interest; indeed, when the final order in *Re National Federation of Retail Newsagents, Booksellers and Stationers' Agreement* (11) is made in the near future, any repeat of the present endeavour would, it seems to me, come with-
- I** in an injunction restraining other agreements to the like effect. As at present advised, I consider that a restrictive agreement, once found by the Restrictive Practices Court to be contrary to the public interest, would, if it were sought to be implemented, properly be regarded as the employment of unlawful means for present purposes. Further, I consider that we are entitled to regard as contrary to the public interest a restriction which it appears to us would necessarily be condemned by the Restrictive Practices Court in those terms.

In those circumstances, I consider that a sufficient *prima facie* case has been

established to justify both the negative and the positive injunctions ordered by PHILLIMORE, J. The balance of convenience is, of course, heavily down on the side of the plaintiffs, and the plaintiffs, in my judgment, have not been guilty of conduct such as should upset that balance. In my judgment, the appeal should be refused and the mandatory injunction must at once be complied with.

*Appeal dismissed. Leave to appeal to the House of Lords refused.*

Solicitors: *Shaen Roscoe & Bracewell* (for the defendants); *Nicholson, Graham & Jones* (for the plaintiffs).

[Reported by F. GUTTMAN ESQ., Barrister-at-Law.]

## MANN v. D'ARCY AND OTHERS.

[CHANCERY DIVISION (Megarry, J.), January 11, 12, 15, 1968.]

*Partnership—Authority of one partner to bind firm—Partnership with third party for single venture—Transaction involved was one that would be in usual way of partnership business—Firm of produce merchants—Joint venture with plaintiff in purchase and re-sale of potatoes arranged by one partner—Whether partnership bound—Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 5.*

In May, 1958, an oral agreement was made between the plaintiff and the first defendant, who was the active partner in a partnership of the three defendants as produce merchants carried on under the name of D'A. & Co., whereby the first defendant agreed with the plaintiff "to go on a joint account" on the purchase and re-sale of some 350 tons of potatoes forming part of the cargo of a vessel "Anna Schaar"—viz., in effect, an agreement for a partnership between the firm and the plaintiff in the single venture. The purchase and re-sale of the potatoes remained under the control of D'A. & Co. By this arrangement D'A. & Co. were in substance buying and selling potatoes, which was part of their business as produce merchants. The question arose whether the first defendant had implied authority to bind the firm, D'A. & Co., to a partnership with the plaintiff for the joint venture,

**Held:** the arrangement made by the first defendant with the plaintiff, being an arrangement for sharing profit and loss on a transaction of purchase and re-sale of potatoes, was something done for carrying on "in the usual way business of the kind carried on by" D'A. & Co. within s. 5\* of the Partnership Act, 1890; and accordingly, even though a partner has no implied authority to make his co-partners partners with another person in another business, the first defendant had authority to bind, and did bind, D'A. & Co. to a partnership with the plaintiff for the single venture (see p. 176, letters C, D and G, post).

Dictum of JAMES, L.J., in *Re European Society Arbitration Acts* ((1878), 8 Ch.D. at p. 704) distinguished.

[As to the power of one partner to bind the firm, see 28 HALSBURY'S LAWS (3rd Edn.) 503, 504, para. 968 and for instances of implied authority of partners, see *ibid.*, p. 505, para. 970 and for cases on the subject, see 36 DIGEST (Repl.) 435-437, 91-106.]

For the Partnership Act, 1890, s. 5, see 17 HALSBURY'S STATUTES (2nd Edn.) 584.]

\* Section 5 is set out at p. 175, letter I, post.

## A Cases referred to:

*European Society Arbitration Acts, Re, Ex p. Liquidators of the British Nation Life Assurance Association*, (1878), 8 Ch.D. 679; sub nom. *Re European Assurance Society Arbitration, British Commercial Insurance Co. v. British Nation Life Assurance Association*, 48 L.J.Ch. 118; 39 L.T. 136; 10 Digest (Repl.) 1165, 8113.

B *Hawksley v. Outram*, [1892] 3 Ch. 359; 62 L.J. Ch. 215; 67 L.T. 804; 36 Digest (Repl.) 438, 108.

*Singleton, Dunn & Co. v. Knight*, (1888), 13 App. Cas. 788; 57 L.J.P.C. 106; 59 L.T. 738.

*Toune v. Eisner*, (1918), 245 U.S. Rep. 418.

## Action.

- C By his statement of claim endorsed on his writ of summons, issued on Mar. 11, 1964, the plaintiff pleaded that the defendant, Gordon Thomas D'Arcy, Maurice Wetherill Tiplady and John Langstaff (to whom he referred collectively as "the firm") at all material times between July, 1957, and October, 1958, carried on business together in partnership as produce merchants under the style "D'Arcy & Co.". The plaintiff further pleaded that in about May, 1958 the plaintiff
- D and the firm agreed to become partners in a joint venture (referred to as the "Anna Schaar venture") consisting of the purchase and sale of some 350 tons of potatoes forming part of the cargo of a ship called the Anna Schaar on the terms that the profits and losses of the venture should be paid and borne as to one half to and by the plaintiff and as to the other half to and by the firm; that the potatoes were discharged at Colchester in June, 1958, and were sold
- E during that month; that the firm received £11,180 or thereabouts in respect of the sale of potatoes and expended £8,770 or thereabouts in respect of the purchase thereof; but that the firm had failed to account to the plaintiff for his one half share of the profit of £2,410 or thereabouts. The plaintiff claimed a declaration that the plaintiff and the firm were partners in the Anna Schaar venture; a declaration that the partnership was dissolved as from the termination
- F of the Anna Schaar venture in June, 1958, or alternatively by the service of the writ; and that the affairs of the partnership might be wound up, and payments made and any sums found due to the plaintiff on the taking of accounts. The second defendant, by his defence served on Apr. 22, 1964, pleaded that he had no personal knowledge of the agreement referred to as the Anna Schaar venture; and that if either or both of the other defendants purported to enter
- G into any such agreement on behalf of the firm they did so without the authority of the second defendant and the agreement was not binding on the firm. The action came on for trial as between the plaintiff and the second defendant, but on motion for judgment in default of defence as against the first and third defendants.

M. Essayan for the plaintiff.

## H M. Browne for the second defendant.

The first and third defendants did not appear and were not represented.

MEGARRY, J.: In this case the plaintiff claims that towards the end of May, 1958, an agreement was made whereby he entered into a partnership with the three defendants for a single venture, namely, the purchase and resale of some 350 tons of potatoes forming part of the cargo of the vessel "Anna Schaar".

I The potatoes were discharged from the Anna Schaar at Colchester on or about June 2, 1958. The three defendants were then carrying on business in partnership as produce merchants in Essex under the name of D'Arcy & Co. The partnership was converted into a limited company named D'Arcy & Co. (Colchester), Ltd. on Oct. 6, 1958, when the limited company took over the assets of the partnership and assumed its liabilities.

The plaintiff's case is that one morning at the end of May, 1958, about five days before the Anna Schaar arrived, the first defendant, in his office, asked



him if he would go on a joint account on the Anna Schaar. The plaintiff did not agree at once; but two or three hours later, after lunch, he returned and said that he would, whereupon the first defendant said "All right, then". It is not disputed that the first defendant was the only active partner in D'Arcy & Co., and that he ran the business. The plaintiff alleges that the first defendant made the agreement on behalf of himself and his two partners, the other two defendants, and that it constituted a partnership. No evidence in writing of the partnership alleged has been put before me. Equally, however, it may be observed that there is no documentary evidence of the partnership agreement which constituted the admitted partnership of D'Arcy & Co.

The defence to this claim is two-fold. First, it is said that the alleged agreement was never in fact made; and this, of course, is a question of fact. Secondly, it is said that if the agreement was in fact made then the first defendant had no authority to bind the partnership; and this raises a somewhat interesting question of law. It is not disputed by the second defendant that if the agreement was made it constituted a partnership. The case comes on in the form of an action between the plaintiff and the second defendant and a motion for judgment in default of defence against the first and third defendants, who have taken no part in these proceedings before me. It appears that although the second defendant is a man of substance the first and third defendants are the reverse.

[His LORDSHIP turned to the first question. Having considered the evidence, His LORDSHIP decided that the agreement alleged was entered into as claimed and continued:] That brings me to the second main question, the question of law: had the first defendant an implied authority to bind the partnership? On this issue counsel for the second defendant based himself in the first instance on the proposition to be found in LINDLEY'S LAW OF PARTNERSHIP (12th Edn., 1962), p. 187. It reads: "A partner has no implied authority to make his co-partners partners with other persons in another business." That proposition is supported by a footnote referring to three cases to which I will refer in a moment. These three cases have been closely analysed by counsel for the plaintiff; and in my judgment they require careful examination. I may take first the case of *Hawksley v. Outram* (1). This was a case which was not greatly pressed by counsel for the second defendant, and I think rightly so; for the issue there was the construction of a power of attorney. The passage cited from the judgment of LINDLEY, L.J., (2) does not, I think, provide any real assistance in the decision of this case.

The second of the authorities cited by LINDLEY is that of *Singleton, Dunn & Co. v. Knight* (3). The last sentence of the headnote in that case provides strong support for the passage from LINDLEY that I have quoted. It reads:

"One partner has no authority from the other partners to enter into a partnership with other persons in another business."

That sentence, however, is less well supported by the judgment of the Judicial Committee of the Privy Council, delivered by SIR BARNES PEACOCK. The case came from Quebec, and involved the Civil Code of Lower Canada, as Quebec was then called. There is a passage (4) on which counsel for the second defendant relied which states what had been decided by the Courts in Quebec; and the wording of this passage certainly provides some support for the quotation from LINDLEY'S LAW OF PARTNERSHIP as a statement of the law of Quebec. The question in the case was whether one partner of C. & Co. could make the partnership liable to contribute to the losses of a business carried on by K., who had borrowed money from C. & Co. for five years and had promised to pay the interest and a half share of the profits of his (K.'s) business. K. had in fact never treated C. & Co. as partners, nor had he accounted for any profits. The case, however,

(1) (1892), 3 Ch. 359.

(2) (1892), 3 Ch. at pp. 373, 374.

(3) (1888), 13 App. Cas. 788.

(4) (1888), 13 App. Cas. at p. 790.

A largely turned on s. 1831 and s. 1855 of the Civil Code, which were by no means identical with English law. No doubt the case provides authority in Quebec for the statement in LINDLEY, in so far as the Quebec decisions were accepted by the Judicial Committee as correctly laying down the law of the Province; but I find it of little assistance on the law of England.

B The third authority cited by LINDLEY is *Re European Society Arbitration Acts, Ex p. Liquidators of the British Nation Life Assurance Association* (5). This was a somewhat complex case, but it contains a clear dictum by JAMES, L.J. uttered when delivering the judgment of the Court of Appeal. He said of the association there being considered (6):

C “Prima facie there is nothing more inconsistent with the whole scope and character of such a body than it should enter into a contract of partnership with any other person or persons in any other business whatever. It would require very clear powers to enable a man's partner or partners, or, in a joint stock company, his delegated officers, or the majority of his co-shareholders, to make him a partner with any other person or a shareholder in any other society.”

D Even if this is a mere dictum, as it may indeed be, I would attach much weight to any words uttered by so great a master of equity. If with these words in mind one takes the proposition stated in LINDLEY'S LAW OF PARTNERSHIP at its face value, it seems to me that it lays down that a partner in A. & Co. has no implied authority to make his co-partners partners with B., or with B. & Co., in another business; but in saying this I emphasise the words “in another business”. Accepting that proposition fully in relation to a partnership in another business concern, the question still remains whether it applies to the facts of this case.

E Two features in the present case seem to me to be of importance. First, the joint venture in the Anna Schaar was a venture to be managed by D'Arcy & Co., and not by the plaintiff. Accordingly, so far as the partners in D'Arcy & Co. were concerned, there was no element of added risk; there was no danger of the plaintiff involving the partners in D'Arcy & Co. in any liabilities which they had not already contemplated. They plainly contemplated dealing with potatoes. All that was being done was to halve the risks of loss and halve the prospects of profit. This is not a case of D'Arcy & Co. being made partners in a business to be controlled by the plaintiff, or in a joint venture to be managed by him, whether wholly or in part. From first to last the transaction remained under the sole control of D'Arcy & Co.

G Secondly, the Anna Schaar venture as a whole was in the ordinary course of D'Arcy & Co.'s business. The only question lies in the plaintiff's participation in it, bearing half the losses and taking half the profits. This took place at a time when the potato market was in a difficult state; as the second defendant said, in May, 1958, the market was becoming unprofitable. The joint venture produced something of the same result as insuring against an unprofitable deal; and it enabled D'Arcy & Co. to continue trading when the market conditions were uncertain, instead of having to cease trading and yet continue to carry their overheads. This, said counsel for the plaintiff, fell within the terms of the Partnership Act, 1890, s. 5. That provides as follows:

H “Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership; and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority, or does not know or believe him to be a partner.”

(5) (1878), 8 Ch.D. 679.

(6) (1878), 8 Ch.D. at p. 704.

The question on s. 5 that has troubled me a little is the phrase "in the usual way". In relation to any joint ventures, counsel for the plaintiff has expressly disclaimed any usage of produce merchants in general; and on the facts of this case he cannot rely on any course of conduct in this particular partnership. He does, however, place some weight on a passage discussing this section set out on p. 168 of LINDLEY'S LAW OF PARTNERSHIP, though he couched his arguments in terms of what was "reasonably necessary" for carrying on the business, rather than on carrying on the business "in the usual way". His link between these two expressions was that to do what was absolutely necessary for the conduct of the business, or what was reasonably necessary, or even what was highly desirable for it, was to carry on the business "in the usual way".

In my judgment the reality of the matter is that what in substance D'Arcy & Co. were doing through the first defendant was to buy and sell potatoes; and this was plainly carrying on business "in the usual way". The terms on which the first defendant bought and sold the potatoes were also plainly matters within his authority. Clearly he could agree the prices and other terms both for purchases and sales. Equally, I think, it was within his implied authority to insure the goods, whether during transit or otherwise. In my judgment the arrangement for sharing the profit and the loss which he made with the plaintiff falls within this sphere of authority. The arrangement was merely one mode of buying and selling what he was authorised to buy and sell on behalf of the partnership; and he was mitigating the risk at the expense of reducing the profit. Accordingly, it was within his authority. Although the joint venture was a partnership, I do not regard it as being "another business" within the meaning of the doctrine set out in LINDLEY'S LAW OF PARTNERSHIP at p. 187.

It is important not to be bewitched by words. There are partnerships and partnerships. A general partnership for a period of years may be very different in substance from a partnership in a single venture; and one single venture may differ greatly from another. In *Towne v. Eisner* (7) HOLMES, J., reminded us that "a word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." One must, I think, penetrate beyond the word "partnership" to the substance of the transaction and not generalise the words of either JAMES, L.J., or LINDLEY'S LAW OF PARTNERSHIP beyond anything that they can fairly have intended. Looking in that way at the transaction in this case, I reach the conclusion that it was within the scope of the first defendant's authority to enter into the alleged partnership agreement and that he thereby bound not only himself but also the second and third defendants.

*Declarations accordingly as against all three defendants.*

Solicitors: *E. Edwards, Son and Noice*, agents for *Nelson Mitchell & Williams*, Southend-on-Sea (for the plaintiff); *Jaques & Co.*, agents for *Scholefield, Taylor & Maggs*, Batley (for the second defendant).

[Reported by R. W. FARRIN, ESQ., Barrister-at-Law.]



# BRITISH OXYGEN CO., LTD. v. BOARD OF TRADE.

[CHANCERY DIVISION (Buckley, J.), April 1, 2, 3, 10, 1968.]

*Trade—Investment grants—Machinery and plant—Gas manufacturers—Transporters and cylinders used for the sale and delivery of gas—Articulated vehicles—Hydrogen trailer, and individual gas cylinders, which were left with customers for the gas to be drawn off—Whether capital expenditure on provision of such new equipment for distributive purposes or storage purposes was eligible for investment grant—Discretion of Board of Trade over approval of capital expenditure—Low cost of individual items not by itself a sufficient ground for withholding investment grant when aggregate expenditure was substantial—Industrial Development Act 1966 (c. 34), s. 1 (1), (2) (a), (3) (b) (c), s. 13 (1).*

A company manufactured, delivered and sold industrial and medical gases. The gases required special containers. The gases in liquid form had to be kept at very low temperatures. Gases in gaseous form, particularly hydrogen, had to be kept at high pressures. For delivery of the gases the company had three kinds of transporters; and in addition the company used very many individual cylinders as containers for storing and transporting gas, the customers retaining the cylinders while using the gas. One type of transporter was a large tanker assembly, comprising a tractor and a half trailer. The tractor was a four-wheeled vehicle and was bought by the company from suppliers. The half trailer included an insulated tank for containing gas at low temperature, a pump for pumping the gas into customers' storage tanks, controls, and other incidental equipment. When used for transport the tractor and half trailer were always united. The second kind of transporter equipment was the small tanker assembly, which served a similar purpose to the large assembly. The insulated tank, pumping equipment and other associated items on the small tanker assembly were not, however, detachable, from the chassis of the vehicle, which was not an articulated vehicle. The third kind of equipment was a hydrogen trailer assembly, comprising a tractor, which the company bought from outside suppliers, and a half trailer. The half trailer had only two wheels at the rear. Nine steel cylinders were assembled on the half trailer, capable of containing hydrogen under pressure of about  $1\frac{1}{2}$  tons to the square inch. The half trailer was frequently detached from the tractor and left detached at a customer's premises, the customer drawing gas from the cylinders as required. The cylinders were not usually detached from the trailer. Gas from the cylinders could, however, be delivered from the half trailer into a customer's own storage cylinders when delivery was made. It was admitted that the individual gas cylinders, which constituted the fourth type of equipment in the present case, were plant for the purposes of Pt. 1 of the Industrial Development Act 1966. These gas cylinders were bought by the company for about £20 each. In the year ending with September, 1966, the company expended a total of £1,707,000 on such cylinders. There was, apparently, a general practice in the government department administering investment grants not to approve for grant expenditure on items of equipment costing individually less than £25\*, however great the number of such items might be. Questions had arisen whether expenditure in providing new equipment of the types mentioned would be eligible for investment grant.

**Held:** (i) expenditure on the provision of a new large tanker or small tanker assemblies would not be eligible for investment grant for the following reasons—

(a) the large tanker assembly, whose components were only occasionally

\* See, as to this practice, p. 186, letter D, post.

separated, was an articulated vehicle, and the small tanker assembly was also a vehicle, and they would not, therefore, be machinery or plant for the purpose of qualifying under s. 1 of the Industrial Development Act 1966, unless they were vehicles within para. (a) of the definition of machinery and plant in s. 13 (1);

(b) these transporters were, however, comprehensive units which carried a load of gas in addition to the tanks and associated equipment incorporated in them, with the consequence that they were not vehicles that satisfied the requirements of para. (a) of the definition, namely, that of being constructed to carry no other load than the tanks and other associated equipment (see p. 183, letters C, G and I, and p. 184, letter A, post).

(ii) expenditure on the provision of new hydrogen trailers was eligible for investment grant for the following reasons—

(a) although a hydrogen trailer was mobile when attached to the tractor it was not a vehicle, for, as it had only two rear wheels, it could not be moved until it was attached to the tractor which thus took the weight of the front portion of the trailer (see p. 183, letter F, and p. 184, letter A, post);

(b) as it was necessary to keep hydrogen under high pressure, a hydrogen trailer served the purposes of a qualifying industrial process within s. 1 (2), as a purpose of packing or storage was not wholly excluded from s. 1 (2) of the Act of 1966; alternatively, if the matter did not fall within s. 1 (2) itself, the hydrogen trailer was to be treated by virtue of s. 1 (3) (b) or (c) as being for a process that was incidental to the manufacture of hydrogen within s. 1 (2) (a) (see p. 184, letters F, G and H, post).

(iii) expenditure on the provision of new gas cylinders was eligible for investment grant for the same reason as that expressed at (ii) (b) above, the company's gas being in effect stored in the cylinders (see p. 184, letter I, to p. 185, letter A, post).

(iv) to refuse to consider an application for approval of capital expenditure for the purpose of awarding investment grant solely on the ground of low individual cost of items (viz., that individual items cost less than £25 each) would not be a proper exercise of the discretion, conferred by the Act of 1966 on the Board, over the approval of capital expenditure for that purpose (see p. 187, letter C, post).

Dictum of LORD REID in *Padfield v. Minister of Agriculture, Fisheries and Food* ([1968] 1 All E.R. at p. 699) applied.

[As to investment grants, see SUPPLEMENT to 38 HALSBURY'S LAWS (3rd Edn.) para. 240A.

For the Industrial Development Act 1966 s. 1, s. 13, see 46 HALSBURY'S STATUTES (2nd Edn.) 820, 832.]

Cases referred to:

*Cherry v. International Alloys, Ltd.*, [1960] 3 All E.R. 264; [1961] 1 Q.B. 136; [1960] 3 W.L.R. 568; Digest (Cont. Vol. A) 586, 205a.

*Baker, Re, Nichols v. Baker*, (1890), 44 Ch.D. 262; 59 L.J.Ch. 661; 62 L.T. 817; 4 Digest (Repl.) 544, 4747.

*Julius v. Oxford (Lord Bishop)*, [1874-80] All E.R. Rep. 43; (1880), 5 App. Cas. 214; 49 L.J.Q.B. 577; 42 L.T. 546; 44 J.P. 600; 19 Digest (Repl.) 360, 1526.

*Padfield v. Minister of Agriculture, Fisheries and Food*, [1968] 1 All E.R. 694; [1968] 2 W.L.R. 924.

### Adjourned Summons.

The plaintiff company, British Oxygen, Ltd., applied by originating summons, dated July 7, 1967, for the determination of questions arising on the interpretation and the effect of Part I of the Industrial Development Act 1966. The questions raised by the summons included the following—(i) whether on the true

- A** construction of the Industrial Development Act 1966 (a) the tank and pump portions of gas tankers and (b) the hydrogen gas trailer constituted "machinery or plant" or "part of any machinery or plant" within the meaning of s. 13 (1) of the Act of 1966; and (ii) a declaration that (a) the tank and pump portions of the gas tankers, (b) the hydrogen gas trailer and (c) the metal cylinder were capable of being approved capital expenditure within the meaning of s. 1 (1)
- B** and s. 13 of the Act of 1966 notwithstanding that each was a form of container or served a distributive function and (iii) a declaration that the Board of Trade was not entitled to decline to make a grant towards bulk capital expenditure on the metal cylinders on the sole ground that each cylinder cost less than £25. The tank and pump portions of the gas tankers, the hydrogen gas trailer, and the metal cylinders were identified by reference to photographs that were intended to be
- C** exhibited to affidavits in the proceedings; their nature sufficiently appears from the statement of fact that follows hereafter. For the purposes of his judgment His Lordship, BUCKLEY, J., read the provisions of Pt. 1 of the Act of 1966, which are set out below\*. The following description of the plaintiff company's business and of the equipment with which the present case was concerned is taken from the judgment.
- D** The plaintiff company's major activity consisted in the manufacture, delivery and sale of industrial and medical gases in gaseous and liquid form. By their nature the gases required special containers. It was necessary for the plaintiff company to undertake delivery of the gases to the purchaser's premises and to

\* Section 1 of the Industrial Development Act 1966, so far as relevant provides:

**E** "(1) Subject to the provisions of this section, the Board of Trade . . . may make to any person carrying on a business in Great Britain a grant towards approved capital expenditure incurred by that person in providing new machinery or plant for use in Great Britain—(a) for carrying on a qualifying industrial process in the course of that business; or (b) for carrying on in the course of that business scientific research relating to a qualifying industrial process whether carried on in the course of that business or not.

**F** "(2) For the purposes of this section a qualifying industrial process is a process for or incidental to any of the following purposes, that is to say—(a) the making of any article; . . ."

"(3) For the purposes of this section—

"(a) the repair or maintenance in the course of a business of an article which is used in the course of that business for carrying on a process for or incidental to any of the purposes mentioned in sub-s. (2) of this section;

**G** "(b) the storage in the course of a business of anything which is to be used in the course of that business for carrying on any such process or which is to be or has been subjected to, or has resulted from, any such process carried on in the course of that business; and

"(c) the packing in the course of a business of anything which is to be or has been subjected to, or has resulted from, any such process carried on in the course of that business

**H** "shall be treated as a process incidental to that purpose, but, save as aforesaid, repair, maintenance, storage or packing shall not be treated as a process incidental to any of the purposes mentioned in sub-s. (2) of this section.

"(6) Subject to any order under s. 7 of this Act, the amount of any grant under this section shall be twenty per cent. of the expenditure in respect of which it was made, except that it shall be forty per cent. of the said expenditure so far as it qualifies as development area expenditure in accordance with Sch. 1 to this Act."

Section 7 to the Act of 1966 gives power to vary the rates of grant under the Act. Sections 2, 3, 5, and 6 provide that the Board of Trade may make grants under the

**I** Act in respect of computers, hover vehicles, ships and mining works. The following are the relevant definitions in s. 13 (1)—

"Approved capital expenditure' in relation to any grant means expenditure appearing to the Board to be of a capital nature and approved by [the Board] for the purposes of the grant;

"Article' means an article of any description (including any means of transport) and includes part of an article;

"Machinery or plant' includes part of any machinery or plant but does not include a computer, ship or aircraft or any vehicle except—(a) a vehicle constructed or adapted for the conveyance of a machine incorporated in or permanently attached to it and of no other load except articles used for the purposes of the machine; . . ."



do so in a manner which permitted the gases to be used when delivered. Ex-works delivery to purchasers was impracticable in this business. Gases provided and sold in a liquid form must be preserved at low temperatures to retain their liquidity, and in the tankers used to transport them the pressure of the gas within the container might be anything between the normal pressure of the atmosphere and twice that pressure. Gases that were sold in a gaseous form and, in particular, hydrogen, had to be transported and delivered at a very high pressure which might be as much as 224 times the normal atmospheric pressure.

For the purposes of their business the plaintiff company used three kinds of transporter. The first of these was a tanker with a cubic capacity of 410,000 cubic feet (herein referred to as "the large tanker assembly"). It consisted of two principal component parts: a tractor and a half trailer. The tractor was bought by the plaintiff company from an outside supplier. It was a Foden tractor, a four-wheeled tractor fitted with an internal combustion engine and a driver's cab, mounted on a chassis which extended some four or five feet behind the driver's cab and had mounted on it a turntable. The half trailer consisted of certain components which were bought from other makers, and other components which were made by a subsidiary of the plaintiff company. The component which was bought was a four-wheeled bogey, each wheel unit being a double wheel, consisting therefore of eight wheels on a double axle, which supported the rear of the half trailer. The other component parts of the half trailer consisted of a vacuum insulated tank suitable for carrying gas and keeping it at an appropriate low temperature; a pumping unit, which consisted of an alternator, which was in fact mounted on the tractor and powered by the engine of the tractor; an electric motor for driving the pump; a centrifugal pump, a liquid meter and counter, and various controls, valves and pipework, and a pressure raising coil. These components, apart from the alternator, were all assembled on the half trailer. The half trailer was detachable from the tractor and when assembled with the tractor the trailer connected with the turntable on the tractor. The half trailer was fitted with jacks towards its front which could be lowered so as to support the front of the half trailer when the tractor was detached. The pressure in the customer's storage tanks into which the liquid gas must be delivered was customarily much higher than the pressure in the tanker and might be as high as twenty times the normal atmospheric pressure, and, accordingly the pump which formed part of the equipment had to be of a sufficient power to overcome the resistance of that pressure. The half trailer, in the case of this assembly, was only detached from its associated tractor for maintenance purposes or, perhaps, occasionally for domestic reasons of the plaintiff company's, but when it was in use for the purpose of transporting and delivering the plaintiff company's product, the tractor and the half trailer were always united.

The second kind of equipment (referred to as "the small tanker assembly") served a similar purpose as the large tanker assembly. It had a cubic capacity of two hundred thousand cubic feet. It consisted of an Albion "Clydesdale" chassis, which was an ordinary kind of lorry chassis with four wheels, two in the front and two at the rear; mounted on that chassis behind the driver's cab was a vacuum insulated tank with pumping equipment and other associated items similar to those which were mounted on the large tanker assembly, but in this case the insulated tank and the other items associated with it were not detachable from the chassis of the vehicle. This assembly was used in precisely similar ways to those in which the large tanker assembly was used. It was merely a smaller variant of the same kind of equipment mounted on four wheels and not articulated, whereas the large tanker assembly, when the tractor and the half trailer were united, constituted an articulated vehicle.

The third kind of equipment (referred to as "the hydrogen trailer assembly") had a capacity of thirty-eight thousand cubic feet. It consisted of a tractor provided by an outside supplier and a half trailer. In this case the half trailer did not have a

A four wheeled bogey at the rear, but had two wheels at the rear. Mounted on the platform of the half trailer were two bulkheads, one at the front and the other at the back, between which were assembled nine steel cylinders, which were bought from another company, capable of containing hydrogen under a pressure of up to 224 atmospheres, viz., one and a half tons to the square inch. Various controls and meters were assembled on the rear bulkhead for use when the gas was delivered out of the cylinders. The half trailer part of this assembly was detachable from the tractor and frequently was detached and left detached at a customer's premises so that the customer might draw the gas out of the cylinders as he required it for his own consumption. The cylinders themselves were not usually detached from the half trailer. They were only detached for certain statutory tests at five yearly intervals and for maintenance. This half trailer was also equipped with jacks towards its forward end, which were lowered to support that end of the half trailer when the tractor was withdrawn. There were two methods of delivery of gas to customers by means of this equipment. Either the gas was delivered out of the cylinders on the half trailer into the customer's own storage cylinders when delivery was made, or the half trailer was detached from its tractor and left at the customer's premises, connected to the customer's supply lines so that the customer might use the gas as he wished direct from the plaintiff company's cylinders on the half trailer, or a combination of those two methods might be employed: part of the gas might be decanted into the customer's own storage capacity and in part the gas might be drawn from the half trailer directly to the point of use.

The fourth kind of equipment was individual cylinders of gas. Very large quantities of certain of the gases produced by the plaintiff company were stored under pressure in metal cylinders which, for the most part, were between 3 ft. 11 ins. and 4 ft. 9 ins., in length and of a diameter between 9 ins. and 11 ins., though there was considerable variation in sizes of cylinders. Metal cylinders containing gas were delivered to customers. The cylinders remained in the customer's possession until the gas had been exhausted, when they were returned to the plaintiff company. While the gas was being drawn off, the cylinder was normally connected to the customer's equipment and might remain so connected for many days or weeks until the gas was used. A rental was generally charged by the plaintiff company for the use of the cylinder while in the customer's possession.

J. A. Brightman, Q.C., and P. E. Whitworth for the plaintiff company.  
G M. Finer, Q.C., and J. P. Warner for the Board.

*Cur. adv. vult.*

Apr. 10. BUCKLEY, J., having read s. 1 (1), (2) (a), (3), (6), having referred to the general nature of ss. 2, 3, 5, 6, 7, having read the definitions quoted in the footnote at p. 179, letters E to I, ante, and having stated that it was conceded that the gases manufactured and dealt in by the plaintiff company came within the definition of the word "article", described in the manner previously set out the activities of the plaintiff company and the nature of the equipment with which the case was concerned, and continued: With the assistance of an analysis which counsel for the plaintiff company made for the purposes of his argument, I can, I think, summarise the effect of the sections of the Industrial Development I Act 1966 so far as they relate to the present case as follows. 1. The plaintiff company to qualify as a recipient of the grant under the Act of 1966 must be a person carrying on business in Great Britain. 2. The grant must be towards expenditure which (a) appears to the Board of Trade to be of a capital nature and (b) is approved by the Board for the purposes of the grant. 3. The expenditure must be incurred in providing new machinery or plant for use in Great Britain except any vehicle other than a vehicle qualified under para. (a) of the definition of "machinery or plant" in s. 13 (1) of the Act of 1966. 4. The machinery or plant must be provided for carrying on a process for or incidental

to the making of gas in the course of the plaintiff company's business. 5. Such processes include (a) the storage in the course of that business and (b) the packing in the course of that business of anything which has been subjected to or has resulted from a process for or incidental to the making of gas in the course of that business.

No question arises on paras. 1 or 2 (a) of this analysis in this case, nor does any arise on para. 3 except whether and to what extent the assets in respect of which the plaintiff company seeks a grant are "vehicles" and, if so, whether they fall within the terms of para. (a) of the definition of "machinery or plant". If and so far as any of them is a "vehicle", it cannot qualify for grant unless it satisfies para. (a). It is for consideration whether any of these assets falls within para. 4, taken apart from para. 5. It is also for consideration whether any of them can be brought within para. 4 by virtue of para. 5. None of these assets, which is not within para. 4 and cannot be brought within that paragraph by reference to para. 5, can qualify for grant because it will not have been provided for a "qualifying industrial process". If any of these assets qualifies for grant, a further question arises about the nature and extent of any discretion vested in the Board to determine whether and to what extent the expenditure shall be approved by the Board for the purposes of the grant.

The plaintiff company says that it is apparent from the Industrial Development Act 1966 that it is intended to provide industry with an incentive to invest in new equipment with a view to faster modernisation, greater output and an improved balance of payments. I think that the apparent intention or policy of the Act of 1966 is to encourage capital investment, in those fields of industrial activity which are indicated in s. 1 (2), by way of providing plant or machinery and thus improving or maintaining the capital stock of industry in this country consisting of physical assets of this kind, and so increasing or maintaining industrial efficiency and productivity. This may be little more than a paraphrase of the plaintiff company's submission. It is, I think, only relevant as a guide to the interpretation of the statute so far as it may be found to be capable of more than one interpretation, in which case I shall adopt that one which best suits the object and scope of the Act of 1966 (*Cherry v. International Alloys, Ltd.* (1)); but, as will appear hereafter, I think that it is relevant to the consideration of the nature and scope of the Board's discretion to approve expenditure for the purposes of the grant.

The plaintiff company contend that the word "vehicle" is one of general import incapable of precise definition and that, accordingly, I should adopt that legitimate interpretation of the word which is most consistent with the intention of the Act of 1966. They point out that the insulated tanks of the large and small tankers and the cylinders of the hydrogen trailer are specifically designed in the one case to maintain the necessary low temperatures of liquid gases, and in the other to maintain hydrogen at the necessary very high pressure so that the plaintiff company's products can be delivered in an acceptable form at the point of delivery to the customers. They are, the plaintiff company say, sophisticated forms of storage which, if they were immobile, would qualify for grant and for which one would not expect the grant to be denied merely because the plant is mobile. They invite me to construe "vehicle" in s. 13 as meaning ordinary vehicles such as lorries, trucks and motor cars intended for transporting goods or people. The plaintiff company asked me to consider the trailer part of both the large tanker assembly and the hydrogen trailer assembly separately from the tractor parts, and to hold that the former part is not in either case a "vehicle" but should be regarded as a load which is moved by the tractor part. They point out that the trailers are immobile on their own and are only mobile when married to the tractor portion which is bought separately although designed specifically for this purpose.



A The Board, on the other hand, submits that a trailer as a means of transport is itself a "vehicle" within the meaning of s. 13 of the Industrial Development Act 1966, as it is for the purposes of the Road Traffic Act, 1960, and so cannot be "plant or machinery" for the purposes of the Act of 1966. The fact that they are specialised vehicles is, they say, neither here nor there.

B In my opinion, a distinction must be drawn between the large tanker assembly and the hydrogen trailer assembly. The two component parts of the former are never separated in use. The trailer is only severed from the tractor occasionally for maintenance and sometimes, maybe, for domestic reasons of the plaintiff company's own such as convenience of parking in the plaintiff company's garage or transferring a tractor from one trailer to another. The hydrogen trailer, on the other hand, is commonly divorced from the tractor at the customer's

C place of business. It would, in my judgment, be over-refined to refuse to recognise the entire large tanker assembly as a vehicle in ordinary parlance. It is an articulated vehicle and none the less so because its two component sub-assemblies can be, and occasionally are, separated. Accordingly, in my judgment, the large tanker assembly cannot be machinery or plant for the purposes of the Act of 1966, unless either (a) "vehicle" in s. 13 ought to be construed in some

D narrower sense excluding such a vehicle or (b) the large tanker assembly satisfies para. (a) of the definition of "machinery or plant". I am unable to accept the plaintiff company's contention that "vehicle" here means only such ordinary means of transport as lorries and motor cars. The terms of para. (a) of the definition of plant and machinery, in my judgment, make clear that it extends to specialised vehicles and I think that it embraces the large tanker assembly.

E The hydrogen trailer, on the other hand, seems to me to stand in a different position in this respect. The trailer constitutes a distinct piece of equipment capable of being used, and frequently used, separately from the tractor which moves it. When separate from any tractor it is completely immovable. Although it is fitted with two wheels at the rear, it cannot be moved until the rear wheels of a tractor unit have been inserted under its front portion to take the weight of

F that part of the trailer. In my judgment, it is realistic to describe this trailer as a load which is moved by and on its tractor. Although it has some of the characteristics of a vehicle, I do not consider that, when its true nature is appreciated, it can be appropriately described as a vehicle.

The next question about the large tanker assembly is whether it satisfies para. (a) of the definition of "machinery or plant" in s. 13 (1) of the Act of 1966.

G The same question arises in connexion with the small tanker assembly which is, in my judgment, indisputably a vehicle. The plaintiff company say that these vehicles are constructed for the conveyance of a machine for storing and delivering liquid gas in a state and manner acceptable to customers. I am prepared to assume that the insulated tanks and associated equipment may properly be described as a machine which is incorporated in or permanently attached to the

H vehicle, but, in my judgment, it is impossible to say that the vehicle carries no other load. When the tank is full the vehicle carries a load of gas. This is clearly not part of the machine nor, in my judgment, is it "an article used for the purposes of the machine". The machine serves the gas, not the reverse. Accordingly, in my opinion, neither the large tanker assembly nor the small tanker assembly is "machinery or plant" for the purposes of the Act of 1966. The same

I would be true, in my judgment, of the hydrogen trailer if, contrary to my view, the trailer were a vehicle within the meaning of the section.

The plaintiff company suggested that the insulated tanks and the pumping equipment, gauges and so forth, associated with them could be regarded as machinery or plant provided separately from the vehicular parts of the assemblies. I cannot accept this view. The large tanker assembly and the small tanker assembly are, in my judgment, comprehensive units every part of which contributes to and is necessary for the functioning of the whole. The tanks, pumps, gauges and so forth are incorporated in and form part of the vehicle. Unless the

vehicle so constructed can satisfy para. (a) of the definition of "machinery or plant", no part of it can, in my opinion, be treated as within the definition. A

For these reasons I reach the conclusion that the hydrogen trailer is, but the large tanker assembly and the small tanker assembly are not, nor is any part of them, machinery or plant within the meaning of the Industrial Development Act 1966.

The next question is whether the hydrogen trailer is provided for carrying on a "qualifying industrial process" (2) within the meaning of the Act of 1966. B  
The plaintiff company urge, as is the fact, that it is essential that hydrogen should be kept under very high pressure and delivered under very high pressure to the customer. It would be useless to produce hydrogen unless the means of so keeping it and delivering it were available. Such means is, therefore, they submit, a process incidental to the making of the hydrogen. The Board, on the other hand, C  
contends that the fact that storage and packing are separately dealt with in s. 1 (3), indicates that s. 1 (2) (a) refers to the actual process or processes of making any article and processes directly incidental to making it. Transporting the article when it has been made is not, they say, such a process.

The terms of s. 1 (3) indicate, in my opinion, that the Act of 1966 is meant to have a wide scope of operation. The circumstance that packing and storage are D  
there mentioned separately from the processes dealt with in s. 1 (2) does not require s. 1 (2) to be construed in a way which would exclude all kinds of packing and storage from its scope. There is likely to be a very large number of kinds of packing or storage falling within the terms of s. 1 (3) of which it would be at least doubtful whether they could properly be described as processes for or incidental E  
to one or other of the processes referred to in s. 1 (2). It is, therefore, sensible for s. 1 to contain sub-s. (3) notwithstanding that some processes of packing or storage may come within the scope of sub-s. (2). The provision of suitable means of transporting and delivering hydrogen is, in my opinion, clearly part of the business of a manufacturer of hydrogen, and, in my judgment, such transport and delivery are accurately described as processes incidental to the making of hydrogen since F  
without them no purchaser could be supplied and no hydrogen would be marketed or made.

If, contrary to this view, these processes do not fall within s. 1 (2) (a), then, in my judgment, the hydrogen trailer is provided for use in a process which must be treated as incidental to making hydrogen by reason of s. 1 (3) (b) and (c), or one of those paragraphs. From the time of manufacture until delivery to the customer the hydrogen must be kept under the necessary pressure. The character of the commodity is such that during this period, be it long or short, it must be stored G  
or packed in a particular manner, i.e., under very high pressure to make delivery to the customer possible. For these reasons, the hydrogen trailer is, in my judgment, eligible for grant under the Act of 1966.

I come now to the cylinders. These are admitted to be plant within the meaning of the Act of 1966. The Board contends that the evidence does not establish H  
that these cylinders are used for storage in the course of the plaintiff company's business, but merely that they are at times used as a means of storage by customers who do not return the cylinders to the company until they have exhausted the gas from them. This, in my view, is not the effect of the plaintiff company's evidence, which is uncontradicted. That evidence is that very large quantities of gas produced by the company are stored under pressure in these cylinders and I  
that, when the gas is sold, it is delivered in the cylinders which are retained by the purchasers until the gas is exhausted, after which the cylinders are returned to the company. As I understand this evidence, the plaintiff company hold a stock of gas in these cylinders. Such a stock of gas so held appears to me to be accurately described as "stored" in the cylinders. Moreover, if I am right in my view of the hydrogen trailer, exactly similar considerations apply to the

(2) The words "qualifying industrial process" are defined in s. 1 (2) of the Act of 1966, see p. 179, letter F, ante.



**A** cylinders. Consequently I am of opinion that the cylinders are eligible for grant under the Act of 1966.

In the course of the correspondence which passed between the parties before these proceedings were launched the Board expressed the view that no grant is payable under the Act of 1966 on containers in any form. I can find no justification in the Act of 1966 for this broad statement. In this respect, the Board, has,

**B** in my judgment, misconstrued the Act of 1966.

I now reach the question of the nature and extent of the Board's discretion under the Industrial Development Act 1966. That the Board has a discretion is not disputed. The plaintiff company say that this arises from the fact that s. 13 (1) provides that approved capital expenditure means (3) expenditure approved by the Board for the purposes of the grant. Once expenditure has been so approved,

**C** they say that no further discretion is conferred on the Board by the use (4) of the word "may" in s. 1 (1) which must be construed as conferring a power coupled with a duty to exercise it in respect of the expenditure so approved. In this connection I was referred to the well-known case of *Julius v. Lord Bishop of Oxford* (5), and in particular to the speech of EARL CAIRNS, L.C. (6), and to *Re Baker, Nichols v. Baker* (7). The Board, on the other hand, contends that the

**D** Act of 1966 confers on it a discretion whether or not to make a grant in any particular case which is wholly uncontrolled by anything in the Act of 1966 and derives from the word "may" in s. 1. The Board submits that the words "approved by them for the purposes of the grant" in the definition section (8) relate only to quantum. Thus, for instance, if an applicant for a grant has expended £10,000 on providing plant which would otherwise rank for grant but

**E** could have been obtained for £8,000, the Board could approve the expenditure for the purposes of the grant to the extent of £8,000 only. I can see no reason for restricting these words to approval on grounds relating only to quantum. In my judgment, the word "may" in s. 1 and the reference to approval for grant in the definition section refer to one and the same discretion. The Board has a discretion whether to approve the making of a grant in any particular case or not to do so.

**F** In the exercise of this discretion it can approve the whole expenditure, refuse to approve any of it or approve part only of it for the purposes of the grant. This discretion, however, must be lawfully exercised. It must be exercised impartially; it must not be exercised arbitrarily. It must be exercised in good faith so as to promote the policy and object of the Act of 1966. (See *Padfield v. Minister of Agriculture, Fisheries and Food* (9), per LORD REID.) If in any case it were

**G** established that the Board in reaching a conclusion had misdirected itself about the meaning of the Act of 1966 or as to the facts or as to the relevance or irrelevance of particular facts, it is possible that an exercise of the discretion founded on that conclusion could be assailed as unlawful (*Padfield v. Minister of Agriculture, Fisheries and Food* (10)). The policy and object of the Act of 1966 must be determined by construing the Act as a whole (see *ibid.*, per LORD REID (11))

**H** in the light of its terms and of any properly admissible extraneous considerations but without regard to other extraneous matters, such, for instance, as what is usually referred to as the Parliamentary history of the statute.

I have indicated earlier what I consider to be the intention and policy of this Act and, in my judgment, the Industrial Development Act 1966 imposes a duty on the Board to exercise its discretion in accordance with that intention and policy.

**I** The discretion is otherwise unfettered. Whether any particular equipment is machinery or plant within the meaning of the Act of 1966 is a question of law

(3) For the relevant definition, see p. 179, letter I, ante.

(4) for the relevant terms of s. 1 (1) see p. 179, letter E, ante.

(5) [1874-80] All E.R. Rep. 42; (1880), 5 App. Cas. 214.

(6) [1874-80] All E.R. Rep. at p. 47; (1880), 5 App. Cas. at p. 222.

(7) (1890), 44 Ch.D. 262.

(8) See s. 13 (1) of the Act of 1966, definition of "approved capital expenditure".

(9) [1968] 1 All E.R. 694 at p. 699.

(10) [1968] 1 All E.R. 694.

(11) [1968] 1 All E.R. at p. 699.



depending on the construction of the Act of 1966, but whether, if it is machinery or plant within that Act, it should be approved for the purposes of the grant, is a matter to be decided by the Board in the exercise of its discretion in accordance with the intention and policy of the statute.

In the course of the correspondence in the present case the Board stated its position as follows in a letter dated Oct. 24, 1967:

“ It has occurred to the Board’s legal advisers that you may not appreciate the significance of the government policy underlying the investment grants scheme. The Board takes the view that it would be inconsistent with such policy to make grants in the case of any equipment such as that in dispute, which the Board regards as serving primarily a distributive function, even if, which is not admitted, the payment of those grants would be authorised by the Act. For this reason, even if your clients were successful in obtaining declarations favourable to them on the questions raised in the summons, the Board would nevertheless, in the exercise of its discretion, feel bound to refuse to make a grant.”

The Board also has adopted another general rule of practice not to approve for grant expenditure on items of machinery or plant which individually cost less than £25 however great the number of such individual items provided at any one time may be. In the course of the exercise of the discretion of the kind which the Board has under this Act, it is inevitable that a body of precedents will accumulate in the department and that certain classifications of what will or will not be approved will become established. This does not mean that each application should not be considered on its merits. If the view that it is inconsistent with government policy to make grants in the case of any equipment serving primarily a distributive function means that grants should not be made in respect of vehicles, this would depend not on government policy but on the interpretation of the Act of 1966; but presumably it is meant to have a much wider significance. If it means that expenditure on plant which is not a vehicle within the meaning of the Act of 1966 but primarily serves a distributive function will be disapproved by the Board because approval would be inconsistent with government policy, an exercise of the discretion for this reason might, I think, be assailable on the ground that the Board ought to exercise the discretion not in the light of government policy but of the policy of Parliament expressed in or inferred from the statute. I am not, however, asked to decide any question about this and I do not propose to do so. If the question had been asked in the originating summons, evidence might have been filed which I have not got. Moreover, although the Board has, in the letter to which I have referred, expressed an intention to refuse approval, it has not yet done so and it is not for me to attempt to in any way control the exercise of the discretion, notwithstanding that after its exercise another court may be asked to say whether it has been well exercised.

I am asked by the summons to declare that the Board is not entitled to decline to make a grant towards the capital expenditure on cylinders on the sole ground that, as is the fact, each cylinder costs less than £25. The average cost of a cylinder is about £20. They are bought by the plaintiff company in very large quantities. In the period of twelve months ended on Sept. 30, 1966, the company expended the sum of £1,707,000 in the provision for use in its business of such cylinders and the evidence contains an estimate that in the three years ending on Sept. 30, 1968, the total expenditure by the company in the provision of such cylinders will exceed £4,000,000. I can well understand that on administrative grounds the Board might consider it unreasonable that it should be required to entertain applications for grants in respect of small expenditures. In the present case the expenditure is not small because the cylinders are bought in bulk, although the cost of any one cylinder is small. This question was raised by amendment when the case was opened. The Board, who had been given a few days’ notice of the plaintiff company’s intention to ask leave to amend, has filed no

**A** evidence and did not seek an adjournment for this purpose. I have no indication, therefore, of the nature or purpose of what has been called in argument "the £25 rule", other than appears in the exhibited correspondence, the effect of which I have stated. The existence, however, of this practice is admitted, and I doubt if any evidence would assist me very much. I, therefore, feel able to deal with this question on the material before me. I agree with the plaintiff company's submission that to refuse to consider an application for approval for a grant in respect of a bulk purchase of a large number of items individually costing less than £25 solely (and I emphasise solely) on the ground of the low individual cost of the items would not be an exercise of the discretion but an abrogation of it. As I have already said, every application—that is, every genuine and reasonable application—must be considered on its merits. Refusal to consider an application merely on the ground of the low cost of the individual equipment provided involves ignoring whatever characteristics the application has meriting approval. Low individual costs cannot, in my judgment, be so weighty and conclusive a consideration (and I make no attempt otherwise to assess the importance of low individual costs) as to make all other considerations irrelevant.

**D** Accordingly, I think that this question in the originating summons should be answered affirmatively and that I should make a declaration accordingly.

*Declaration accordingly.*

Solicitors: *Stafford Clark & Co.* (for the plaintiff company); *Solicitor, Board of Trade.*

[*Reported by JENIFER SANDELL, Barrister-at-Law.*]

## JAKUES v. LLOYD D. GEORGE & PARTNERS, LTD.

[COURT OF APPEAL, CIVIL DIVISION (Lord Denning, M.R., Edmund Davies, L.J., and Cairns, J.), February 19, 20, 1968.]

**F** *Estate Agent—Commission—Agreement to pay commission on introduction of person willing to sign a document capable of becoming a contract to purchase—Misrepresentation as to effect of written clause governing commission—Introduction of person who signed a contract subject to landlord granting licence to assign lease—Licence refused—Whether agent entitled to commission.*

**G** The plaintiff was the proprietor of a café with a lease which had seven years to run. In 1965, he was desirous of selling the café and orally agreed with a representative of the defendants, a firm of estate agents, to sell for £2,500 cash; the representative told the plaintiff that if the defendants found a suitable purchaser and the deal went through, he would have to pay the defendants £250. He signed a printed form of particulars of sale which contained the following clause: "Should you be instrumental in introducing a person willing to sign a document capable of becoming a contract to purchase at a price, which at any stage of the negotiations has been agreed by me, I agree to pay you a commission of £250 . . ." That clause was not explained to the plaintiff; and a copy of it was not left with the plaintiff. The defendants introduced S. who signed a contract of sale, under which the plaintiff was to sell the café to S. for £2,500 and S. was to pay the defendants £250 deposit as selling agents, the agreement being subject to the landlord granting a licence to assign and S. supplying satisfactory references for that purpose. S. paid the deposit to the defendants, but his references were unsatisfactory and the landlord refused to grant a licence to assign. The plaintiff told the defendants to release the deposit to S., but they claimed that they were entitled to commission of £250. S. having recovered £250 from the plaintiff, the plaintiff claimed to recover it from the defendants who counterclaimed £250 commission.

**Held:** (i) the defendants were not entitled to the commission for which they counterclaimed because:

(a) (per LORD DENNING, M.R., and CAIRNS, J.) the meaning of the clause was so uncertain that it was not enforceable (see p. 190, letter H, and p. 194, letter F, post); and

(b) (per LORD DENNING, M.R., and EDMUND DAVIES, L.J.) the defendants' representative misrepresented to the plaintiff the effect of the clause, and therefore the defendants were not entitled to enforce the clause so as to recover the stipulated commission in the circumstances (see p. 191, letter B, and p. 193, letter G, post).

*Sheggia v. Gradwell* ([1963] 3 All E.R. 114) distinguished.

(ii) accordingly the plaintiff was entitled to recover £250 from the defendants (see p. 191, letter F, p. 193, letter H, and p. 194, letter H, post).

Appeal allowed.

[As to estate agents' commission, see, 1 HALSBURY'S LAWS (3rd Edn.) 198, 199, para. 457; and for cases on the subject, see 1 DIGEST (Repl.) 594-596, 1909-1925.]

Cases referred to:

*Ackroyd & Sons v. Hasan*, [1960] 2 All E.R. 254; [1960] 2 Q.B. 144; [1960] 2 W.L.R. 810; 1 Digest (Repl.) 589, 1893.

*Curtis v. Chemical Cleaning and Dying Co., Ltd.*, [1951] 1 All E.R. 631; [1951] 1 K.B. 805; 3 Digest (Repl.) 103, 289.

*Dellafiora v. Lester, Lester v. Adrian Barr & Co., Ltd.*, [1962] 3 All E.R. 393; [1962] 1 W.L.R. 1208; Digest (Cont. Vol. A) 8, 1925a.

*Hocker v. Waller*, (1924), 29 Com. Cas. 296; 1 Digest (Repl.) 581, 1859.

*L'Estrange v. F. Graucob, Ltd.*, [1934] All E.R. Rep. 16; [1934] 2 K.B. 394; 103 L.J.K.B. 730; 152 L.T. 164; 12 Digest (Repl.) 69, 395.

*Midgley Estates Ltd. v. Hand*, [1952] 1 All E.R. 1394; [1952] 2 Q.B. 432; 1 Digest (Repl.) 595, 1913.

*Nicolene, Ltd. v. Simmonds*, [1953] 1 All E.R. 822; [1953] 1 Q.B. 543; [1953] 2 W.L.R. 717; Digest (Cont. Vol. A) 274, 458a.

*Reed (Dennis), Ltd. v. Goody*, [1950] 1 All E.R. 919; [1950] 2 K.B. 277; 1 Digest (Repl.) 594, 1911.

*Scammell v. Ouston*, [1941] 1 All E.R. 14; [1941] A.C. 251; 110 L.J.K.B. 197; 164 L.T. 379; 39 Digest (Repl.) 448, 31.

*Sheggia v. Gradwell*, [1963] 3 All E.R. 114; sub nom *Schegsia v. Gradwell*, [1963] 1 W.L.R. 1049; Digest (Cont. Vol. A) 8, 1914a.

*Wilkinson (A.L.), Ltd. v. Brown*, [1966] 1 All E.R. 509; [1966] 1 W.L.R. 194; Digest (Cont. Vol. B) 10, 1914b.

## Appeal.

This was an appeal by the plaintiff from a judgment of His Honour JUDGE POTTER at Bow county court on June 28, 1967. On Dec. 21, 1966, the plaintiff was ordered by His Honour JUDGE STOCKDALE at Ilford county court to pay £250 to one Sullivan, who had paid that sum to the defendants, as estate agents, as a deposit for the purchase of the plaintiff's café. The plaintiff claimed this sum from the defendants who counterclaimed for the same amount as commission. His Honour JUDGE POTTER found for the plaintiff on the claim and for the defendants on the counterclaim. The facts are set out in the judgment of LORD DENNING, M.R.

*G. K. Rice* for the plaintiff.

*Leon Brittan* for the defendants.

**LORD DENNING, M.R.:** The plaintiff, Mr. Jaques, was the proprietor of a café business at 159, Chingford Road, Walthamstow. He had a lease which had seven years to run; but he was advised by his doctor that he ought to give up the business. So he put it into the hands of two estate agents for sale in the middle of 1965. They had not found a purchaser by October, 1965. Then a



- A Mr. Higgins went along to see the plaintiff. He was a representative of the defendants, another firm of estate agents called Lloyd D. George & Partners, Ltd. He told the plaintiff that he had heard that he was wanting to sell the business, and that he would like to assist him. The plaintiff told him that the price he would like to get was £2,950. Mr Higgins went away. He came back again on Nov. 28, 1965, and said: "I have found a prospective purchaser; he will pay £2,500."
- B The plaintiff replied: "I am willing to sell for £2,500 if it is a cash price." Mr. Higgins said: "Yes, it will be a cash price." He added: "If we find a suitable purchaser and the sale goes through, you will pay us £250." Then Mr. Higgins produced a printed form of particulars of sale. He wrote down the details of the business and he asked the plaintiff to sign the form. There were conditions on the form. Mr Higgins said: "You realise we are sole agents."
- C The plaintiff said: "No, it is already in the hands of two agents." Thereupon Mr. Higgins struck out one of the clauses in the form. The plaintiff signed the form with the remaining clauses in it. Mr. Higgins did not explain them to the plaintiff. He went away taking the form with him. He did not leave a copy with the plaintiff. Unbeknown to the plaintiff the form contained these important clauses:

D "1. I hereby instruct you to use your best endeavours to sell the above in accordance with the terms appearing below . . .

"3. Should you be instrumental in introducing a person willing to sign a document capable of becoming a contract to purchase at a price, which at any stage of the negotiations has been agreed by me, I agree to pay you a commission of £250 or 7½ per cent. of the selling price, whichever is the greater."

- E A few days later, on Dec. 3, 1965, Mr. Higgins brought along the prospective purchaser, a Mr Sullivan and his wife. The plaintiff did not think much of them. They were not suitable people to run a café. He told Mr. Higgins so. Mr. Higgins said: "What do you want to bloody-well worry about? As long as you get your money, you can hop it." Mr Higgins produced a printed form of contract of sale. Under it, the plaintiff was to sell the business to Mr. Sullivan for £2,500.
- F Mr. Sullivan was to pay a deposit of £250 to the defendants as selling agents for the vendor. There was also this:

"This agreement is subject to the landlord under the said lease granting his licence to assign and the purchaser hereby agrees to supply satisfactory references for this purpose."

- G The plaintiff and Mr. Sullivan signed the form. Mr. Higgins got them both to instruct the same solicitor. He said: "If you take our solicitor, we can get the deal through quickly." So the one firm of solicitors acted for the vendor, the purchaser and the agents. Mr. Sullivan paid his deposit of £250 to the defendants and gave the names of four referees. The solicitors took up the references.
- H but they were far from satisfactory. In consequence, the landlord refused to grant a licence to assign, on the simple ground that the purchaser, Mr. Sullivan, was not a suitable person to buy the business. So the sale fell through. The plaintiff told the defendants to release the deposit to Mr. Sullivan. The defendants gave the retort direct: "Not bloody likely." They claimed that they were entitled to commission, £250, equal to the amount of the deposit, although the sale had
- I never gone through.

So the parties went to law. In the first place, the purchaser, Mr. Sullivan, issued proceedings against the vendor, the plaintiff, and the agents, the defendants, claiming back his deposit of £250. On Dec. 21, 1966, the county court judge gave judgment against the plaintiff for £250 and costs. He held that the agents had received the deposit as agents for the vendor, and that the vendor had to pay it back to the purchaser, although he had not received a penny of it himself. Naturally enough, the plaintiff then turned round on the defendants and said: "You received this £250 as my agents. Pay it back to me as money had and

received." The defendants had no answer, but at the doors of the county court they put in a counterclaim for commission. They said that, in the terms of their printed form, they were entitled to £250 commission which wiped out the deposit. The judge held that the defendants were entitled to stick to the £250, although they had done nothing to deserve it. He said: "I have the greatest sympathy for the plaintiff, but I am driven to decide against him." He referred to a dictum of UPJOHN, L.J., in *Ackroyd & Sons v. Hasan* (1), and asked himself: Does the clause cover the event which has happened? As it did, he held that the defendants were entitled to their commission. The plaintiff appeals to this court.

We have had many cases on commission claimed by estate agents. The common understanding of mankind is that commission is only payable by the vendor when the property is sold. It is payable out of the purchase money; but some agents have sought, by their printed forms, to get commission even though the property has not been sold or the purchase money received. At first, it was "when a binding contract is signed". Next, it was if they introduce a person "ready, able and willing to purchase". Then they missed out "able" and wanted commission if they only got a "prospective" purchaser or a "willing" purchaser who was unable to purchase. Now we have got to the widest clause that I have yet seen.

"Should you be instrumental in introducing a person willing to sign a document capable of becoming a contract to purchase . . ."

Can an estate agent insert such a clause and get away with it? I think not. I regard this clause as wholly unreasonable and totally uncertain. Suppose a man signed a piece of paper which had just got on it the address of the premises and the price. That could be said to be "a document capable of becoming a contract", even though there was not an offer contained in it. So, also, if a man signed a document which was expressly "subject to contract"; or even signed a blank form with all the blanks to be filled in. It might be said to be "a document capable of becoming a contract". Even if the man was quite unable to complete, he might still be a person "willing" to sign. So we are faced with the question in this case: to what extent can estate agents go in putting a form before vendors to sign?

The principles which, in my opinion, are applicable are these: When an estate agent is employed to find a purchaser for a business or a house, the ordinary understanding of mankind is that the commission is payable out of the purchase price when the matter is concluded. If the agent seeks to depart from that ordinary and well-understood term, then he must make it perfectly plain to his client. He must bring it home to him so as to make sure he agrees to it. When his representative produces a printed form and puts it before the client to sign, he should explain its effect to him, making it clear that it goes beyond the usual understanding in these matters. In the absence of such explanation, a client is entitled to assume that the form contains nothing unreasonable or oppressive. If he does not read it and the form is found afterwards to contain a term which is wholly unreasonable and totally uncertain, as this is, then the estate agent cannot enforce it against the innocent vendor. Applying this principle, I think that the clause in this case was wholly unreasonable and totally uncertain. It can and should be rejected, leaving the agent to his commission on the usual basis, namely, that, if the sale goes through, he gets his commission. That follows from the principle laid down by the House of Lords in *Scammell v. Ouston* (2), together with the corollary stated by this court in *Nicolene, Ltd. v. Simmonds* (3). The other principle is that an estate agent cannot rely on the printed form when his representative misrepresents the content or effect of the form. In *Dennis Reed, Ltd. v. Goody* (4), the representative said that it was "merely a routine matter"

(1) [1960] 2 All E.R. 254 at p. 257; [1960] 2 Q.B. 144 at p. 154.

(2) [1941] 1 All E.R. 14; [1941] A.C. 251.

(3) [1953] 1 All E.R. 822; [1953] 1 Q.B. 543.

(4) [1950] 1 All E.R. 919 at pp. 924, 925; [1950] 2 K.B. 277 at p. 287.

A when he asked the seller to sign. In the present case, he said: "If we find a suitable purchaser and the deal goes through, you pay £250." That is equivalent to a representation that the usual terms apply. It was a misrepresentation of the effect of the document. No person can hold another to a printed form which has been induced by a misrepresentation, albeit an innocent misrepresentation. I well remember SCRUTTON, L.J., in *L'Estrange v. F. Graucob, Ltd.* (5) saying with emphasis: "... In the absence of fraud, or, I will add, misrepresentation, the person signing it is bound."

Applying this other principle I think that the agent misrepresented the effect of the document, and for this reason it can and should be avoided, leaving the agent to claim for commission on the usual basis. It was said that this misrepresentation was not pleaded. True enough; but the claim for commission was not inserted until the last moment. I see no reason why, in answer to it, the plaintiff should not put forward the misrepresentation, especially, as Mr. Higgins did not go into the witness box to say anything to the contrary.

C Counsel for the defendants relied very much on *Midgley Estates, Ltd. v. Hand* (6), and *Sheggia v. Gradwell* (7), in this court. Those cases are distinguishable. In each of them the vendor had a remedy. In *Midgley Estates, Ltd. v. Hand* (6), D he forfeited the deposit. In *Sheggia v. Gradwell* (7) he had a remedy against the purchaser for damages for breach of contract. Those cases have no application to a case such as the present one where the deal goes off without any fault of the vendor and he is without any remedy against the purchaser.

I would, therefore, allow this appeal. The plaintiff is entitled to the £250 deposit paid to the defendants. The counterclaim of the defendants for commission should be dismissed. I may add that the plaintiff did not claim in this action the costs which he had to pay in the action brought against him by Mr. Sullivan. He might, perhaps, have recovered them as the client did in *Dellaflora v. Lester*. *Lester v. Adrian Barr & Co., Ltd.* (8); but it would have to be raised as a claim for breach of duty by the agent in not handing over the deposit when told to. It is too late to raise it now in this action, and, when this was pointed F out, counsel for the plaintiff did not pursue it.

I would, therefore, allow the appeal and hold that the plaintiff is entitled to judgment for the £250.

EDMUND DAVIES, L.J.: This is yet another of these difficult and by no means infrequent cases arising out of a claim for commission by a firm of estate agents. In *Midgley Estates, Ltd. v. Hand* (6), where the agent was held G entitled to commission on introducing a purchaser who signed a legally binding contract even though he was unable to raise enough money and forfeited his deposit, JENKINS, L.J., said (9):

"... prima facie, the intention of the parties to a contract of this type is likely to be that the commission stipulated for should only be payable in the event of an actual sale resulting. The vendor puts his property into the hands of an agent for sale and, generally speaking, contemplates that, if a completed sale results, and not otherwise, he will be liable for the commission, which he will then pay out of the purchase price... but this does not mean that the contract, if its terms are clear, should not have effect in accordance with those terms even if they do involve the result that the agent's commission is earned and becomes payable although the sale in respect of which it is claimed for some reason or another turns out to be abortive."

By today the cases on this branch of the law have become many and not always

(5) [1934] All E.R. Rep. 16 at p. 19; [1934] 2 K.B. 394 at p. 403.

(6) [1952] 1 All E.R. 1394; [1952] 2 Q.B. 432.

(7) [1963] 3 All E.R. 114.

(8) [1962] 3 All E.R. 393.

(9) [1952] 1 All E.R. at pp. 1396, 1397; [1952] 2 Q.B. at pp. 435, 436.



consistent. But I would respectfully adopt the summation of their effect expressed by HARMAN, L.J., *A. L. Wilkinson, Ltd. v. Brown* (10), in the following words:

"It comes to this in the end, that before it is found that the commission is payable, the court must be satisfied that the condition on which it is payable has been fulfilled. There is nothing more in it than that. There is no question of construing the document pro or contra the estate agent. It is a question of what, in the events which happened, can be said as to the fulfilment of the vital condition."

The effectiveness of such a test depends, of course, on the employment of perfectly clear language in expressing the condition the fulfilment of which entitles the estate agent to his commission. It is, for example, conceivable that an owner may be willing to bind himself to pay commission for the mere introduction of one who *offers* to purchase at the specified or minimum price, but such a construction of the contract would require clear and unequivocal language (see *Hocker v. Waller* (11)), and if the language of the contract prepared by the agent is ambiguous it should, notwithstanding the foregoing observation of HARMAN, L.J., be interpreted contra proferentem. Great (and at times unattractive) ingenuity has been shown by some estate agents to ensure their being paid commission even although, through no fault of the vendor, no concluded bargain has resulted. *Sheggia v. Gradwell* (12) was such a case, and it is no wonder that counsel for the defendants now strongly relies on it. For the reasons tellingly given by SALMON, L.J., in *A. L. Wilkinson, Ltd. v. Brown* (13), however, it would be undesirable to extend the scope of that decision, for the consequence might well be to compel the courts to give effect to ridiculous bargains where the parties were in reality not on equal terms, the one being perfectly familiar with the language and effect of the contract he was proffering, the other coming to it dewy-eyed and venturing forth into wholly unknown territory.

One ventures to express the hope that the clause (14) here relied on is not in common use among estate agents, for it is likely to trap all except the most wary. Nevertheless, however much to be condemned, is cl. 3 clear and certain? And did the defendants in fact introduce to the would-be vendor "a person willing to sign a document capable of becoming a contract to purchase at a price which . . . has been agreed"? Those two questions do not, as it seems to me, of necessity demand the same answer. In other words, the exact scope and operation of the clause may, when considered in general, be uncertain (and counsel for the defendants did not contend otherwise), and yet, at the same time, one may be satisfied that, having regard to later events, the condition laid down by cl. 3 was in truth fulfilled. I think that may well be the case here. One may conjure up a number of hypothetical cases (and some, but by no means all, have already been adverted to by LORD DENNING, M.R.) and remain in doubt whether the condition contained in cl. 3 has been fulfilled in those circumstances. Nevertheless, whatever the degree of doubt which might arise in relation to such other cases, it may well be that (as counsel for the defendants has submitted) there can be no possible room for doubt that the defendants did in truth introduce in Mr. Sullivan a person who was not only "willing to sign a document capable of becoming a contract" but also one who actually entered into a binding written contract to purchase the plaintiff's premises. In this context, it is to be observed that the county court judge's note of counsel for the plaintiff's opening speech concludes with the following sentence: "*Concede* document signed was capable of becoming a contract to purchase." For my part, I think that it may well be that counsel for the defendants is correct in submitting that, whatever else cl. 3 may mean,

(10) [1966] 1 All E.R. 509 at p. 510.

(11) (1942), 29 Com. Cas. 296.

(12) [1963] 3 All E.R. 114.

(13) [1966] 1 All E.R. at pp. 514, 515.

(14) The terms of the clause (cl. 3) are at p. 189, letter D, ante.

A it unmistakably does involve the vendor in the payment of commission in the event (which happened here) of a binding contract being entered into.

While thus indicating the way in which I should in all probability have decided this point, however, I do not, in the light of the other circumstances, consider it necessary to express any final conclusion on it. I approach the case generally in this way. On any view, cl. 3 is ambiguous in its meaning and scope, and  
 B commission could become payable thereunder on the happening of one or other of a variety of events. If, when proffering a contract ambiguous as to payment of commission (as in this case), the estate agent there and then explains away all ambiguity by orally specifying the circumstances which must arise before he could become entitled to commission, it would clearly be unconscionable for him to claim commission notwithstanding that those circumstances have never  
 C arisen. Would he, however, be pursuing a claim which, in addition to being unconscionable, could not be sustained in law? In *L'Estrange v. F. Graucob, Ltd.* (15), SCRUTTON, L.J., said:

“When a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, *misrepresentation*, the party signing it is bound, and it is wholly immaterial whether he has read the document or not.”

No suggestion of fraud arises in the present case, but was there misrepresentation? For the reasons and in the circumstances already referred to by LORD DENNING, M.R., I think that there clearly was. That being so, what consequences flow? Despite the assurance by the defendants' accredited representative that the  
 E commission would be payable only if the sale went through and Mr. Sullivan paid cash, did they become entitled to payment even though the sale fell through and Mr. Sullivan paid no cash? I should answer that question in the affirmative with the greatest reluctance and only if the law compelled me to arrive at so unrighteous a conclusion. Fortunately, I do not think that it does. The facts in *Curtis v. Chemical Cleaning and Dyeing Co., Ltd.* (16) differed from those of  
 F the present case, but there, also, one contracting party's agent had innocently misrepresented the legal effect of the document which the other party signed, and the former was held disentitled to enforce the contract which *ex facie* had thereby been concluded. I see no reason for adopting a different approach in the present case. In the result, even assuming that, putting the narrowest construction on the wording of cl. 3 of the contract here under consideration, the event thereby contemplated had arrived, the accompanying circumstances  
 G were such that the defendants were nevertheless not entitled to recover any part of the stipulated commission. Their agent having misrepresented the position, it was not open to them to insist on payment notwithstanding the turn of events which had completely defeated the very purpose for which the plaintiff (being thus assured) entered into the contract.

H Accordingly, although not on exactly the same grounds, I concur with LORD DENNING, M.R., in holding that this appeal should be allowed.

CAIRNS, J.: I agree that this appeal must be allowed. I rest my judgment on the vagueness of the commission clause relied on by the defendants. In *Ackroyd & Sons v. Hasan* (17), UPJOHN, L.J., said:

I “When an agent claims commission from a principal there are certain principles of law applicable which cannot be doubted. First: when an agent claims that he has earned the right to commission the test is whether on the proper interpretation of the contract between the principal and the agent the event has happened on which commission is to be paid. Secondly: there are no special principles of construction applicable to commission

(15) [1934] All E.R. Rep. at p. 19; [1934] 2 K.B. at p. 403.

(16) [1951] 1 All E.R. 631; [1951] 1 K.B. 805.

(17) [1960] 2 All E.R. at p. 257; [1960] 2 Q.B. at p. 154.

contracts with estate agents. Thirdly: contracts under which a principal is bound to pay commission for an introduction which does not result in a sale must be expressed in clear language.” A

The necessity for the term being clear was emphasised also by JENKINS, L.J., in *Midgley Estates, Ltd. v. Hand* (18).

In the clause relied on in this case, I can find no clear meaning at all. It might be taken to mean that commission would become payable if the proposed purchaser signed any document which could be completed so as to form the contract of sale, so that the signature on a blank piece of paper might be sufficient. It might mean that the document must be such as would become a contract of sale if the vendor added his signature. It might mean or include a contract subject to a condition which required no further action on the part of the parties; for example, a condition in the terms “if the bank rate is not raised before the date of completion”. I see no way of determining which of these or various other possible meanings was intended. Counsel for the defendants argued that, whatever meaning is adopted, it must be wide enough to cover an actually completed contract of purchase and that that is sufficient to enable the agents to recover when such a contract has been executed. In my view, that will not do. For the clause to have legal effect, it must be ascertainable at the time of the contract of agency what class of events will attract commission. I accept that, if there is such a class of events, the clause may be valid although it might be difficult to define the exact boundaries of the class; but here I have no idea what the class is intended to be. B C D

Counsel for the defendants, further contends that the case is governed by the decision of the majority of this court in *Sheggia v. Gradwell* (19). That seems to me to be quite a different case. The literal meaning of the express words of the commission clause there was clear enough. The only question was whether the wide literal meaning could be cut down by importing the proviso that the person introduced must be ready, willing and able to purchase. E

In this case, because the clause has no clear meaning at all, it is, in my judgment, of no effect. This does not mean that, if a sale actually went through, the agent would get no remuneration. He could recover either commission on the basis that, once this clause is gone, an undertaking to pay commission on the usual terms must be implied or possibly on the basis of a quantum meruit. F

As to counsel for the plaintiff's other argument, which has found favour with both my lords, the argument founded on the misrepresentation of which the plaintiff gave evidence, my view is that, as no plea of misrepresentation or estoppel appeared on the pleading, this point was strictly not open to the plaintiff. It is true that the defendants' counterclaim had been raised by a last-minute amendment, but I consider that, if this answer to it was to be relied on, it should have been raised at the latest at the end of the plaintiff's case and before counsel for the defendants had elected to call no evidence. I gather that it was not raised until counsel for the plaintiff made his final speech, and I take the view that it was then too late. G H

However, on the former ground I agree that the appeal should be allowed.

*Appeal allowed.*

Solicitors: *Edwin Roast & Co.*, Barking (for the plaintiff); *Nairnsey, Fisher & Co.* (for the defendants). I

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

(18) [1952] 1 All E.R. at pp. 1396, 1397; [1952] 2 Q.B. at pp. 435, 436.

(19) [1963] 3 All E.R. 114.



A

## THE STATUE OF LIBERTY.

OWNERS OF MOTORSHIP SAPPORO MARU *v.* OWNERS OF STEAM TANKER  
STATUE OF LIBERTY.

B

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sir Jocelyn Simon, P.), March 18, 1968.]

*Shipping—Collision Evidence—Radar echoes recorded mechanically—Real evidence—Radar not monitored by human agency—Whether photographic record admissible in evidence in collision action.*

C

The record made, by purely mechanical means and without human intervention, by a radar set at a shore radar station, in respect of the echoes of two ships involved in a collision at sea, is in the nature of real evidence and is admissible in evidence in a collision action; and the same principle will apply to other types of real recordings (see p. 196, letters F and H, post).

*R. v. Maqsood Ali. R. v. Ashiq Hussain* ([1965] 2 All E.R. 464) considered.

D

[**Editorial Note.** Proposed legislation is now before Parliament to amend the Evidence Act, 1938, and to abolish the hearsay rule and reform the law of evidence in other respects; the proposed new legislation is to include provisions directed to the admissibility in evidence in civil proceedings of the products of computers and other business machines (see Civil Evidence Bill 1968 (No. 114), cl. 5, cl. 10).

E

As to the admissibility in evidence of photographic recordings, see SUPPLEMENT to 15 HALSBURY'S LAWS (3rd Edn.) para. 486.]

Cases referred to:

F

*Myers v. Director of Public Prosecutions*, [1964] 2 All E.R. 881; [1965] A.C. at p. 1009; [1964] 3 W.L.R. at p. 153; 128 J.P. 481; 48 Cr. App. Rep. 348; *affg.* sub nom. *R. v. Myers*, [1964] 1 All E.R. 877; sub nom. *Myers v. Director of Public Prosecution*, [1965] A.C. 1001; [1964] 3 W.L.R. 145; Digest (Cont. Vol. B) 255, 377a.

*R. v. Maqsood Ali, R. v. Ashiq Hussain*, [1965] 2 All E.R. 464; [1966] 1 Q.B. 688; [1965] 3 W.L.R. 229; 129 J.P. 396; 49 Cr. App. Rep. 230; Digest (Cont. Vol. B) 261, 4063Aa.

*R. v. Senat, R. v. Sin* (Mar. 16, 1968), *The Times*; 112 Sol. Jo. 252.

G

## Summons for directions.

On a summons for directions in a pending action, folio 20 of 1965, between the plaintiffs, the owners of the motor ship Sapporo Maru, and the defendants the owners of the steam tanker, Statue of Liberty, the question arose whether a record on cinematograph film of the radar echoes, recorded mechanically, of the vessels involved in the collision should be admitted in evidence. The summons was heard in chambers, and is reported on this point by permission of the President, SIR JOCELYN SIMON. The collision occurred in the River Thames.

H

*J. D. H. Rochford* for the plaintiffs.

*Michael Thomas* for the defendants.

I

SIR JOCELYN SIMON, P.: This summons arises out of a collision which occurred in December, 1964, in Sea Reach of the river Thames between the plaintiffs' vessel, the Sapporo Maru, which was proceeding down river, and the defendants' vessel, the Statue of Liberty, which was proceeding up river. The question which arises on the summons is whether a certain piece of evidence should be admitted to prove such facts as can be deduced from it. What the plaintiffs ask for and what the defendants resist is that a film strip from a shore radar station should be admitted in evidence.

At a shore station at Thames Haven there is a radar set in operation. It records, ultimately on a cinematograph film, echoes of vessels which are within

its range. It is said that the echoes of the two ships involved in this collision appear on the film and that a succession of photographs from the film will throw light on where and how the collision occurred and the responsibility of each ship. Normally this radar and screen are monitored by human agency, but on this occasion—for reasons I was not told, nor needed to be—it was not monitored. The film strip, however, is available. The defendants resist the admissibility of this strip of film on the broad ground that it is a piece of evidence produced purely mechanically without human intervention and as such offends against the hearsay rule. Counsel for the defendants relies on *Myers v. Director of Public Prosecutions* (1). He has argued robustly that it makes all the difference that no human agency is available to verify or explain what the machine records. The Evidence Act, 1938, does not render this sort of evidence admissible, in his submission.

I am clearly of the opinion that the evidence is admissible, and could, indeed, be a valuable piece of evidence in the elucidation of the facts in dispute. In a case concerned with mechanical recordings by tape recorder, *R. v. Maqsum Ali, R. v. Ashiq Hussain* (2), the Court of Criminal Appeal, in ruling that the tape recordings were admissible, stated (3) that it could see no difference in principle between a tape recording and a photograph. See also *R. v. Senat, R. v. Sin* (4). Moreover, *R. v. Maqsum Ali* (2) makes it plain that we are not here concerned with evidence admissible under the Evidence Act, 1938, because that Act is not applicable to criminal proceedings. Counsel for the defendants seeks to distinguish *R. v. Maqsum Ali* (2) from the present case on the ground that in the former case the police officer set up a recording machine to overhear part of a recorded conversation and claimed to be able to identify the voices recorded. I should be sorry to think that that was a ground for distinction; for in *R. v. Maqsum Ali* (2), the language was a dialect of Punjabi, not understandable by Urdu experts, let alone by English police officers. In my view the evidence in question in the present case has nothing to do with the hearsay rule and does not depend on the Evidence Act, 1938. It is in the nature of real evidence, which is conveniently defined in COCKLE'S CASES AND STATUTES ON EVIDENCE (10th Edn., 1963) at p. 348:

“Real evidence is evidence afforded by the production of physical objects for inspection or other examination by the court.”

If tape recordings are admissible, it seems equally a photograph of radar reception is admissible—as, indeed, any other type of photograph. It would be an absurd distinction that a photograph should be admissible if the camera were operated manually by a photographer, but not if it were operated by a trip or clock mechanism. Similarly, if evidence of weather conditions were relevant, the law would affront common sense if it were to say that those could be proved by a person who looked at a barometer from time to time, but not by producing a barograph record. So too with other types of dial recordings. Again, cards from clocking-in and out machines are frequently admitted in accident cases. The law is bound these days to take cognisance of the fact that mechanical means replace human effort.

*Ruling accordingly.*

Solicitors: *Middleton, Lewis & Co.* (for the plaintiffs), *Norton, Rose, Botterell & Roche* (for the defendants).

[Reported by N. P. METCALFE, ESQ., Barrister-at-Law.]

(1) [1964] 2 All E.R. 881; [1965] A.C. 1001.

(2) [1965] 2 All E.R. 464; [1966] 1 Q.B. 688.

(3) [1965] 2 All E.R. at p. 469; [1966] 1 Q.B. at p. 701.

(4) (Mar. 16, 1968), *The Times*; 112 Sol. Jo. 252.

A

## LADYMAN v. WIRRAL ESTATES, LTD.

[LIVERPOOL ASSIZES (Fisher, J.), February 12, 1968.]

B

*Landlord and Tenant—Notice to quit—Business premises—New tenancy for three years “from” May 1, 1963—First rent payable on May 1, 1963—Rent payable in advance—Notice terminating tenancy on Apr. 30, 1966—Validity of notice—Landlord and Tenant Act, 1954 (2 & 3 Eliz. 2 c. 56), s. 25 (4).*

C

*Time Computation—Period within which an act may be done—New tenancy of business premises for three years “from” May 1, 1963—Rent payable in advance, first payment on May 1, 1963—Notice terminating tenancy on Apr. 30, 1966—Validity of notice—Landlord and Tenant Act, 1954 (2 & 3 Eliz. 2 c. 56), s. 25 (4).*

D

A tenant held business premises under an agreement for a new tenancy which was reached pursuant to the Landlord and Tenant Act, 1954. The agreement provided for a tenancy “for the term of three years from May 1, 1963”, at a rent payable quarterly in advance on May 1, Aug. 1, Nov. 1 and Feb. 1, the first of such payments to become due on May 1, 1963. On Sept. 22, 1965, the landlords served on the tenant notice, under s. 25 (1)\* of the Landlord and Tenant Act, 1954 “... terminating your tenancy on Apr. 30, 1966.” By s. 25 (4) of the Act of 1954, a notice under s. 25 was not to specify a date of termination earlier than the date on which, apart from Part 2 of that Act, the tenancy would have come to an end by effluxion of time. On the question whether the notice was bad on the ground that the term would not expire until the end of May 1, 1966,

E

**Held:** the notice was good, because, although the general principle was that a term limited to commence from a certain date commenced on the first moment of the day following that named, yet that was only a prima facie construction of the document of demise; in the present case, however, there was a clear indication from the agreement that the parties had a different intention, for the rent was payable in advance and the first payment was to be made on the day from which the term was to run, viz., May 1, 1963, and, therefore, that day should be included in the term demised, which accordingly began with the beginning of May 1, 1963 (see p. 200, letter A, and p. 199, letter E, post).

F

G

*Ackland v. Lutley* ((1839), 9 Ad. & El. 879) and *Lester v. Garland* ([1803-1813] All E.R. Rep. 436) considered.

[**Editorial Note.** This decision should be considered with *Re Figgis* ([1968] 1 All E.R. 999.

H

As to a landlord's notice to terminate business tenancy, see 23 HALSBURY'S LAWS (3rd Edn.) 889, 890, para. 1711.

As to the inclusion or exclusion of first or last days in the computation of prescribed periods of time, see 37 HALSBURY'S LAWS 92-99, paras. 161-173; and for cases on the subject, see 45 DIGEST (Repl.) 252-257, 195-250.

For the Landlord and Tenant Act, 1954, s. 25, see 34 HALSBURY'S STATUTES (2nd Edn.) 410.]

I Cases referred to:

*Ackland v. Lutley*, (1839), 9 Ad. & El. 879; 8 L.J.Q.B. 164; 112 E.R. 1446; 31 Digest (Repl.) 581, 7013.

*Cartwright v. MacCormack*, [1963] 1 All E.R. 11; [1963] 1 W.L.R. 18; Digest (Cont. Vol. A) 945, 8653a.

*English v. Cliff*, [1914] 2 Ch. 376; 83 L.J.Ch. 850; 111 L.T. 751; 17 Digest (Repl.) 366, 1721.

\* Section 25 (1), so far as material, is set out at p. 198, letter H, post.



- Lester v. Garland*, [1803-13] All E.R. Rep. 436; (1808), 15 Ves. 248; 33 E.R. 748; 45 Digest (Repl.) 254, 211. A
- Sidebottom v. Holland*, [1891-94] All E.R. Rep. 617; [1895] 1 Q.B. 378; 64 L.J.Q.B. 200; 72 L.T. 62; 31 Digest (Repl.) 488, 6136.
- Trow v. Ind Coope (West Midlands), Ltd.*, [1967] 2 All E.R. 900; [1967] 2 Q.B. 899; [1967] 3 W.L.R. 633. B

### Action.

This was an action by the plaintiff, Arthur Edward Ladyman, the tenant of premises at 52, Park Lane, Liverpool, against the defendants, Wirral Estates, Ltd., the landlords, claiming that a notice given by the landlords under the Landlord and Tenant Act, 1954, s. 25, terminating his tenancy was bad. The facts are set out in the judgment. C

*Gerson Newman* for the tenant.

*J. Turner* for the landlords

**FISHER, J.:** This case raises a very short point under the law relating to landlord and tenant. The plaintiff held premises at 52, Park Lane in the city of Liverpool under an agreement for a lease made on Nov. 22, 1962, from the defendants. The agreement recites that the tenant is in occupation of the property thereafter described under and by virtue of a lease dated Apr. 30, 1958, between the landlords of the one part, and the tenant of the other part. Notice under the Landlord and Tenant Act, 1954, terminating that tenancy on May 1, 1963, was served by the landlords on the tenant, and agreement for terms of a new tenancy, had been reached to commence as from May 1, 1963, on the terms hereinafter appearing. The agreement then continues, by cl. 1; D

“The landlord agrees to let and the tenant agrees to take the tenancy of all that piece of land and premises now in occupation of the tenant situated at 52, Park Lane in the city of Liverpool for the term of three years from May 1, 1963, at a rent payable by four equal instalments in advance on May 1, Aug. 1, Nov. 1, and Feb. 1 in each year.” E

The first of such payments if it became due was to be made on May 1, 1963. On Sept. 22, 1965, the landlords' solicitors served on the tenant a notice under the Landlord and Tenant Act, 1954 in these terms: F

“We, solicitors for the defendants, the landlords of the above-mentioned premises, hereby give you notice terminating your tenancy on Apr. 30, 1966.” G

The premises are agreed to be premises to which Part 2 of the Landlord and Tenant Act, 1954, applies, and by s. 25 (1) of that Act it is provided that:

“The landlord may terminate a tenancy to which this Part of this Act applies by a notice given to the tenant in the prescribed form specifying the date at which the tenancy is to come to an end . . .” H

By sub-s. (3) of that section, provision is made for tenancies which could have been brought to an end by notice to quit given by the landlord. Subsection (4) deals with any other tenancy, and provides:

“a notice under this section shall not specify a date of termination earlier than the date on which apart from this Part of the Act the tenancy would have come to an end by effluxion of time.” I

The tenant contends that the notice (in this case the notice given on Sept. 22, 1965) is bad since it states as the date on which the tenancy is terminated Apr. 30, 1966, and the tenant contends that the date on which, apart from the Act of 1954, the tenancy would have come to an end by effluxion of time is not Apr. 30, but May 1. The reason why that contention is put forward is that the agreement for a lease provides that the tenancy is to commence from May 1, 1963. It is conceded by counsel for the tenant that, if the agreement had

- A provided that the tenancy should commence *on* May 1, 1963, then the notice under the Act of 1954 would be in order. His contention, shortly put, is that, where a lease provides that the term is to commence *on* a named date, the tenancy commences at the first moment of that date, but that, where a lease provides that the tenancy is to commence *from* a named date, the tenancy commences at the first moment of the day following. Counsel for the landlords
- B contends that, on the true construction of this agreement for a lease, whatever may be the general rule, it is clear that it was the intention of the parties that the tenancy should commence from the first moment of May 1.

I have been referred to a number of text-books and decided cases, from which it is clear that there have been differences of opinion as to the moment at which a lease commencing from a given date commences. It seems to me that a general

C rule can be derived from the authorities, namely, that, *prima facie*, a lease in those terms commences from the first moment of the day following that named, but it seems to me equally to be well-established by the cases that this is only a *prima facie* indication, and that it can be displaced if, on the construction of the lease or agreement for a lease, a contrary intention can be derived. In *Ackland v. Lutley* (1), LORD DENMAN, C.J., giving the judgment of the court,

D said:

"The general understanding is, that terms for years last during the whole anniversary of the day from which they are granted. Indeed, if this were otherwise, the last day, on which rent is almost uniformly made payable, would be posterior to the lease."

- E It seems to me, by parity of reasoning, that, if one finds a case where rent is payable in advance, and the first payment of rent is to be made on the day which is stated in the lease as being that from which the term is to run, that is an indication that the parties intended that day to be included in the term. It is, of course, open to the parties to provide that the first payment of rent shall be made before the term commences, but where as in the present agreement
- F the dates mentioned are quarterly dates (though not the usual quarter days), it seems to me that that is a strong indication that the parties intended that the date of the first payment should be a date included in the term.

The leading case on the subject is that of *Lester v. Garland* (2) which is cited at length in *Carthwright v. MacCormack* (3). As I understand the judgment of SIR WILLIAM GRANT, M.R., he is there laying down that, although as a general

G rule a day stated as being that from which the time is to run should be excluded, this general rule must give way to the conclusion to be drawn from a construction of the particular deed in question. Counsel for the landlords referred me to one case where this course was followed, namely, *English v. Cliff* (4), and, as I understand the reasoning of WARRINGTON, J., in that case, he was basing his decision on the intention to be inferred from the document which he was considering.

- H Counsel for the landlords has drawn my attention to *Sidebottom v. Holland* (5), and, although the dictum was obiter, it seems to have been the view of LINDLEY, L.J., and LORD HALSBURY, who agreed with LINDLEY, L.J., that no distinction was to be drawn between terms commencing on a certain date and terms commencing from a certain date. It is conceded that a term commencing on May 1, would include that day, and, if that reasoning were right, a tenancy commencing
- I from May 1, would, in any case, lead to the same result, but I do not feel able to decide the case on that ground. In the recent case of *Trow v. Ind Coope (West Midlands), Ltd.* (6), although LORD DENNING, M.R., was disposed to say that no distinction should be drawn between periods commencing on a date and

(1) (1839), 9 Ad. & El. 879 at p. 894.

(2) [1803-13] All E.R. Rep. 436; (1808), 15 Ves. 248.

(3) [1963] 1 All E.R. 11.

(4) [1914] 2 Ch. 376.

(5) [1891-94] All E.R. Rep. 617 at p. 620; [1895] 1 Q.B. 378 at p. 384.

(6) [1967] 2 All E.R. 900; [1967] 2 Q.B. 899.

periods commencing from a date, neither of the two other members of the Court of Appeal were prepared to take the same view. A

Nothing which I have said in this judgment is intended to cast any doubt on the general principle which I find well established in the cases that in the absence of any indication to the contrary a term limited to commence from a certain date commences on the first moment of the day following, but in this case I find a clear indication in the document itself that the parties had a different intention, and, accordingly, I find that the notice was good, and the action must be dismissed with costs. B

*Action dismissed.*

Solicitors: *Thos. R. Jones & Son*, Liverpool (for the plaintiff); *J. M. Quiggin & Son*, Liverpool (for the defendants). C

[*Reported by K. B. EDWARDS, Esq., Barrister-at-Law.*]

## R. v. SHILLINGFORD. R. v. VANDERWALL.

[COURT OF APPEAL, CRIMINAL DIVISION (Salmon, L.J., Phillimore and Blain, JJ.), February 12, 1968.] D

*Criminal Law—Drugs—Administering drug to woman to obtain intercourse—Intent to stupefy to enable more than one man to have unlawful sexual intercourse—Essence of the offence the administration of the drug—Indictment containing two counts in respect of one administration—One administration one offence—Conviction on second count quashed—Sexual Offences Act, 1956 (4 & 5 Eliz. 2 c. 69), s. 4 (1).* E

A French au pair girl, who worked in Oxford, went to London. At about 10 p.m. she got into conversation in Leicester Square with the appellants. When they got to Paddington the last train back to Oxford had left. The appellants took her to S.'s flat, where he gave her three Nembutal pills. She fell asleep and when she woke up she found herself naked in bed with the appellant S., who was trying to have intercourse with her, and subsequently, according to her evidence, the other appellant got into the bed and also tried to have, or had, intercourse with her. S. had bought a bottle of Nembutal tablets on a doctor's prescription, and when the bottle was discovered subsequently in the flat three tablets were missing from it. On the following morning the girl went to hospital and was examined. On examination signs were found showing that probably there had been an attempt to have sexual intercourse with her. The appellant S. was charged (count 1) with administering a drug, namely the three tablets of Nembutal, to her with intent to stupify or overpower her, so as thereby to enable him to have unlawful sexual intercourse with her contrary to s. 4 (1)\* of the Sexual Offences Act, 1956. He was also charged (count 2) with administering the same three tablets of Nembutal to her with like intent so as to enable the second appellant, V., to have unlawful sexual intercourse with her contrary to s. 4 (1). By s. 4 (2) a person could not be convicted under s. 4 of the Act of 1956 on the evidence of one witness, unless the witness was corroborated by evidence implicating the accused. Both appellants were also convicted of aiding and abetting attempted rape. In summing-up to the jury the trial judge correctly directed them on corroboration with regard to the charges relating to attempted rape; but gave them no different direction in regard to count 1, the charge under s. 4 (1) of the Act of 1956. On appeal (among other matters) against the convictions, F

**Held:** (i) the essence of the offence under s. 4 (1) of the Sexual Offences Act, 1956, was the administering of the drug, and as there had been only G

\* Section 4 (1) is set out at p. 202, letter H, post. H I



A one administration, there could be only one offence; accordingly S.'s conviction on the second count (i.e., the second charge under s. 4 (1)) would be quashed (see p. 202, letter I, and p. 203, letter B, post).

(ii) the direction concerning corroboration required for the purposes of count 1 (the first charge under s. 4 (1)) was not the same as that required for the charges of rape (viz., that it would be dangerous to convict in the absence of corroboration), but was that the jury could not convict unless there were corroboration; however, as the court was satisfied that the jury would have come to the same verdict if the correct direction had been given, the conviction on count 1 would stand\* (see p. 203, letters G and H, and p. 204, letter G, post).

Appeal allowed in part.

C [As to the offence of administering a drug to facilitate intercourse, see 10 HALSBURY'S LAWS (3rd Edn.) 749, para. 1444.

For the Sexual Offences Act, 1956, s. 4 (1), see 36 HALSBURY'S STATUTES (2nd Edn.) 200 and 818.]

### Appeal.

D The appellants, Holly Shillingford and Rayonne Niel Vanderwall, were convicted on July 25, 1967, at the Central Criminal Court. The appellant Shillingford, was convicted on four counts. The first two counts were of causing a drug to be taken by a woman with intent to stupefy her so as to enable a man to have unlawful sexual intercourse with her, contrary to s. 4 (1) of the Sexual Offences Act, 1956. The third count charged Shillingford that on Mar. 27, 1965, he had sexual intercourse with the woman without her consent; the fourth count charged Shillingford with aiding and abetting Vanderwall to have sexual intercourse with the woman. On the third and fourth counts the appellant Shillingford was convicted of attempted rape and of an offence of aiding and abetting attempted rape. The appellant Vanderwall was convicted of attempted rape. Shillingford was sentenced to imprisonment for a total of five years and Vanderwall for three years. They appealed against conviction by leave of the Court of Appeal, criminal division. The following additional grounds of appeal were notified on behalf of both appellants—(i) that the conviction of Shillingford on the first two counts was bad in that both counts charged him in respect of the same administration of the drug; (ii) that the trial judge failed to direct the jury in relation to the first two counts against Shillingford as to the statutory requirement of corroboration under s. 4 (2) of the Act of 1956; and, in regard to both appellants, that the trial judge omitted to direct the jury on what constituted in law an attempt; that in dealing with what could amount to corroboration on counts 3 and 4 he had failed to distinguish between his function and those of the jury and that he had wrongly directed the jury as to matters which they should regard as corroboration. There were other grounds of appeal not material to be stated in this report.

H *L. Giovane* for the appellants.

*D. H. Spencer* for the Crown.

I **SALMON, L.J.**, delivered the following judgment of the court: On Mar. 26, 1967, a French au pair girl, who was referred to throughout the trial as Miss "X" and who was then aged some twenty-two years and a virgin, went from Oxford, where she worked, to London for the day intending to catch the last train back to Oxford from Paddington. According to her, she missed a woman whom she had come up to London to spend the afternoon with and she walked around Leicester Square at around 10 p.m. at night. She got into conversation with the appellant Shillingford and also with the appellant Vanderwall, whom she had never seen before, and they undertook, according to her evidence, to drive

\* See s. 4 (1) of the Criminal Appeal Act, 1907, as amended by s. 4 of the Criminal Appeal Act 1966; 5 HALSBURY'S STATUTES (2nd Edn.) 929 and 46 *ibid.*, 55.

her to Paddington. She had the impression that going to Paddington they made some detours, and she admitted that she allowed a good deal of kissing and cuddling to go on in the motor car. When they finally arrived at Paddington it was discovered that she had missed her last train back to Oxford, which left at about 11.30 p.m., and that the next train did not go until 6.22 a.m. on the following morning.

According to her, the appellants suggested that they should go to a night club but first go back to the appellant Shillingford's flat; and they did go back to the appellant Shillingford's flat. She admitted that they danced to a gramophone in his flat and there was a good deal of kissing and cuddling. She said that the appellant Shillingford offered her some coffee and then suggested to her that she might take three pills which he offered her because they would have the effect of keeping her awake, and she took the three pills.

According to the case for the prosecution these pills were a barbiturate known as Nembutal, and undoubtedly the appellant Shillingford had bought on a doctor's prescription a bottle of these sleeping pills about a week previously, and when the police discovered the bottle in his flat there were three missing. The girl said that she fell asleep, and woke up naked in bed some time later, that the appellant Shillingford was in bed with her virtually naked on top of her trying to have sexual intercourse with her and that after that the appellant Vanderwall got into the bed virtually naked and also tried to have sexual intercourse with her, or had it.

She said that the next morning the appellant Shillingford said that he could not drive her to the station until 10 a.m., so she set out to walk there assisted by the appellant Vanderwall. On the way she felt extremely ill and went to the hospital. When she went to the hospital her genitalia were examined and they were extremely tender and, indeed, so painful that it was difficult for the doctor to examine them. Some semen was found either in or just outside the vagina, and it appeared that there had been penetration of the vagina to the extent of about half an inch, but the hymen was not fractured.

The appellants were eventually tried at the Central Criminal Court and there were four counts. On the first count the appellant Shillingford was charged that on Mar. 27, 1967, he caused a drug, namely three tablets of Nembutal, to be taken by a person called Miss X with intent to stupefy or overpower her so as thereby to enable him to have unlawful sexual intercourse with her, and in the second count he was charged with administering the same three tablets of Nembutal with intent to stupefy or overpower her, so that thereby the appellant Vanderwall might have unlawful sexual intercourse with her.

The appellant Shillingford was found guilty on both those counts; and one point, the first point that emerges, before I deal with the rest of the appeal, is this. That count was laid under s. 4 (1) of the Sexual Offences Act, 1956, which reads as follows:

"It is an offence for a person to apply or administer to, or cause to be taken by a woman any drug, matter or thing with intent to stupefy or overpower her so as thereby to enable any man to have unlawful sexual intercourse with her."

The point is taken on behalf of the appellants—and, in the opinion of this court, it is a good point—that the essence of this offence consists in administering the drug, and that accordingly in this particular case there was one offence only under the section. Therefore, since the appellant Shillingford was found guilty on count 1 that is an end of the matter as far as an offence under s. 4 (1) was concerned. The second count ought not to have been charged because there was only one administration, and the verdict in respect of the second count ought to have been not guilty. In this particular case the point is of little practical significance, because the appellant Shillingford was sentenced to two years' imprisonment on each count, the sentences to run concurrently. The point, however, may in the future be of some general importance. If it were

- A possible in respect of one administration to put several counts into an indictment, because the drug was being administered to enable several different men to have intercourse with the woman, it would be possible if there were a conviction on more than one of the counts that the sentences might be consecutive. In the view of this court, if there is only one administration there is only one offence, whether it is with the purpose of enabling one man or half a dozen men to have intercourse with the woman in question. Therefore, this court will quash the conviction on the second count.

- B In the third count the appellant Shillingford was charged with having had sexual intercourse with Miss X without her consent, and he was found guilty of the attempt but not guilty of rape. The appellant Vanderwall was charged with having had sexual intercourse with Miss X without her consent, and he was found guilty of the attempt but not guilty of rape, and in that count the appellant Shillingford was also charged with aiding, abetting and assisting the appellant Vanderwall to commit the offence.

- C The appellant Vanderwall was sentenced to three years in respect of attempted rape. The appellant Shillingford was sentenced to three years in respect of attempted rape, two years consecutive in respect of administering the drug contrary to s. 4 of the Act of 1956 and two years concurrent for aiding and abetting the appellant Vanderwall's offence.

- D The court will now deal with the count which relates to the appellant Shillingford's conviction under s. 4 of the Sexual Offences Act, 1956. Section 4 (2) provides that

- E "A person shall not be convicted of an offence under this section on the evidence of one witness only, unless the witness is corroborated in some material particular by evidence implicating the accused."

- It is clear that the judge ought to have told the jury that they could not convict the appellant Shillingford in respect of the count under sub-s. (1) unless they were satisfied that there was corroboration of the girl's evidence to the effect that the drug had been administered to her for the purpose stated in the count.
- F Unfortunately, the judge apparently overlooked sub-s. (2), and perhaps even more unfortunately, when very properly his attention was drawn to this omission or oversight by counsel, he said that he had already dealt with it. What he had done was to give the jury a perfectly clear and proper direction as far as the counts of rape or attempted rape were concerned, that it would be unsafe to convict unless there had been corroboration, and he gave them precisely the same direction in respect of the first count under s. 4. The direction was, as the court has indicated, satisfactory and, indeed, perfectly proper so far as rape was concerned; but it was the wrong direction under s. 4, because the direction there ought to have been not that it would be unsafe to convict but that it would be impossible in law to convict without corroboration.

- G This court, however, has come to the clear conclusion that there is no possibility of any miscarriage of justice having occurred. The court has no doubt but that this jury, had it had the correct direction as to corroboration in respect of count 1, would undoubtedly have come to the same conclusion as that at which it did arrive on the direction which it received.

- H During the course of the girl's evidence the judge invited the jury in the clearest possible terms to stop the case against the appellants. The jury refused that invitation and said that they would like the case to go on. Then later on during the girl's evidence, before any other testimony had been called, the judge reminded the jury that they were entitled to stop the case if they thought that they had heard enough of it; but the jury said no, they wanted the case to proceed.

I The case did proceed. It is quite clear to this court that it is in the highest degree unlikely that the jury would have convicted either of these men on the girl's evidence if it had stood alone. They had at a very early stage of the trial the clearest intimation from the judge that it did not amount to much standing



by itself, but they possibly sensibly decided that they would like to go on and find out what evidence there was against the appellants other than the girl's own testimony; and as it turned out there was a great deal of other evidence.

The appellant Vanderwall was seen by the police, and he said: "Eddie [that is the appellant Shillingford] gave her the tablets." I am omitting the immaterial part of what he said. "I took her to hospital. I was in bed with her. I slept with her. She allowed it." Then he was asked—this is all after caution— "Do you mean you had intercourse with her?" "Yes", he said. "She slept with Eddie as well." Then the officer said: "What happened then?" and the appellant Vanderwall said: "After a while she fell asleep. We undressed her and put her in bed." "Naked", said the officer, "Was that necessary? What then?" "We had sex with her." At the trial the appellant Vanderwall said something quite different from that. He said that she had played about with him and taken off her pants, but that he had not attempted to have intercourse with her and never had intercourse with her nor went to bed with her.

Then the appellant Shillingford was questioned by the police after caution. He was asked "Your friend says you both had intercourse with her", to which he replied, "He did later. I didn't. I just laid with her." "You were all naked?" "Yes." "Wasn't she unconscious or asleep?" to which he made no reply. Then later on at the police station the appellant Shillingford said: "I only gave her the pills. They did her no harm. I only slept in the bed with her. Jooy [that is Vanderwall] had sex with her. I had all this trouble because of him. Can I see my brother?" When he gave evidence he denied all that and said in fact that none of them ever went to bed at all on that night.

If the jury believed, as apparently they did, that the appellants stated to the police what has just been recited, and if, coupled with that, they accepted the medical evidence that the next morning this girl's genitalia were extremely painful and that she appeared to have had her vagina penetrated, that there were traces of semen in the region of her vagina and clear evidence of Nembutal in her blood, there was about as strong corroboration as it is possible to imagine of the girl's story, however unreliable she may have appeared when she was giving evidence-in-chief.

In these circumstances, it seems to this court as far as count 1 is concerned that if the jury had been told that they could not convict without corroboration they would certainly have come to the same conclusion as that at which they arrived after being told that it would be dangerous to convict without corroboration. The summing-up as a whole seems to this court to have been absolutely fair. It put the case for the accused as plainly as possible to the jury. The judge had indicated that he did not take a very rosy view of the girl or the evidence she gave, but he did indicate what the jury might regard as corroboration. He made it abundantly plain that the statement made by the appellant Shillingford was evidence only against him and not against the appellant Vanderwall, and he made the same thing clear *mutatis mutandis* in relation to the statement made by the appellant Vanderwall. He explained the onus of proof perfectly fairly. The only criticism that can be made of the summing-up is the mistake to which I have referred in relation to corroboration under count 1; but for the reasons already stated that mistake is quite irrelevant. It cannot possibly have caused any miscarriage of justice. Save that the conviction on count 2 will be quashed the appeals against conviction are dismissed.

There are no grounds for reducing the sentences, and the application for leave to appeal against sentence are dismissed.

*Conviction on count 2 quashed. Appeal on count 1 dismissed.*

Solicitors: Registrar of Criminal Appeals (for the appellants); Solicitor, Metropolitan Police (for the Crown).

[Reported by JUDITH ASHER, Barrister-at-Law.]

A

## ELECTROCHROME, LTD. v. WELSH PLASTICS, LTD.

[GLAMORGAN ASSIZES (Geoffrey Lane, J.), January 24, 1968.]

B

*Negligence—Duty to take care—Property—Damage to property—Consequential loss to plaintiffs who did not own the property damaged—Defendants damaged hydrant on industrial estate—Water supply cut off for repairs—Loss of a day's work at plaintiff's factory on same estate owing to water being cut off—Plaintiffs having no cause of action against defendants for negligence.*

C

The defendants' servant negligently drove their lorry so as to collide with and damage a fire hydrant near the defendants' factory on an industrial estate. Water escaped and the supply of water through the main had to be stopped for some hours. As a result the plaintiffs' factory had its water supply cut off, and this caused the loss of a day's work at their factory. The main and the hydrant were not the property of the plaintiffs, but, so it seemed, of the owners of the industrial estate. In an action by the plaintiffs in negligence to recover the amount of their loss from the defendants,

D

**Held:** the action did not lie because there was no *injuria*, the duty of care owed by the defendants not to damage the hydrant being owed not to the plaintiffs but to the owners of the hydrant that was damaged (see p. 208, letter F, p. 209, letter A, post).

*Simpson v. Thomson* ((1877), 3 App. Cas. 279) applied.

E

[**Editorial Note.** This is a rather striking instance of the application of the long standing principle that *damnum sine injuria* is not actionable; the same principle was applied recently in relation to the carriage of goods by sea in *Margarine Union G.m.b.H. v. Cambay Prince Steamship Co., Ltd.* ([1967] 3 All E.R. 775). In the present instance the outcome may seem contrary to what might be expected to be the law; loss such as that in the present case could, presumably, be covered by insurance by factory occupiers in the position of the plaintiffs.

F

As to the circumstances in which a legal duty to take care arises, see 28 HALSBURY'S LAWS (3rd Edn.) 7, para. 4, and as to the necessity for a duty of care to be owed to the plaintiff if liability in negligence to him is to be established, see *ibid.*, p. 3, para. 1; and for cases on the subject, see 36 DIGEST (Repl.) 12-25, 34-112.]

G

Cases referred to:

*Cattle v. Stockton Waterworks Co.*, [1874-80] All E.R. Rep. 220; (1875), L.R. 10 Q.B. 453; 44 L.J.Q.B. 139; 33 L.T. 475; 39 J.P. 791; 1 Digest (Repl.) 37, 277.

*Simpson v. Thomson*, (1877), 3 App. Cas. 279; 58 L.T. 1; 3 Asp. M.L.C. 567; 1 Digest (Repl.) 61, 452.

H

*Weller & Co. v. Foot and Mouth Disease Research Institute*, [1965] 3 All E.R. 560; [1966] 1 Q.B. 569; [1965] 3 W.L.R. 1082; Digest (Cont. Vol. B) 554, 109c.

### Action.

I

The factories of the plaintiffs, Electrochrome, Ltd., and of the defendants, Welsh Plastics, Ltd., were on the same industrial trading estate, about five hundred feet apart. The Estate Corporation was responsible for the supply of water to these and other factories on the estate. In November, 1964, the defendants were constructing or enlarging the access road to their factory. On Sunday, Nov. 8, 1964, a little after midday a servant of the defendants was driving a van of theirs at a point just outside their factory, and negligently (as was admitted in the action) collided with a fire hydrant there. Water flowed from the damaged hydrant and, so soon as possible, the mains were turned off. Repairs began about 7.30 a.m. on the following Monday morning. The supply of water was restored between 10 a.m. and 10.30 a.m. on that day.

The plaintiff's manufacturing process involved plating small items of hardware. Water was essential to it, and the boilers took some ten hours to heat; moreover at the time of the accident water was also essential for heating the factory, because the weather was extremely cold. It was not disputed that the factory did not operate during Monday, Nov. 9, 1964, owing to there being no water. The reason why there was no water was that the main supplying the hydrant was on the same water circuit as that which supplied the plaintiffs' factory; and so the collision with the hydrant was the cause of the water supply being cut off from the plaintiffs' factory and the loss of work at the factory on Nov. 9, 1964. The plaintiffs claimed as damages the loss suffered by them by stoppage of the work for Nov. 9, 1964. At the trial it was ultimately conceded that the amount of their loss for this was £29 10s.

*Michael Evans* for the plaintiffs.

*Bruce Griffiths* for the defendants.

**GEOFFREY LANE, J.**, having stated the nature of the action and reviewed the facts and evidence, made the finding that it was the knocking over of the hydrant which indirectly caused the water supply to be cut off from the plaintiffs' factory, and, having considered the evidence regarding the plaintiffs' consequential loss, stated that the amount of the loss (£29 10s.) was conceded and continued:] I will now turn to examine the question, which is purely a matter of law, whether on the facts the plaintiffs are entitled to recover the £29 10s., or indeed anything, from the defendants.

The circumstances in law can, perhaps, be put thus. With knowledge that the damage to this particular hydrant and damage to this particular water main might cause inconvenience or loss to other people on the industrial estate (that knowledge I assume against them for the purposes of argument) the defendants, through their servant, nevertheless damaged the hydrant. The hydrant and the water main did not belong to the plaintiffs; indeed, the plaintiffs had no proprietary rights or possessory rights of any sort either in the hydrant or the main. That hydrant and that main, so far as I know—there has been no specific evidence to this effect—were the property of the industrial estate. If then damage was done to the property of the industrial estate, damage negligently done to that property, can the plaintiffs, whose property it was not, succeed in an action for damages for financial loss which they have suffered as a consequence of such damage?

The matter is set out in convenient form in *SALMOND ON TORTS* (14th Edn.), p. 702. It is headed as follows: "Damnum suffered by one person and injuria by another" and it reads:

"In the second class of case there is both *damnum* and *injuria*, but the *damnum* is suffered by one person and the *injuria* by another. A person who suffers *damnum* cannot recover compensation on the basis of *injuria* suffered by another. He who does a wrongful act is liable only to the person whose rights are thereby violated. He is not bound to make compensation to all persons who, in the result, suffer harm from his wrongdoing. The *damnum* and *injuria* must be united in the same person. So in *Cattle v. Stockton Waterworks Co.* (1) the plaintiff was a contractor who had undertaken to construct a tunnel under land belonging to another person. The defendants, the owners of the adjoining waterworks, negligently allowed the escape of water from their main, and this escape rendered the completion of the plaintiffs' contract much more difficult and costly than it would otherwise have been. Nevertheless the plaintiff was held to have no cause of action for the loss so suffered by him."

That statement of the law I adopt as correct.

(1) [1874-80] All E.R. Rep. 220; (1875), L.R. 10 Q.B. 453.



A The ratio is set out clearly in the decision of the House of Lords in *Simpson v. Thompson* (2). The headnote in that case, which I am reading, as it is quoted in *Weller v. Foot and Mouth Disease Research Institute* (3), to which I must refer later, runs as follows:

B “There is no independent right in underwriters to maintain in their own name, and without reference to the person insured, an action for damage to the thing insured. Although the underwriters have paid for a total loss, and are entitled to all the rights in the injured ship which belong to its owner, yet if that owner cannot assert a right for damages against the wrongdoer, neither can the underwriters.”

I turn to the opinion of LORD PENZANCE which runs as follows (4):

C “But in the argument at your lordships’ Bar the learned counsel for the respondents took their stand upon a much broader ground. They contended that the underwriters, by virtue of the policy which they entered into in respect of this ship, had an interest of their own in her welfare and protection, inasmuch as any injury or loss sustained by her would indirectly fall upon them as a consequence of their contract; and that this interest was such as would support an action by them in their own names and behalf against a wrongdoer. This proposition virtually affirms a principle which I think your lordships will do well to consider with some care, as it will be found to have a much wider application and signification than any which may be involved in the incidents of a contract of insurance. The principle involved seems to me to be this—that where damage is done by a wrongdoer to a chattel not only the owner of that chattel, but all those who by contract with the owner have bound themselves to obligations which are rendered more onerous, or have secured to themselves advantages which are rendered less beneficial by the damage done to the chattel, have a right of action against the wrongdoer although they have no immediate or reversionary property in the chattel, and no possessory right by reason of any contract attaching to the chattel itself, such as by lien or hypothecation. This, I say, is the principle involved in the respondents’ contention.”

Breaking off there for a moment, that is precisely the contention put forward by counsel for the plaintiffs in this case, and he so concedes. That is exactly what happened here. Damage was done by a wrongdoer to the hydrant in which the plaintiffs had no immediate or reversionary property and no possessory right by reason of any contract, and as a result of that damage the contract which the plaintiffs had with the industrial estate for the supply of water became less beneficial. That is precisely the claim made in this case. I resume reading the opinion of LORD PENZANCE (4):

H “This, I say, is the principle involved in the respondents’ contention. If it be a sound one, it would seem to follow that if, by the negligence of a wrongdoer, goods are destroyed which the owner of them had bound himself by contract to supply to a third person, this person as well as the owner has a right of action for any loss inflicted on him by their destruction. But if this be true as to injuries done to chattels, it would seem to be equally so as to injuries to the person. An individual injured by a negligently driven carriage has an action against the owner of it. Would a doctor, it may be asked, who had contracted to attend him and provide medicines for a fixed sum by the year, also have a right of action in respect of the additional cost of attendance and medicine cast upon him by that accident? And yet it cannot be denied that the doctor had an interest in his patient’s safety. In like manner an actor or singer bound for a term to a manager of a theatre is disabled by

(2) (1877), 3 App. Cas. 279.

(3) [1965] 3 All E.R. 560; [1966] 1 Q.B. 569.

(4) (1877), 3 App. Cas. at p. 289.

the wrongful act of a third person to the serious loss of the manager. Can the manager recover damages for that loss from the wrongdoer? Such instances might be indefinitely multiplied, giving rise to rights of action which in modern communities, where every complexity of mutual relation is daily created by contract, might be both numerous and novel. My lords, I have given these illustrations because I fail to see any distinction in principle between them and the right asserted by the underwriters in the present case; and if I am right in so regarding them, they show at least how much would be involved in a decision by your lordships whereby that right should be affirmed. But the ground upon which I will ask your lordships to reject this contention of the respondents' counsel is this —that upon the cases cited no precedent or authority has been found or produced to the House for an action against the wrongdoer except in the name, and therefore, in point of law, on the part of one who had either some property in, or possession of, the chattel injured. On the other hand, the existence of authorities in which the suit has been brought in the name of the owner, though for the benefit of persons having a collateral interest, is somewhat strong to show that such persons had no right of action in themselves."

Counsel for the plaintiffs has been no more successful than counsel before the House of Lords in *Simpson v. Thomson* (5) in finding cases to support his contention. It is perfectly true that it may seem inequitable that a person who has undoubtedly suffered loss in this manner should have no right of action against the person who started off the train of events, who first put a match to the blue touch-paper, but one only has to consider the possible results if such an action succeeded to realise that this is one of the cases where public convenience and interest demand that the right of action must stop short.

In the case of water being cut off in this manner one can imagine a whole series, maybe hundreds, of actions being brought against the defendants based on this type of negligence and, as LORD PENZANCE said, the complexity of society would mean in effect that there might be no end to the concatenation of resulting damage. However, whatever the reasons behind it may be, it is perfectly plain to me that for the reasons which I have given English law does not allow the plaintiffs in circumstances such as these to succeed.

I am fortified in that view by the judgment of WIDGERY, J., as he then was, in *Weller & Co. v. Foot and Mouth Disease Research Institute* (6). The facts in that case were these:

"In consequence, as was assumed, of the escape of a virus imported by the defendants and used by them for experimental work on foot and mouth disease at land and premises owned and occupied by them, cattle in the vicinity of the premises became infected with the disease. Because of the disease an order was made under statutory powers closing cattle markets in the district, with the result that the plaintiffs, who were auctioneers, were temporarily unable to carry on their business at those markets and suffered loss. The court was required to assume that the loss to the plaintiffs was foreseeable and that there was neglect on the part of the defendants which caused the escape of the virus. On the question whether in law an action for damages would lie for the loss,"

WIDGERY, J., held as follows:

"(i) an ability to foresee indirect or economic loss to another person as the result of a defendant's conduct did not automatically impose on the defendant a duty to take care to avoid that loss; in the present case the defendants were not liable in negligence, because their duty to take care to avoid the escape of the virus was due to the foreseeable fact that the virus

(5) (1877), 3 App. Cas. 279.

(6) [1965] 3 All E.R. 560; [1966] 1 Q.B. 569.

A might infect cattle in the neighbourhood and thus was owed to owners of cattle, but, as the plaintiffs were not owners of cattle, no such duty was owed to them by the defendants."

I have, I hope, said enough to indicate the basis on which, on these facts, I have come to the conclusion that the plaintiffs fail and the defendants succeed. There must be judgment for the defendants.

B *Judgment for the defendants.*

Solicitors: *R. L. Edwards & Evans*, Bridgend (for the plaintiffs); *S. Garelick & Co.*, Cardiff (for the defendants).

[*Reported by T. M. EVANS, Esq., Barrister-at-Law.*]

C

## Re WALLACE'S SETTLEMENTS.

[CHANCERY DIVISION (Megarry, J.), February 21, 22, 23, 1968.]

D *Trust and Trustee—Variation of trusts by the court—Power of appointment—Fraud on power—Principle governing court's approach to question of approving proposed arrangement—Fair case for investigation whether fraud on power—Question to be resolved before arrangement approved—Factors of possible benefit to appointors, being life tenants of funds—Variation of Trusts Act, 1958 (6 & 7 Eliz. 2 c. 53), s. 1 (1).*

E *Trust and Trustee—Variation of trusts by the court—Protective trusts—"Like" trusts to protective trusts—Determinable life interests—Variation of Trusts Act, 1958 (6 & 7 Eliz. 2 c. 53), s. 1 (2).*

Under cl. 14 of a settlement made in 1912 each of two life tenants had a life interest determinable on alienation, etc., and on determination thereof a discretionary trust would arise in favour, among others, of the former life tenant and her issue. By cl. 9 each life tenant had a special power of appointment in favour of her children, with (in effect) per stirpes interests for remoter issue. Each life tenant was over sixty years of age, and each had two children of full age. One child of each life tenant had been married and had issue. Each life tenant had for some time been intending to appoint in exercise of the special power, and in November, 1967, each did so, one appointing to one of her two children absolutely and the other appointing equally between her two children. An arrangement was made between the life tenants and the appointee children, under which each life tenant was to receive the actuarial value of her life interest, calculated on the basis of its being indefeasible, not determinable, and the rest of the capital of the trust fund was to be received by the appointees. On application under s. 1 (1)\* of the Variation of Trusts Act, 1958 for approval of the proposed arrangement,

H **Held:** (i) the trusts in cl. 14 of the settlement, being closely similar in objective, in structure and in operation to the trusts stated in s. 33 of the Trustee Act, 1925, were "like trusts" to those of s. 33 for the purposes of para. (d) of s. 1 (1) of the Variation of Trusts Act, 1958; accordingly the proviso to s. 1 (1) of the Act of 1958 did not forbid the court approving the proposed arrangement on behalf of any person prospectively entitled under the discretionary trusts of cl. 14 without being satisfied first that carrying out the arrangement would be for his benefit (see p. 212, letters B and D, post).

I (ii) (a) although, if there were a fair case for investigation whether a proposed arrangement involved a fraud on a power and that question remained unresolved, the court should not give approval under s. 1 (1) of the Variation of Trusts Act, 1958, to the proposed arrangement; yet in the present

\* Section 1 so far as material, is set out at p. 211, letter H, post.



case the power had been exercised bona fide having regard to the factors stated in (b) below, and the proposed arrangement would be approved (see p. 214, letter A, and p. 216, letters E and F, post).

*Re Robertson's Will Trusts*, ([1960] 3 All E.R. 146, n.) considered.

(b) the factors that the actuarial values of the life interests exceeded their market value, that these values were estimated on the basis of indefeasible, not determinable, life interests and that the life tenants were to receive disposable capital sums, did not in the circumstances of the present case render the arrangement beneficial to the life tenants for the purposes of inferring an intention to exercise the special powers of appointment so as to benefit themselves; and, having regard to the fact that each life tenant had been intending for some time past to make such appointments as these, no fraud on the power was involved (see p. 215, letter I, and p. 216, letters A and E, post).

*Pelham Burn, Petitioners* (1964 S.C. 3) considered.

[As to a fraud on a power, see 30 HALSBURY'S LAWS (3rd Edn.) 275-278, paras. 522-524, and for cases on the subject, see 37 DIGEST (Repl.) 375-383, 1110-1161.]

As to variation of trusts by the court, see 38 HALSBURY'S LAWS (3rd Edn.) 1029-1031, para. 1772.

For the Variation of Trusts Act, 1958, s. 1, see 48 HALSBURY'S STATUTES (2nd Edn.) 1130.]

Cases referred to:

*Baker's Settlement Trusts, Re*, [1964] 1 All E.R. 482, n.; [1964] 1 W.L.R. 336, n.; 47 Digest (Repl.) 335, 2999.

*Druce's Settlement Trusts, Re*, [1962] 1 All E.R. 563; [1962] 1 W.L.R. 363; 47 Digest (Repl.) 333, 2996.

*Munro's Settlement Trusts, Re*, [1963] 1 All E.R. 209; [1963] 1 W.L.R. 145; 47 Digest (Repl.) 339, 3027.

*Pelham Burn, Petitioners*, 1964 S.C. 3; [1964] S.L.T. 9; 47 Digest (Repl.) 327, \*1076.

*Robertson's Will Trusts, Re*, [1960] 3 All E.R. 146, n.; [1960] 1 W.L.R. 1050; 47 Digest (Repl.) 336, 3010.

*Wyndham, Petitioners*, [1964] S.L.T. 290.

#### Adjourned Summonses.

These were three applications under s. 1 (1) of the Variation of Trusts Act, 1958, by originating summonses seeking the court's approval of proposed arrangements varying trusts, which trusts in each case subsisted under the same three settlements, viz., settlements dated Aug. 25, 1912, July 18, 1913, and Mar. 15, 1916, all made between A. F. Wallace and others. The plaintiffs in the first summons (the "Fane" summons) were Barbara Kathleen Fane, Venetia Sophia Diana Fane and Vere John Alexander Fane. In the second summons (the "Chance" summons) the plaintiffs were Daphne Corona Chance and Daphne Ann Barrington Hewitt; and in the third summons (the "Wallace" summons) the plaintiff was Alexander Lewis Paget Falconer Wallace. The plaintiffs in all three cases were beneficiaries in funds subject to certain trusts subsisting under the three settlements, the first plaintiff in each of the first two summonses and the plaintiff in the third summons each having a terminable life interest in a certain share of a fund referred to in the settlements. The defendants to the first two summonses were the two trustees, of whom the first was the plaintiff on the Wallace summons and the second was Archibald Leslie Hutson. The second defendant trustee to the first two summonses was also the twelfth and last defendant to the Wallace summons. The first three defendants to the Wallace summons were adult children of the plaintiff on that summons, and the fourth to eleventh defendants were an infant child and infant grandchildren of his. The relevant provisions of the first settlement are set out in the judgment.

A The cases noted below\* were cited during the argument in addition to those referred to in the judgment.

A. L. Price for the plaintiff beneficiaries on the Fane and Chance summonses.

J. M. E. Byng for the defendant trustees to the Fane and Chance summonses and the twelfth defendant to the Wallace summons.

B Martin Nourse for the first three defendants to the Wallace summons (adult children of the plaintiff life tenant).

O. M. W. Swingland for the fourth to eleventh defendants (infants) to the Wallace summons.

C MEGARRY, J.: There are three cases before me. The first may conveniently be called by the name of "Fane", the second by the name of "Chance" and the third by the name of "Wallace". All three are applications made under the Variation of Trusts Act, 1958, and arise out of the same settlement, dated Aug. 25, 1912. The first two cases are closely similar. They raise points of some importance which are almost identical. I propose to deal first with these two cases together, and then to turn to the third case.

D In each of the first two cases a lady, whom for convenience I shall call "the life tenant", has a life interest under trusts of pure personalty. By cl. 14 of the settlement each life interest is made determinable if the life tenant

E "shall at any time alienate or charge or affect to alienate or charge the said income or by reason of any act or event (whether done or happening before or after such life or less interest shall come into possession not being merely a consent to the exercise of a power of advancement) the said income or any part thereof shall or but for this present clause would become vested in or charged in favour of some other person persons or a corporation . . ."

Upon such an event occurring the trustees are required to

F "pay all or any part of the said income to or apply the same for the maintenance and personal support or benefit of all or any one or more to the exclusion of the others or other of the following objects namely such person his wife or her husband (if any) and his or her children or remoter issue for the time being in existence whether minors or adults and the other person or persons for the time being entitled or interested whether absolutely contingently or otherwise to or in the said income or the capital from which the same proceeds or any part thereof respectively

G under the trusts herein contained to take effect after the death of such person in such proportions and manner as the trustees shall in their uncontrolled discretion from time to time think fit . . ."

The first question arises under s. 1 (1) (d), the proviso to s. 1 (1) and s. 1 (2) of the Variation of Trusts Act, 1958. Under s. 1 (1) (d)

H "... the court may if it thinks fit by order approve on behalf of— . . . (d) any person in respect of any discretionary interest of his under protective trusts where the interest of the principal beneficiary has not failed or determined, any arrangement . . ."

put before the court. The proviso to s. 1 (1) reads:

I "Provided that except by virtue of para. (d) of this subsection the court shall not approve an arrangement on behalf of any person unless the carrying out thereof would be for the benefit of that person."

Subsection (2) reads:

"In the foregoing subsection 'protective trusts' means the trusts specified in paras. (i) and (ii) of sub-s. (1) of s. 33 of the Trustee Act, 1925, or any

\* *Portland v. Topham*, [1861-73] All E.R. Rep. 980; (1864), 11 H.L. Cas. 32; *Re Greaves*, [1954] 1 All E.R. 771; [1954] Ch. 434; *Re Burney's Settlement Trust*, [1961] 1 All E.R. 856.

like trusts, 'the principal beneficiary' has the same meaning as in the said sub-s. (1) and 'discretionary interest' means an interest arising under the trust specified in para. (ii) of the said sub-s. (1) or any like trust."

On these provisions the question is whether in relation to the familiar trusts to be found in s. 33 of the Trustee Act, 1925, the trusts in cl. 14 of the settlement are "like trusts", so that the opening words of the proviso to s. 1 (1) of the Variation of Trusts Act, 1958, apply and the court is not required to ascertain that the arrangement would be for the benefit of the persons contingently entitled under the discretionary provisions.

In my judgment these trusts plainly are "like trusts". The word "like" requires not identity but similarity; and similarity in substance suffices, without the need of similarity in form or detail or wording. Indeed, every word of a clause might differ from the corresponding words of s. 33, and yet the two provisions might be clearly similar in substance and effect, and so "like" each other. Without comparing in detail the terms of cl. 14 and those of s. 33 of the Act of 1925, and setting out the similarities and dissimilarities, it can be said that in objective, in structure and in operation the trusts under cl. 14 are closely similar to those under s. 33. Accordingly, I hold that s. 1 (1) (d) of the Act of 1958 applies, and so by the opening words of the proviso to s. 1 (1) the prohibition against approving an arrangement on behalf of any person unless the carrying out thereof would be for his benefit has no application in relation to those who are prospectively entitled under the discretionary trusts.

The main discussion in these cases has centered round the doctrine of a fraud on a power. Clause 9 of the settlement gives to each life tenant, who is referred to as the "grandchild", a wide power of appointment among his or her issue, with a provision in default of appointment

"in equal shares for all or any of the children or child of such grandchild living at the time of the death of such grandchild or the end of the accumulation period whichever shall last happen who shall attain the age of twenty-one years or being female marry under that age and for all or any of the issue living at such time who shall attain the age of twenty-one years or being female marry under that age of any child of such grandchild who shall die before such time leaving issue living at such time such issue to take through all degrees according to their stocks in equal shares the share or shares which their parent would have taken if living at such time and having then attained a vested interest and so that no issue shall take whose parent is living at such time and so capable of taking . . ."

There is then a provision for hotchpot.

Each life tenant is in her sixties, and each has two children of full age; and in each case one of the two children is married and has issue. The persons entitled in default of appointment have accordingly yet to be ascertained. In each case the life tenant irrevocably exercised the power of appointment by a deed executed last November, shortly before the summons was issued, in one case one day before, and in the other case five days before. In the case of "Chance" the appointment was to one child absolutely, and in the case of "Fane" equally between the two children absolutely. The effects of each appointment were, first, that the persons prospectively entitled in default of appointment were as such excluded from all possibility of benefit under the trusts, and so do not fall to be considered under s. 1 of the Act of 1958. It thus became unnecessary for the arrangement to include any provision for their benefit. Second, the appointees became persons of full age absolutely entitled with whom the life tenant could negotiate the terms of an arrangement.

The arrangement proposed in each case is for a simple division of the capital of the trust funds between each life tenant and the appointees. The life tenant is to receive the actuarial value that her life interest would have had if, instead of being determinable, it had been absolute; the appointees are to receive the



A remainder. This arrangement is likely to result in a considerable saving of estate duty, though the whole benefit of this saving would accrue not to the life tenants but to the appointees. Each life tenant would have whatever advantage there may be in having the capital value (on the actuarial basis that I have mentioned) of her present interest in income.

B In these circumstances, the question has arisen whether the approval of the court to the arrangement ought to be withheld on the ground that a fraud on the power is or might be involved. In *Re Robertson's Will Trusts*, (1) RUSSELL, J., began his judgment with these words:

C "I myself raised the question whether possibly the appointment was a fraud on the power, because, if it were, the proposed scheme of arrangement, involving the disbursement of the fund, would be one which the court ought not to approve. I have considered the evidence and the additional information supplied to the court as to the working out of the scheme, and I am satisfied that there is no reason to continue to suppose that there was a fraud on the power."

D If it is clear that a fraud on the power is involved, then plainly the court ought to withhold its approval. The power of the court under the Act of 1958 is a discretionary power exercisable if the court "thinks fit"; and I cannot conceive that it would be fitting for an arrangement to be approved if that arrangement had been made possible by a manifest fraud on a power, or was in some way connected with such a fraud. On the other hand, there is no difficulty if it is plain that there is no fraud on the power. But between plain fraud, on the one  
E hand, and no fraud, on the other hand, there is a wide spectrum, ranging from strong though not conclusive evidence to far-fetched suspicion. At what point should the court draw the line? The first sentence of the judgment of RUSSELL, J., may possibly be read in two ways, depending on what was meant by the words "if so". On one view what the court ought not to approve is an arrangement involving what in fact was a fraud on the power. On the other view, it suffices  
F if the arrangement involves what was possibly a fraud on the power.

Counsel for the trustees' instructions were to support the arrangement. His clients were fully prepared to accept any risks that they might run if the appointment were to be set aside. At my invitation, however, counsel for the trustees assumed the additional function assigned to counsel for the trustees by RUSSELL, J., in *Re Druce's Settlement Trusts*, (2) and by WILBERFORCE, J., in *Re Munro's  
G Settlement Trusts*, (3). He accordingly performed the duties of a watch dog for those who might be adversely affected by the arrangement. I will not say whether he gave tongue with greater force as their watch dog than as a guide dog for the trustees; but owing to interventions from the Bench it was undoubtedly at greater length. I am indebted to him for the painstaking discharge of his dual function, as I am to counsel for the beneficiaries for his performance in unquity.  
H At one stage counsel for the trustees suggested that only if there was prima facie evidence of a fraud on the power ought the court to withhold its approval. After some discussion, however, he abandoned this formulation and accepted the suggestion that the real question was whether it appeared to the court that there was a case for investigation; and counsel for the beneficiaries concurred in this.

I In substance, I consider that this is right. The evidence in an application under the Act of 1958 may or may not deal in detail, or at all, with the circumstances of the appointment. It cannot be right to say that the court will grant its approval in every case unless the parties have been incautious enough to provide evidence of a prima facie case of a fraud on the power. On the other hand, I do not think that it would be right to withhold approval merely by reason

(1) [1960] 3 All E.R. 146 at pp. 147, 148.

(2) [1962] 1 All E.R. 563 at p. 568.

(3) [1963] 1 All E.R. 209 at p. 212.

of far-fetched suspicions of a possible fraud on the power. If as a result of either the presence of evidence or its absence the court comes to the conclusion that there is a fair case for investigation whether a fraud on the power is involved, approval should be withheld until such investigation has been made and satisfactorily resolved. In reaching the decision whether there is a fair case for investigation, I would disregard remote possibilities or fantastic suggestions; equally, I would not require cogent evidence. In my judgment, if to a fair, cautious and enquiring mind the circumstances of the appointment, so far as known, raise a real and not a merely tenuous suspicion of a fraud on the power, the approval of the court ought to be withheld until that suspicion is dispelled. But, I may add, however alert and persistent a watch dog should be, I do not think that he ought to be required to discharge the functions of a bloodhound or a ferret.

One further question has arisen in these cases, and that is whether the arrangements will benefit the life tenants. If they do not, then the main basis for any contention that there has been a fraud on the power disappears. Each life tenant has made it plain in evidence that she does not desire the arrangement to involve any element of benefit to her personally. There is satisfactory evidence that each will receive merely the actuarial value that her life interest would have were it not determinable. There is also, however, evidence that this actuarial value exceeds the market value of such a life interest, the difference being due to the limited market for such interests and the cost to the purchaser of replacing the capital invested in a wasting asset of this nature. In one case the market value is nearly £5,000 less than the actuarial value of over £25,000, and in the other, where the actuarial value is over £46,000, there is a difference of rather less than £6,000. Accordingly, it can be urged that the arrangement is for the benefit of the life tenant in each case on three grounds. First, in place of an inalienable and defeasible interest in income the life tenant will receive an absolute interest in capital, thereby gaining in certainty and flexibility; for, unlike income, capital may be used either as capital or to produce income. Second, the capital sum is the actuarial equivalent not of the determinable life interest which the life tenant actually has, but of a different and better life interest which she has not, namely, an indefeasible life interest. Third, even if the difference between a determinable life interest and one that is indefeasible be ignored, in receiving the actuarial equivalent the life tenant would be receiving appreciably more than she could obtain for her life interest on the open market.

In this connexion I have been referred to two Scottish cases in the First Division of the Court of Session, namely, *Pelham Burn, Petitioners* (4), and *Wyndham, Petitioners* (5), each concerning the same trusts. These cases present an initial difficulty to an English lawyer in that they concerned "alimentary liferents", a term of art not current in England. During the argument I was able to contribute little more on the meaning of this term than my recollection of a passage in a book not normally cited in these cases, *MISCELLANY-AT-LAW* (5a). On p. 145 of that book it is said that

"Even among the most learned conveyancers there are some who do not know that the familiar 'protective trusts' of the Trustee Act, 1925, s. 33, initially suffered a statutory Scots christening: for in the original version of s. 33 as it appeared in the Law of Property Act, 1922, s. 115 (1), the phrase required to bring the section into operation was a direction to hold the income 'on alimentary trusts'."

Over the adjournment I sought the aid of such Scottish books as lay readily to hand. DALRYMPLE AND GIBB'S *SCOTTISH JUDICIAL DICTIONARY* (1946) did not define the term. It defined the word "aliment", but the definition failed to advance my understanding. The definition reads:

(4) 1964 S.C. 3.

(5) [1964] S.L.T. 290.

(5a) (1955), by R. E. MEGARRY; "a diversion for lawyers and others".

- A "Aliment.—For purposes of personal diligence, this word includes inlying expenses and expenses of an action for aliment."

However, it appears from GLOAG AND HENDERSON'S INTRODUCTION TO THE LAW OF SCOTLAND (5th Edn., 1952) pp. 504, 505 and SMITH'S SHORT COMMENTARY ON THE LAW OF SCOTLAND (1962), pp. 491-495 that in English law the nearest analogue to an alimentary liferent is a life interest subject to the now extinct restraint on anticipation. Indeed, GLOAG AND HENDERSON at p. 504 in note 37 states:

"The English equivalent of a wife's alimentary liferent, the 'restraint upon anticipation', has recently been abolished."

- C Across the Atlantic, the "spendthrift trust", against which PROFESSOR JOHN CHIPMAN GRAY inveighed so forcefully and so vainly in his RESTRAINTS ON THE ALIENATION OF PROPERTY (2nd Edn., 1895), seems to be of a similar nature. For present purposes I hope it will suffice if I assume that an alimentary liferent differs widely from the English protective trust (which is perhaps why the word "alimentary" did not survive the transit from the Law of Property Act, 1922 to the Trustee Act, 1925), and that such a liferent is a life interest which, by direct prohibition and without the machinery of determinable interest and discretionary trust, can neither be alienated nor be attached by the liferenter's creditors.

- E Each of the Scottish cases concerned applications under s. 1 of the Trusts (Scotland) Act, 1961, which made provisions similar to those of the English Variation of Trusts Act, 1958. In each case the court considered the doctrine of fraud on a power; and in each case the court took the view that as under the arrangement the liferentrix received no more than the actuarial value of her liferent interest, there was no benefit to her. As the liferent was an interest which was inalienable but not determinable, no question arose as to putting an actuarial value on a life interest different from that which in fact existed; the actuary did not have to value as indefeasible that which was in fact determinable.
- F Nor did any question arise of any difference between actuarial value and market value; for the liferent was inalienable, and was valued as such, without any hypothetically alienable and indefeasible life interest entering the picture in the way that it has in this case. There were, however, valuable expressions of opinion, particularly by LORD SORN in *Pelham Burn, Petitioners* (6), that on the facts of the case the liferentrix did not derive any benefit merely because in place of her liferent she received an equivalent capital sum.

- G With these matters in mind, I turn to the facts of this case. I consider that there was here a fair case calling for investigation whether there was a fraud on a power; but in my judgment, having regard in particular to the further affidavits filed by the life tenants, there is sufficient material before me, when coupled with counsel for the beneficiaries' persuasive explanations, to satisfy me that there is no real substance in the suspicions, and accordingly that I ought not to withhold approval on this score. As regards such advantages as there may be in the certainty and flexibility of capital as opposed to the limitations of an inalienable and defeasible life interest, I am satisfied that in relation to the other material circumstances of the life tenants there is no real advantage to either of them; and plainly I must consider the position of these particular life tenants and not the position in which other life tenants in other circumstances might be. On this score the reasoning in *Pelham Burn, Petitioners* (7), indeed seems cogent. Secondly, on the facts of these cases the prospects of the life interests determining in the lifetime of either life tenant seem to me to be negligible. Thirdly, on the facts of these cases the gap between actuarial value and market value appears to be without real significance. Rights may have no market value because they are unmarketable, and yet they may be most valuable to

(6) 1964 S.C. at p. 11.

(7) 1964 S.C. 3.



their owner. In my judgment each life tenant will receive no more than the value to her of her life interest: and if that is so, it matters not that she will be receiving more than she would have received if, her life interest being different from what it is and being marketable, she had sold it in the open market. A

One further point should be mentioned. There is clear evidence that for some years each life tenant has been intending to make the appointment that she now in fact has made. As counsel for the beneficiaries pointed out, far from facilitating the arrangement, the making of the appointment immediately prior to the application to the court created difficulties in each case by injecting considerations as to a possible fraud on a power into a situation otherwise free from such doubts. As each life tenant had the long-settled intention to make the appointment, and also to secure for the appointees all the advantages resulting from the saving of estate duty, it would have been wrong for her to have abstained from making the appointment. For if she had, she would nevertheless have been under a duty to the court to reveal frankly her subsisting intention to make the appointment in the near future. With the appointment impending, there would then have been great difficulty in determining the quantum of the provision for the persons entitled in default of appointment which would have been for their benefit. Further, any provision for those entitled in default of appointment would have diminished the property that would go to the appointees, and to that extent the life tenant's intention to secure all the benefit for the appointees would have been defeated. C D

My conclusion on the whole of the facts is that in each case the power has been exercised bona fide for the purpose for which it was intended, and not for any ulterior purpose. In my judgment the extent to which the appointments have become embangled with the arrangements has not tainted the appointments; and there is no fraud on the power. E

As to the protective trusts, the question posed by UNGOED-THOMAS, J., in *Re Baker's Settlement Trusts* (8), was whether these trusts "continue to serve any useful purpose". In the circumstances of these cases, and having regard to the march of the years in particular, I feel no hesitation in holding that these trusts have long outlived their initial purposes, and that today they achieve nothing useful. Accordingly I approve the arrangements. F

As regards the third case, having regard to what I have decided in the first two cases in relation to "like trusts", I feel no difficulty in saying that the arrangement put before the court is a proper one. I therefore approve that arrangement also. G

*Orders accordingly.*

Solicitors: *Caprons & Crosse* (for the plaintiff beneficiaries on the Fane and Chance summonses); *Slaughter & May* (for the trustee defendants to the Fane and Chance summonses and the plaintiff on, and fourth and twelfth defendants to, the Wallace summons); *Withers & Co.* (for the first two and fifth to ninth defendants to the Wallace summons); *Dawson & Co.* (for the third, tenth and eleventh defendants to the Wallace summons). H

[Reported by R. W. FARRIN, ESQ., Barrister-at-Law.]

I

A

*In the Estate of BRAVDA (deceased).*  
BRAVDA AND ANOTHER v. BRAVDA.

[COURT OF APPEAL, CIVIL DIVISION (Wilmer, Russell and Salmon, L.J.J.), January 31, February 1, 2, 1968.]

B

*Will—Attestation—Superfluous signature—Intention with which signature affixed—Will signed by four persons below word “witnessed”—First two signatures those of testator’s daughters who were his sole residuary legatees—Presumption of signing as witnesses—Daughters signed at testator’s request “to make it stronger” after independent witnesses had signed—Whether inference that daughters signed as witnesses was rebutted—Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 15.*

C

By his will the testator left the whole of his estate to his two daughters. It was a holograph will, written on one side of a half sheet of notepaper with the testator’s signature at the foot and on the back the words “witnessed 14.12.65” at the top. Evidence showed that two independent witnesses signed first, one of them being fetched at the testator’s instance to be “the other witness”, and that the two daughters then signed at the testator’s request “to make it stronger”. They signed in the space which was left above the signatures of the two independent witnesses and immediately below the word “witnessed”; and, so it seemed, signed at that place at the testator’s request\*.

D

E

**Held:** there was nothing in the evidence sufficient to rebut the prima facie inference that the daughters’ signatures at the back of the will under the word “witnessed” were signed as those of witnesses; and accordingly the consequence enacted in s. 15 of the Wills Act, 1837, followed, even though there were two independent witnesses to the will, and the gifts to the daughters, which the will purported to make, were void (see p. 221, letter H, p. 222, letters B and D, p. 223, letter F, p. 224, letter E, and p. 225, letters A and I, post).

F

*Kitcat v. King* ([1930] P. 266) distinguished and doubted.

Per WILLMER, L.J.: (i) although the court would naturally be reluctant to defeat the manifest intention of the testator, that was an irrelevant circumstance when considering the narrow question whether the daughters signed as witnesses (see p. 220, letter I, post).

G

(ii) if there had been a substantial break between the execution of the will by the two independent witnesses and the subsequent signatures by the plaintiffs, that would have been a matter of no little significance in determining whether the plaintiffs’ signatures were affixed as those of witnesses (see p. 221, letter F, post).

Decision of CAIRNS, J. ([1967] 2 All E.R. 1233) reversed.

H

[**Editorial Note.** The Wills Bill (No. 80), which is before Parliament at the date of this report, will negative the result reached in the present case, if the Bill becomes law.

As to superfluous attestation, see 39 HALSBURY’S LAWS (3rd Edn.) 871, para. 1319, and for cases on the subject, see 48 DIGEST (Repl.) 134, 135, 1156-1173.

I

For the Wills Act, 1837, s. 15, see 26 HALSBURY’S STATUTES (2nd Edn.) 1338.]  
Cases referred to:

*Denning, Re, Harnett v. Elliott*, [1958] 2 All E.R. 1; [1958] 1 W.L.R. 462; Digest (Cont. Vol. A) 552, 1031a.

*Kitcat v. King*, [1930] P. 266; 99 L.J.P. 126; 143 L.T. 408; 48 Digest (Repl.) 97, 761.

*Peeverett, In the Goods of*, [1902] P. 205; 71 L.J.P. 114; 87 L.T. 143; 23 Digest (Repl.) 102, 1030.

\* See, e.g. p. 225, letter G, post.

*Sharman, In the Goods of*, (1869), L.R. 1 P. & D. 661; 38 L.J.P. & M. 47; **A**  
 20 L.T. 683; 33 J.P. 695; 48 Digest (Repl.) 134, 1163.  
*Smith, In the Goods of*, (1889), 15 P.D. 2; 59 L.J.P. 5; 62 L.T. 183;  
 54 J.P. 199; 48 Digest (Repl.) 135, 1169.

### Appeal.

This was an appeal by the defendant by notice dated June 21, 1967, against an order of CAIRNS, J., made on May 12, 1967, and reported [1967] 2 All E.R. 1233, whereby on the grant of probate of the will dated Dec. 14, 1965, of Lewis Bravda, deceased, the names of the plaintiffs were ordered to be omitted from the will where they appeared on the second and third lines of the second page. The defendant, who was the testator's second wife and had been separated from him for many years, sought that the order of CAIRNS, J., should be discharged and that on the grant of probate the names of the plaintiffs should be included where they appeared on the second and third lines of the second page of the will. The grounds of appeal were: (i) that there was no evidence on which the judge could find that the plaintiffs did not sign the will as attesting witnesses, and (ii) that the judge misdirected himself in holding that the plaintiffs were not attesting witnesses and ought to have found that they were attesting witnesses.

*Gavin Lightman* for the defendant.

*A. Garfitt* for the plaintiffs.

*Cur. adv. vult.*

Feb. 2. The following judgments were read.

**WILLMER, L.J.:** This is an appeal against a judgment (1) given by CAIRNS, J., on May 12, 1967, on a motion in a probate action relating to the testamentary dispositions of Mr. Lewis Bravda, deceased. The plaintiffs are two daughters of the testator by his first wife. The defendant is the testator's second wife, from whom he had been separated for a number of years under a decree of judicial separation. The motion brought by the two plaintiffs asks for three forms of relief, and I read from the notice of motion: first, it asks for the grant of letters of administration made to them on July 29, 1966, to be revoked; secondly, it asks that the plaintiffs be granted probate of the will dated Dec. 14, 1965; and, thirdly, it asks

"that on the grant of probate as aforesaid the names of the plaintiffs be omitted from the said will where they appear on the second and third lines of the second page thereof."

There has been no dispute as to the first two of those three headings. As to the third point, the reason for the application is that the effect of the will sought to be propounded was that the testator left the whole of his estate to the two plaintiffs. Unhappily for them, their signatures appear on the face of the document, apparently as witnesses to the execution of the will, along with the names of two other witnesses. If they are to be regarded as having in fact signed as attesting witnesses, it seems plain that, pursuant to s. 15 of the Wills Act, 1837, they would not be entitled to take under the will. That, it is said, would defeat the plain intention of the testator, and would render the will, in the words of the judge below (2), "a mere shell of a will".

The matter arises in this way. I have said that the testator was married twice. After the death of his first wife, he married the present defendant in 1944. He and his second wife, however, separated in or about 1945; and on May 15, 1947, a decree of judicial separation was pronounced. For a number of years the testator paid alimony to the defendant; but on Apr. 13, 1961, an agreement was arrived at, the effect of which was that he settled his future liability for alimony by a lump sum payment of £1,100. The will which is propounded was executed on Dec. 14, 1965. It is a holograph will, written on a

(1) [1967] 2 All E.R. 1233.

(2) [1967] 2 All E.R. at p. 1234.



A half sheet of notepaper. I say no more at the moment, because I shall have to return hereafter to describe the form of the will.

The testator died on Feb. 23, 1966. It is said that the will could not then be found. The plaintiffs consulted a solicitor and, on his advice and with his assistance, obtained a grant of letters of administration on July 29, 1966. I propose to say nothing as to the advice which was given by that solicitor, or as to the propriety of the course which was then taken; for it has now ceased to be relevant in any way, the reason being that the will was in fact subsequently discovered. After its discovery, the present proceedings were set on foot.

The judge, after considering a number of authorities, which were cited to him and after reviewing the evidence contained in the affidavits put before him, decided in favour of the plaintiffs and acceded to the application under heading (3) of the notice of motion. He expressed his conclusion in the following words (3):

“ In my judgment, the evidence here does sufficiently show that the two plaintiffs signed, not as attesting witnesses, but simply in order to please their father, who thought that in some way the addition of their signatures would improve the will.”

D The defendant now appeals to this court.

I return now to the will itself. It is a short document and I think it only right that I should read the whole of it. It is dated at the top and is in the following terms, on the front of the half sheet of notepaper:

E “ I leave the whole of my estate to my two daughters Sarah Lebovic and Rachel Wachtel who will act as my trustees and to whom I give the following instructions. If my granddaughter Fay Lebovic does not live or get married in London, but lives elsewhere, then the £3,000 which I have invested and left in trust as a present for her when she gets married shall be shared by my two daughters, Sarah Lebovic and Rachel Wachtel.”

F Then follows the signature of the testator. On the back of the document, on the top line it says “ witnessed 14/12/65 ”; underneath that, the signature of Sarah Lebovic; underneath that, the signature of Rachel Wachtel; underneath that the signature of Leonard Sidney Haseldine, followed by his address and a repetition of the date; and underneath that again, the signature of Rebecca Levy, with her address, again followed by the date, Dec. 14, 1965.

G The story as to how the will came to be prepared and signed in that form is told in the affidavits which were before the judge. There is not, I think, any discrepancy with regard to the substance of what the different witnesses said. The story is most fully set out, I think, in the affidavit of Rachel Bravda (formerly Wachtel), and I cannot do better than read a short extract from her affidavit.

H “ (12) The circumstances leading to the signatures of my sister and I appearing upon the said document are that on Dec. 14, 1965, when both my sister and I were at No. 24, Sharon Gardens aforesaid with my father, he said that he was going to make his will and ‘ as Len is here he can be a witness ’. By ‘ Len ’ I know my father referred to Mr. Hasledine who was then working at the house as he often did. My father then said to me ‘ Go and get Mrs. Levy, she can be the other witness ’. I then went into the kitchen and saw Mr. Hasledine and asked him to come into the room after which I went up the road to Mrs. Levy’s house and asked her if she would come and witness my father’s will, which she agreed to do and accompanied me back to the house.

I “ (13) Before making his will my father said to the four of us who were assembled there that he was making the will as he wished to see his children provided for.”

Then follows a passage about the ill-health of the testator, which is not relevant. A

"(14) My father then asked me to write out the will. He dictated it, I wrote it down, read it back to him at his request and then he signed it in the presence of all four of us. My father then asked Mr. Haseldine and Mrs. Levy to sign as witnesses, which they did in that order. After this my father asked my sister and I to sign the will in order, as he said, 'to make it stronger'. We did not know what he meant as the will had already been witnessed, but we signed as he wanted." B

As I have already indicated, on the face of the will it appears that the two plaintiffs signed as witnesses. They signed in the place immediately underneath the words "Witnessed 14/12/65". That circumstance, I have no doubt, raises a rebuttable presumption against them. I do not think it has really been disputed that the relevant law on the subject is correctly stated in *TRISTRAM AND COOTE* (22nd Edn.) at p. 46, from which I read a short passage: C

"It would appear not unreasonable to state that any person who has signed at the end of a will has to rebut the strong presumption that he did so as a witness. The strength of the presumption may vary according to the position of the signature and the order of signing; it may be less strong if the signature appears in a place other than that of the first or second witness; but if such a person desires to assert his right to benefit by a bequest under the will it is incumbent on him to rebut the presumption that he put his signature there as a witness." D

The question on this appeal is whether the facts such as were proved by the affidavits of the witnesses are sufficient to rebut that presumption. We have in the course of the hearing been referred to quite a number of reported cases, including (as a matter of interest) cases from Ireland, from India and from New South Wales, in which the court has been able to reach the conclusion that the signature of a beneficiary, though appearing on the will, was not appended by way of attestation of its execution. None of these cases is binding on this court. They all arose in differing circumstances; and, except in so far as they indicate the kind of rebutting evidence to which the court has been prepared to give effect, I cannot say that I have found them particularly helpful. In those circumstances, I do not propose to refer to them again in detail. Most of them were fully discussed in the judgment of the judge below (4). In the end, however, I agree with the view of the judge (5) that the question to be decided is a question of fact which must necessarily depend on the circumstances of the particular case. E

On behalf of the defendant, reliance is, of course, placed in the main on the internal evidence provided by the form of the document. The form of the document is such as undoubtedly does make a strong *prima facie* case to show that the plaintiffs were signing it as attesting witnesses. If there were no more to it than the state of the document itself, it seems to me that there could not possibly be any answer to the defendant's case. The judge, however, expressed the view (5) that the trend of the more recent cases cited to him showed a development of the law in the direction of leaning towards a construction which would not defeat the intention of a testator. As to that, I am disposed to agree with the submission made to us by counsel for the defendant that, although the court will naturally be reluctant to defeat the manifest intention of the testator, this is really quite an irrelevant circumstance when the court has to consider the narrow question whether or not the beneficiaries concerned signed as witnesses. That is a question which has to be determined without regard to what the consequences may happen to be. F

Certain pointers in favour of the plaintiffs were relied on by the judge (6) G

(4) [1967] 2 All E.R. 1233.

(5) [1967] 2 All E.R. at p. 1237, letter F, G.

(6) [1967] 2 All E.R. at pp. 1237, 1238. H I

**A** and have again been canvassed in argument before us. First, some reliance is placed on the fact that, whereas the two outside witnesses appended their addresses, following what I think is the usual custom, neither of the plaintiffs recorded their addresses when they signed the document. So far as that point is concerned, I do not think that there is any substance whatsoever in it. Both **B** those plaintiffs were daughters of the testator. They were both living in the house with him. There could not ever be any conceivable difficulty in identifying them and tracing them at any future time, as might have been the case in relation to wholly independent witnesses.

The second pointer is the piece of evidence which described Mrs. Levy as "the other witness". That, it is said, shows that the testator realised that the two witnesses were necessary for the proper execution of his will, and it is further **C** said to show that he did not intend that more than two persons should sign as witnesses. That appeals to me as a point of rather more substance than the first one to which I referred; but let it be assumed that the testator did know that two witnesses were required. He was only a layman, and it does not follow that, as a layman, he would also know that the two plaintiffs would forfeit their right to take under the will if they signed as witnesses, so as to preclude the **D** inference that he changed his mind about the number of witnesses that he desired.

Thirdly, reliance is placed on what is said to have been a break between the formality of the execution of the will by the testator and the two independent witnesses and the subsequent signature by the two plaintiffs. It is not in dispute that the two plaintiffs, although their names appear first, did in fact sign after **E** the two independent witnesses. Mr. Hasledine said in his affidavit that their signatures were requested by the testator "almost as an afterthought". Had there been a real substantial break between the execution by the two independent witnesses and the subsequent signature by the two plaintiffs, I should have been disposed to say that that would have been a matter of no little significance. On a fair reading of the affidavits, however, I can only conclude that the signatures of the two plaintiffs were really appended as part of the same single **F** transaction or, as counsel for the defendant put it, as part of the *res gestae*.

The other point mainly relied on on behalf of the plaintiffs was the remark of the testator that he wanted the plaintiffs to sign, as this would "make it stronger". That phrase used by the testator was relied on as being in line with the phrase "to make it legal", which was the subject of the decision in **G** one of the cases cited, viz., *Kitch v. King* (7). As in that case, so in this, the phrase was relied on as a ground for drawing the inference that the beneficiaries, in signing, did not sign as witnesses. For my part, I find it difficult to draw any conclusion from the use of this rather curious phrase. I do not see how it could be construed as meaning that the signatures were to make the will stronger, for the terms of the will are abundantly clear and quite decisive. It could, **H** however, mean "to strengthen the evidence of execution"; but that is a construction of the words which does not help the plaintiffs' case. In these circumstances, it does seem to me that all the pointers which were relied on in argument, and by the judge in his judgment, as going in favour of the plaintiffs are, at the best equivocal. They are, in my judgment, quite insufficient to outweigh the inference raised by the form of the document itself.

**I** I should mention one other point, which was only faintly argued, or rather adumbrated, before us. The suggestion was made that s. 15 of the Wills Act, 1837, was never intended to apply in a case where there was already a valid execution by two unimpeachable witnesses. It has been suggested that the object of the section was merely to ensure that a will would not fail altogether if one or both of the two witnesses required were named as beneficiaries, as had been the case earlier. In other words, what is said is that the object of the section was merely to ensure that both those witnesses would be "credible"



witnesses. That result was achieved by requiring that they should forego any benefits they would otherwise derive, but that the will would be left unimpaired. That is a point which does not appear to have been argued in the court below. It is not, of course, raised in the notice of appeal. There has been no cross-notice on behalf of the plaintiffs; and I do not think, in those circumstances, that the point is strictly open in this court. If it were open, I should merely say that, in my judgment, it is a point of no substance, for two reasons. One is that I think the words of the section are much too plain to admit of this rather tortuous construction. Secondly, I think that, after 130 years, it is now much too late to endeavour to put this entirely new construction on the well-known words of this section.

It follows that, with all respect to the views expressed by the judge, I find myself unable to draw the same inference as was drawn by him. I do not think that the evidence adduced here was sufficient to rebut the presumption or displace the inference arising from the form of the document and from the fact of the presence of the signatures of the two plaintiffs on the document. In those circumstances, I see no alternative but to allow the appeal and refuse the relief sought under the third heading of the notice of motion. I confess that I reach this conclusion with no little regret; for it is quite manifest to me that the consequences which will follow will be quite contrary to the plain and expressed intentions of the testator. In the present state of the law, however, I do not think it is possible, without doing violence to the known facts as disclosed in the will itself and in the affidavits, to reach any other conclusion. I would accordingly allow the appeal.

**RUSSELL, L.J.:** The question here is whether the two daughters in fact signed the will as witnesses to the execution of it by the testator. Taking the document by itself, there can be no doubt: they signed under the word "witnessed" and are followed by the two non-beneficiary witnesses. The other evidence of fact shows, however, that the document is misleading, at least as to the sequence of events. The testator proposed originally that he should execute a will and that his execution should be witnessed by two strangers to the will—one a builder working in the house, the other an acquaintance living down the road—and sent for them for that purpose. He dictated his will to his daughter Rachel in the presence of all four. Rachel wrote "witnessed" on the back of the sheet; the testator signed on the front; the two strangers then signed, with their addresses, on the back. The will was then complete and valid. Then something new happened. The daughter Rachel thus describes it in para. 14 of her affidavit:

"After this my father asked my sister and I to sign the will in order, as he said, 'to make it stronger'. We did not know what he meant as the will had already been witnessed but we signed as he wanted."

The other daughter confirms that version. The witness Mrs. Rebecca Levy deposed in the same manner, saying that the testator asked her and the other stranger witness "to sign the will as witnesses" and "then said that he would like his daughters to sign the will as well as he thought that it would make it stronger". The other stranger witness, Mr. Haseldine, does not say that the testator used the words "as witnesses" in their case and does not, therefore, reflect any contrast in phraseology. He also remembers the phrase "make it stronger", and says the testator's request to his daughters to sign "appeared almost as an afterthought".

The case on motion states that the testator directed the daughters to sign where they did, which was between the words "witnessed" and the first stranger's signature. Counsel for the plaintiffs, who settled the case on motion and also the affidavits, tells us that he then worked on a typed copy of the will which placed the daughters' signatures above the word "witnessed"; but, although the affidavits do not say that the testator told them to sign where they did,

- A** counsel cannot, I think, have imagined that detail. It must be taken to have emerged in his instructions; and he, of course, on the basis of the typed copy, would have thought it, if anything, advantageous to the daughters' case. But there are the signatures under the word "witnessed". The relevance is this. It might be suggested that the testator should be expected to know, on balance of probabilities, that witnessing by his daughters would be fatal to their beneficial claims, and that was why he sent out for strangers. If that was so, however, it is difficult to see how he could possibly have directed them to sign under the word "witnessed", sandwiched between it and the other witnesses. It would seem more likely that he thought that, provided he had two stranger witnesses, the addition of the daughters could do no harm and might do good. The phrase "make it stronger" seems to me equivocal. It could well mean that, though he originally intended only two witnesses, he thought that the addition of two more would make it more certain that, if there was any challenge to the will, there was a greater chance of more witnesses to the due execution surviving. The daughters say, as I have already quoted: "We did not know what he meant, as the will had already been witnessed, but we signed as he wanted." This seems to me, at best, quite ambiguous on the question whether they were signing as additional witnesses or for some other purpose. The alternative is that somehow he was only hoping to strengthen the chances of the will being carried out by getting the trustee daughters to sign by way of approval and acceptance of its contents and of the instructions contained in it. The daughters, however, were the sole beneficiaries; and the only instructions it contained seem to me by way, if anything, of cutting down some inter vivos provision for a grand-daughter in certain circumstances in favour of the same two daughters. There is, it seems to me, absolutely nothing in the will which would be likely to make the testator want the daughters to bind themselves in some way by setting on it signatures of approval. Finally, the evidence distinguishing the request to sign as witnesses and the request to the daughters to sign is far too meagre to support a conclusion contrary to the face of the document.
- F** In the end, I think there is nothing here sufficient to upset the prima facie appearance from the will of their position as witnesses to the execution. Counsel for the defendant, rightly I think, says that we cannot work on some presumption in favour of effectiveness of testamentary dispositions. We can only decide whether or not the daughters signed as witnesses to the execution by the testator on the totality of the evidence; and, on the basis of that decision, s. 15 of the
- G** Wills Act, 1837, either does or does not operate. There is here no place for the maxim *omnia praesumuntur rite esse acta*, which was behind the cases of *In the Goods of Peverett* (8) and *Re Denning, Harnett v. Elliott* (9), referred to by CAIRNS, J. I do not think that the dictum of LORD PENZANCE in the case of *In the Goods of Sharman* (10), quoted by CAIRNS, J. (11), can be taken either at its apparent width or as covering this case; and counsel for the
- H** plaintiffs rightly accepts that prima facie the signatures are to be taken as attestations of the execution by the testator. The case of *Kitcat v. King* (12) was not defended and, even if correctly decided, it contained evidence that the signatures were put "to show approval".

CAIRNS, J., relied, as a pointer in favour of the plaintiffs, on the fact that they did not append their addresses, as did the two stranger witnesses. Addresses, however, would be for the purpose of identifying and tracing witnesses and would be quite unnecessary in the case of the plaintiff daughters. He took as another pointer that the testator started with the intention of having only two witnesses; but this cannot be inconsistent with the apparent addition of two more. Thirdly, he considered that there was a definite break between complete execution and witnessing of the will and the request to the plaintiffs to sign; but the evidence

(8) [1902] P. 205.

(9) [1958] 2 All E.R. 1.

(10) (1869), L.R. 1 P. &amp; D. 661, at p. 663.

(11) [1967] 2 All E.R. at p. 1235.

(12) [1930] P. 266.

does not really suggest any break at all. The story flows straight on, and the "apparent afterthought" seems to have been immediate. A

I am most loth to do so; but, try as I have—and, I think, manifestly did in the course of argument—I cannot uphold the plaintiffs' claims as a matter of law. They are hit, I think quite unnecessarily, by s. 15 of the Wills Act, 1837, and the whole estate will go to the defendant, the widow, who compounded her alimony several years ago, unless the daughters or either of them, by reason of some disability, can establish a claim under the Inheritance (Family Provision) Act, 1938. B

It was debated in argument (the point originating from the Bench) whether s. 15 could be construed so as not to destroy a benefit given to an attesting witness if, without that witness, there were not less than two other witnesses to whom no benefit was given. This suggestion was made by analogy from the old law. A will of realty, for example, before the Wills Act, 1752, required three credible witnesses for validity (13), a beneficiary not being a credible witness; but, as I understand it, provided there were three credible witnesses, the will was valid and a fourth witness, being a beneficiary, could take his benefit. The Act of 1752 first introduced the system found in s. 15 of the Wills Act, 1837, by which all witnesses were in effect made credible by avoiding any benefit given (14). I would have thought it a very reasonable system of law that benefits to witnesses are not avoided if there are two independent witnesses; but the other view has been generally accepted in the authorities for a very long time indeed, and the language of s. 15 of the Act of 1837 is, I think, too forthright to be overcome by the analogy suggested. I have not myself looked at the language of the Act of 1752. C

I would welcome a change in the law in this regard. I would expect most people to regard the outcome of this case as monstrously unfair to the testator and to his daughters. I do myself; but every time a beneficiary is an attesting witness, s. 15 of the Wills Act, 1837, deprives him of his benefit and defeats the testator's intention. This is considered necessary to ensure reliable unbiased witnesses of due execution; but why it was thought necessary to interfere in cases where there are the requisite number of unbiased witnesses. I cannot imagine. I regretfully agree that the appeal succeeds. D

**SALMON, L.J.:** With very great regret, I also agree that this appeal succeeds. I was at an early stage struck by the force of the argument on the part of the defendant. I confess that I tried very hard to find some way round it—some ground on which in conscience I could find in favour of the plaintiffs; but I have failed. The words of s. 15 of the Wills Act, 1837, are too plain, and the evidence filed on behalf of the plaintiffs is wholly inadequate. Section 15 makes it clear that, if any person attests the execution of any will to whom or to whose wife or husband any benefit is given under the will, then that part of the will which gives the benefit shall be null and void, but such person shall be a competent witness to prove the validity or invalidity of the will. E

That statutory provision makes it impossible for the intentions of the testator to be carried out in the case of a beneficiary signing the will as a witness. That is the very object of the statutory provision. So, when the court is faced with the kind of problem which arises in this case, it is not open to the beneficiary to urge that the intention of the testator must not be defeated. Parliament has clearly laid down that, when the testator intends to benefit a person who signs the will as a witness, the testator's intention shall be defeated. I wholly agree with **RUSSELL, L.J.**, for the reasons which he gives, that it is high time that this provision of the Wills Act, 1837, should be amended, so that, when there are two independent credible witnesses, the mere fact that a beneficiary has also signed as a witness should not operate (as it now does) to defeat the intention of the testator. F

The law is quite plain. The presumption is that any signature appearing on a will



A after that of the testator is presumed to be the signature of a witness to the will. The strength of this presumption depends to some extent on where the signature on the will is found. Sometimes there are just two signatures on the back of a will and nothing on the document which expressly states the capacity in which the signatories are signing. There is still a presumption that they sign as witnesses. In this case, however, as my lords have pointed out, the signatures of  
 B the plaintiffs appear immediately under the words "witnessed 14.12.65". It really is not a question here even of presumption. The document which they signed states on its face that they signed as witnesses.

In spite of that, I can imagine evidence which might justify us in holding that when they signed they had no intention of signing as witnesses, that they were signing merely to verify the contents of the will or for some other purpose which  
 C had nothing to do with attestation. There have been many cases in which beneficiaries who have signed a will have, on the evidence before the court, been able to persuade the court that they were not signing as witnesses; but in all those cases there has been the most clear and unequivocal express evidence that the beneficiaries signed in some other capacity (see, for example, *In b. Sharman* (15) and *In b. Smith* (16)). The judge relied strongly on *Kitcat v. King* (17). That case, however, is only very shortly reported. The evidence is by no means fully set out and I observe that in the headnote it is said (18): "There was evidence that the two beneficiaries signed otherwise than as attesting." This is the only case in the books in which, when a beneficiary's signature appears after that of the testator in a will and the courts have held that he was not signing as a witness, the report does not make it quite plain that there  
 E was unequivocal express evidence that it was not his intention to sign as a witness. Having regard to the meagreness of the report, I am not satisfied that there was no such evidence in that case.

In the present case, the plaintiffs, do not anywhere in their affidavits say that it was not their intention to sign as witnesses. Even had they done so, it might perhaps have been difficult to persuade a court to accept their evidence, having  
 F regard to the place where their signatures appear. However this may be, in the absence of any express statement by them that they did not intend to sign as witnesses, the court can only take what the document says. After all, they signed it. Moreover, the case on motion which was settled by counsel on the instructions of the plaintiffs states that they signed where they did at the request of their father. We know that Mr. Haseldine and Mrs Levy signed as witnesses  
 G before the plaintiffs appended their signatures and that accordingly it was quite unnecessary for either of the daughters to sign as witnesses. Mr. Haseldine was the witness to sign first. There was quite a large space left between his signature and the words "witnessed 14.12.65". It was in this space that the plaintiffs signed, and signed there at the request of the testator. Obviously, this would always have been a very difficult case for them. If it was not their  
 H intention to sign as witnesses, but for some other purpose, they should have said just that, and stated what the other purpose was. It may be that there would have been an application to cross-examine. It may be even so that their evidence would have been accepted. The evidence, however, just does not exist; and, without it, their case is, in my view, hopeless.

In those circumstances, although I have the greatest sympathy for them, I  
 I cannot see how it is possible to support the finding of the judge in their favour. I therefore agree, with great reluctance, that this appeal succeeds.

*Appeal allowed.*

Solicitors: *Lovell, White & King*, agents for *Charles Webb & Sons*, Brighton (for the defendant); *Barber, Young & Co.* (for the plaintiffs).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

(15) (1869), L.R. 1 P. & D. 661.  
 (17) [1930] P. 266.

(16) (1889), 15 P.D. 2.  
 (18) [1930] P. at p. 266.

## DASS (an infant) v. MASIH.

A

[COURT OF APPEAL, CIVIL DIVISION (Lord Denning, M.R., Salmon and Edmund Davies, L.J.J.), March 7, 8, 1968.]

*County Court—New trial—Further evidence—Expert evidence on handwriting—Alleged forgery of postscript in letter—Letter written in Punjabi—Written report of experts ultimately obtained by defendant some months after judgment at adjourned hearing to allow expert evidence—Expert in India—Amount in issue £298 10s.—Necessity of attendance of expert for cross-examination—Whether new trial should be granted.*

B

*Document—Admissibility in evidence—Expert's report on handwriting—Whether a statement tending to establish a fact—Document written in Punjabi—Expert living in India—Whether admissible under Evidence Act, 1938 (1 & 2 Geo. 6 c. 28), s. 1 (1).*

C

The plaintiff, an Indian, sued the defendant for £298 10s., money lent between October, 1964 and October, 1965. When the case came on first in June, 1966, the plaintiff produced a letter written by the defendant and dated May 4, 1965, which contained at the bottom, near the signature, the following postscript—"£200 I will be paying you when I come out of the hospital". The letter was written in Punjabi. The defendant admitted that he had written the letter, but alleged that the postscript was a forgery. The letter was sent to the forensic laboratory at Cardiff; but the report was inconclusive because there was no expert available conversant with Punjabi script. At a further hearing on Sept. 28, 1966, the case was adjourned for handwriting experts to be called, and the judge told the defendant that he would be wise to obtain such evidence. On May 17, 1967, the case came on again and the plaintiff called two witnesses, who testified that the postscript was in the defendant's handwriting, viz., in the same handwriting as the rest of the letter. The defendant cross-examined the two witnesses, but called no evidence of his own. Judgment was given for the plaintiff. In November, 1967, the defendant applied for a new trial on the ground that he had obtained the written report of one, P., a handwriting expert in India. P.'s written report analysed the letter of May 4, 1965, and concluded that the postscript was not in the same handwriting as the rest of the letter. The county court judge refused to grant a new trial, on the ground that he was not satisfied that the new evidence could not have been adduced with reasonable diligence in May, 1967. He was of opinion that if P. had been available to give evidence in person, the court might have come to a different conclusion, but that it would have been necessary for P. to be called as a witness. At that time the defendant did not propose to call P., who was in India. On appeal,

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**Held** (LORD DENNING, M.R., dissenting): applying the tests laid down in *Ladd v. Marshall* a new trial should not be granted, for the evidence contained in P.'s report could have been obtained by the time of the adjourned hearing in May, 1967; and further, as the question was whether there had been forgery of the postscript, it would have been necessary to call P., if the court of first instance was to be convinced that the postscript was written by the defendant, but it was not a practical proposition to bring P. from India for the purpose (see p. 232, letters A, E and H, p. 233, letter I, p. 234, letter C, and p. 235, letter I, post).

H

I

*Ladd v. Marshall* ([1954] 3 All E.R. 745) applied.

Per LORD DENNING, M.R., SALMON, L.J., concurring, EDMUND DAVIES, L.J., dissenting: P.'s report, giving his expert opinion that the postscript was not written by the defendant and his reasons for that conclusion, was admissible in evidence at the trial by virtue of s. 1 (1)\* of the Evidence

\* The relevant words of s. 1 (1) of the Evidence Act, 1938, are set out at p. 229, letter F, post.

- A Act, 1938, as a statement "tending to establish that fact" (see p. 229, letter B, p. 233, letter H, post; cf., p. 235, letter H, post).

Appeal dismissed.

- [ **Editorial Note.** The principal interest of the present decision lies in the dicta on whether the handwriting expert's written report, which gave his opinion, was admissible under s. 1 of the Evidence Act, 1938, as tending to establish a fact. In their recent report on hearsay (Cmd. 2964) the Law Reform Committee confined their recommendations to written statements of fact; they said that they proposed to deal with evidence of opinion in a separate report (para. 13). Meantime the Civil Evidence Bill has passed the report stage in the House of Lords. The Bill will repeal s. 1 of the Evidence Act, 1938, but, as at present proposed, the Bill does not seem necessarily to alter the question whether an expert opinion states a "fact". It should be emphasised, however, that the words "tending to establish that fact", which are quoted in LORD DENNING's judgment at p. 229, letter H, post, are not at the date of this report contained in the replacing provision of the new Bill (Bill No. 114, cl. 2 (1)).

- C As to the admissibility in evidence of statements in documents, see 15 HALSBURY'S LAWS (3rd Edn.) 315, para. 573.

- D As to ordering a new trial in a county court, see 9 HALSBURY'S LAWS (3rd Edn.) 266, 267, para. 628, and as to appeal on such an application, see *ibid.*, p. 269, para. 633.

- E As to the grounds on which a new trial may be granted, by the Court of Appeal, see 30 HALSBURY'S LAWS (3rd Edn.) 475, 476, para. 891; and as to new trials on the ground of new evidence, see DIGEST (Practice) 865-867, 4158-4170, and *ibid.*, 823-828, 3794-3829.

For the Evidence Act, 1938, s. 1, see 9 HALSBURY'S STATUTES (2nd Edn.) 626.]

Cases referred to:

- F *Ladd v. Marshall*, [1954] 3 All E.R. 745; [1954] 1 W.L.R. 1489; 51 Digest (Repl.) 827, 3826.  
*Lenehan v. Queensland Trustees, Ltd.*, [1965] Qd.R. 559.  
*Warner v. Women's Hospital*, [1954] V.L.R. 410; [1954] A.L.R. 682; Digest (Cont. Vol. A) 535, 1828c.

### Appeal.

- G This was an appeal by the defendant, Sardar S. Masih, by notice dated Feb. 19, 1968, from an order of His Honour JUDGE RAWLINS on Nov. 7, 1967, at the Oxford county court, refusing his application for a new trial. The grounds of appeal were: (i) that the county court judge misdirected himself as to the principles to be applied in deciding whether or not to grant a new trial on the ground of fresh evidence; (ii) that, having come to the conclusion that, if the fresh evidence had been available, he might have come to a different conclusion at the trial, the judge wrongly decided that the defendant had not exercised due diligence and did not consider whether the fresh evidence could have been available with due diligence at the trial; (iii) that the judge wrongly considered that fresh evidence would not be available at the new trial; and (iv) that he failed to take into account that there was no expert on Punjabi handwriting available in England and the financial circumstances of the defendant who at the material times could not afford to obtain an expert's report from Pakistan. The plaintiff, Banta Dass, was nineteen years of age at the hearing on June 22, 1966. The plaintiff's claim as pleaded in his particulars of claim was for a total of £298 10s. money lent; the defendant's defence was a denial of the loans alleged by the plaintiff, but he admitted a loan in November, 1965, of £85, which he pleaded that he had repaid within three weeks.

J. Allott for the defendant.

The plaintiff did not appear and was not represented.



**LORD DENNING, M.R.:** Mr. Dass, the plaintiff, came to England from India in September, 1963. He claims in this action a sum of £298 10s. money lent to the defendant, Mr. Masih. It is made up in this way: £100 in October, 1964; £100 in March, 1965; £15 in July, 1965; £10 in August, 1965; and other small items until the last one of £12 in October, 1965. It seems remarkable that the plaintiff, during the short time he has been in this country, should have been able to save all those sums: and even more remarkable that he should lend it all to the defendant, not getting a receipt for any of the sums. Nevertheless he claims that he did lend the sums. In April, 1966, he took out a summons in the Oxford county court. It came on for hearing in June, 1966. The plaintiff gave oral evidence in support of the loans. His wife supported him. He also produced a letter from the defendant which he claimed corroborated the first £200. It was written in the Punjabi language by the defendant on May 4, 1965, from the Osler Hospital, Headington. It has been translated for the court. The first part of it is just a friendly greeting. It starts: "My dear Dass, Greetings"; then a sentence or two and then finishing—"Would you come and see me this Friday. It is very urgent. Yours sincerely, S. Masih". Then near the signature, pressed into the bottom of the letter, there is this statement: "£200 I will be paying you when I come out of the hospital." The plaintiff says that that last sentence was written by the defendant in Punjabi in his handwriting and is written corroboration of the loan of the first £200.

At the hearing there was much controversy about that sentence. The defendant said that it was not his handwriting but was a forgery. It was inserted, he suggested, by the plaintiff. The judge asked the forensic science laboratory in Cardiff to examine the letter. They could not express a definite conclusion one way or the other. The reason was because it was in Punjabi handwriting, of which they were ignorant. On that report being received, the judge adjourned the case again. He told the plaintiff that he should get an expert in handwriting. He also told the defendant to get an expert.

Eventually the case came on for hearing in May, 1967. The plaintiff then called two witnesses. One of them said that he had served in the police and knew the Punjabi language. The other was Mr. Chopra, an M.A. of the Punjab University. They both said that the disputed sentence was in the handwriting of the defendant. The defendant did not call any evidence. So judgment was given by the judge against the defendant for the full amount of £298.

The defendant was disappointed by the result. He then went to great pains to try and get the evidence of a handwriting expert in Punjabi. There was none to be found in England. He wrote to the High Commissioner for India in London. The High Commissioner could not help. The defendant then wrote to a handwriting specialist in England, Major Wilkins, who gave him the names of three handwriting experts in India who were familiar with the Punjabi language. The defendant wrote to them. The first two each wanted £50 for an opinion. So the defendant did not engage them. The third, Mr. Puri, said he would give an opinion for £15. Mr. Masih engaged him; and on Oct. 18, 1967, Mr. Puri made a report on the disputed sentence. His report is seven pages long. It analyses the handwriting and goes into great detail about the hooks, curves, dots and the like. He came to the conclusion that the disputed sentence was not written by the defendant.

Thereupon the defendant went to the county court judge and applied for a new trial on the ground that this was evidence which he could not reasonably have had available at the trial. The judge said:

"If the evidence of the expert had been available, I might have come to a different conclusion."

He indicated, however, that he would want to hear Mr. Puri in person, and to have him cross-examined, before he could hold that the disputed sentence was a forgery. He thought that Mr. Puri could not be got over from India: so it

A would be no use ordering a new trial. He also said that he was satisfied that the defendant did not exercise due diligence and it was, therefore, too late for him to apply for a new trial.

The defendant appeals to this court, with the assistance of legal aid. We have had before us the case of *Ladd v. Marshall* (1), which sets out the three conditions for a new trial.

B "...first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; third, the evidence must be such as is presumably to be believed, or, in other words, it must be apparently credible, although it need not be incontrovertible."

C It seems to me that those three tests are satisfied. In the first place I do not think that the defendant could reasonably have been expected to get the evidence of Mr. Puri for use at the first trial. It is true that the judge, when he granted an adjournment, told him to get an expert; but there was no expert in Punjabi handwriting in England. Moreover, I do not think that at that stage he could have been expected to go beyond England. When things went so badly for him, however, he went to the extreme length of writing out to India. Secondly, it seems to me that Mr. Puri's evidence, if given orally, would have had an important influence on the result of the case. The judge said: "If the evidence of the expert had been available, I might have come to a different conclusion."

E It was also apparently credible; for the analysis appears to be carefully done, and such as to be accepted unless upset by cross-examination. The difficulty is that Mr. Puri is not here to give evidence orally. The defendant said that he was ready to pay all the expense of getting Mr. Puri over here; but I do not think that that is a practical proposition. It would not be right to spend all that money over a claim of this amount; but I must say that I think that Mr. Puri's report itself would be admissible under the Evidence Act, 1938. Section 1 provides:

"In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say—(i) if the maker of the statement either—(a) had personal knowledge of the matters dealt with by the statement; or (b) . . . and (ii) if the maker of the statement . . . is beyond the seas and it is not reasonably practicable to secure his attendance . . ."

G Applying the section it seems to me that the fact in issue was: In whose handwriting was the disputed sentence? Did the defendant write it? I think that "direct oral evidence" would be admissible of that fact. Direct oral evidence could be given by someone who saw the defendant write or knew his handwriting. Next, I think that the statements made by Mr. Puri in his report "tend to establish that fact". His report is an analysis of the disputed sentence. It tends to establish the fact that it was not in the handwriting of the defendant. It stands on the same footing as an analysis made by a chemist of a substance. It tends to establish its ingredients. Next, I think that Mr. Puri had "personal knowledge of the matters dealt with by the statement" in that he had personal knowledge of the analysis contained in the report and of his opinion thereon. Finally, Mr. Puri is beyond the seas and it is not reasonably practicable to secure his attendance. In my opinion, therefore, Mr. Puri's report would be admissible in evidence under the Evidence Act, 1938. Its weight, however, is an entirely different matter. That is for the judge who tries the case.

It has been said that statements of opinion are not admissible under the Evidence Act, 1938, but only statements of fact. I do not agree. When there is a fact in issue (such as the cause of death), the statements made by an expert in a report (stating the nature of the wounds and their probable cause) tend to establish that fact. Such a report by an expert who has examined the body is admissible. So also with any other report which is based on an analysis of observed facts. A

In support of this view I would rely on PROFESSOR CROSS ON EVIDENCE (3rd Edn.), pp. 485, 486, together with the Australian authorities to which he refers, *Warner v. Women's Hospital* (2) and *Lenahan v. Queensland Trustees, Ltd.* (3). I would not suggest that every statement of opinion is admissible. For instance, if a bystander who saw an accident makes a statement of facts seen by him, that would be admissible: but if he gave his opinion that one of the drivers was negligent, it would not be admissible. It would not be admissible even if given on oath. So it is certainly not admissible under the Evidence Act, 1938. But the opinion of an expert, based on his observed facts, is admissible on oath: and if he is not available, his report is admissible under the Evidence Act, 1938. So Mr. Puri's report is, in my opinion, admissible. B

The only remaining question is whether, as a matter of discretion, a new trial should be granted. The judge did not think it right to order a new trial; but he had not the benefit of any argument on the Evidence Act, 1938. If he had realised that Mr. Puri's report was admissible, I think that he might have ordered a new trial, especially in view of his statement: "if the evidence of an expert had been available, I might have come to a different conclusion." It is a very difficult point, but on the whole I would be in favour of ordering a new trial. C

**SALMON, L.J.:** The facts of this case are quite simple. They do, however, give rise to questions which are certainly not free from difficulty. D

The plaintiff, who is a young man of nineteen years of age with a wife and child and is earning between £13 and £15 a week, alleged that during 1963, 1964 and 1965 he had lent just under £300 to the defendant. He claimed that the defendant had not repaid that money. He accordingly brought an action in the county court against the defendant asking for repayment of the loan. The case originally came before the learned county court judge on June 22, 1966. The plaintiff went into the witness box and gave evidence in support of his case. He was corroborated by his wife who said that she was present when some of the loans were made. He also called his brother-in-law who deposed to the fact that he was present on an occasion when the defendant acknowledged that he owed the money to the plaintiff. That was all the oral evidence called by the plaintiff. The defendant said that he had borrowed £88 from the plaintiff during 1964, that he had repaid that money, and that he had borrowed nothing at all since. E

So far as the oral evidence went, one had the plaintiff and his wife and brother-in-law on the one side and the defendant on the other. If the evidence had stopped there, the task of the judge would have been extremely difficult. How he would have decided it we do not know: but the plaintiff produced a letter which was undoubtedly written by the defendant dated May 4, 1965, and this letter had a postscript: "£200 I will be paying you when I come out of the hospital." The defendant says that that postscript was not in his handwriting but had been added to the body of the letter after he had dispatched it. F

The letter was obviously of the greatest significance. Without it the judge would merely have had to weigh up the view that he took of the witnesses for the plaintiff and the view he took of the defendant, and, as I have already said, no-one knows how he would have decided the issue. The letter was, however, critical. If the postscript was in truth in the defendant's handwriting, there was an end of the defendant's case. If it was not in his handwriting, the only other way it G

(2) [1954] V.L.R. 410.

(3) [1965] Qd.R. 559.



A could have got on to the letter would have been by forgery and the only person who would have had any interest in forging it would have been the plaintiff. In these circumstances, the plaintiff or someone at his procuration must have forged it. If that postscript was a forgery, quite obviously the plaintiff would fail.

B At the end of the hearing on June 12, 1966, the judge had no material before him on which he could decide whether this was a forgery or not. He accordingly adjourned this matter for expert evidence. The case came before him again on Sept. 28, 1966, the letter in the meantime having been sent to the forensic science laboratory at Cardiff. The laboratory had produced a report but it was entirely inconclusive. The expert at the laboratory, perhaps not unnaturally, was not conversant with the Punjabi script and he would not express a view one way or the other as to whether the postscript was genuine. So the case was then adjourned for further expert evidence. According to the judge, he then told the defendant that he would be very wise to obtain expert evidence. Now it is quite plain from a letter which was written by the defendant, which is exhibited to one of the affidavits on the application to the judge, that the defendant is an intelligent and well educated man who writes excellent English. It is difficult to believe D that he did not understand what he was told by the judge: nor that a man of his education and intelligence could have been in any doubt about the importance of his obtaining expert evidence.

E The case did not come before the court again until May 17, 1967, that is more than 7½ months later. The defendant came to the court on that occasion with no expert evidence. On the other hand, the plaintiff produced two witnesses, both Indians, one of whom said he specialised in the Punjabi language. He said in effect that the postscript was written by the same man who wrote the body of the letter. He said that he thought it was unlikely that the plaintiff had written it because the letter, including the postscript, was clearly in the writing of an educated man. He had seen the plaintiff's writing and it did not look to him as if the plaintiff was an educated man or that he wrote an educated hand. F This witness does not appear to have had any serious qualifications except certain experience of assisting the Royal Air Force police in translating Punjabi documents. The second witness was an M.A. of the Punjab University. Whether he had any other qualifications the note of the evidence does not relate, but he supported the view that the postscript was in the same handwriting as the letter. It appears that the defendant contended that the first witness who gave evidence G on May 17, 1967, was nothing but an enthusiastic amateur, but the judge said he thought that he was a good deal more than that and was apparently impressed by his evidence.

H In that state of affairs the judge gave judgment for the plaintiff. The defendant applied to the judge in November, 1967, for a new trial, and he based his application for a new trial very largely on a report by a Mr. Puri from Patiala dated Nov. 18, 1967, in which Mr. Puri, who stated that he was a handwriting expert, said that after analysing the letter of May 4, 1965, he was of the opinion that the postscript was not written in the same handwriting as the body of the letter.

I The judge refused the application, and he did so on two grounds. First, he said that he was not satisfied that the defendant had complied with the first requisite for an order for a new trial laid down in *Ladd v. Marshall* (4), namely, he was not satisfied that the evidence contained in Mr. Puri's report could not have been obtained with reasonable diligence for use at the trial. Secondly, he said that if Mr. Puri were called to give the evidence in this report and was subjected to cross-examination, and he believed Mr. Puri, as he might have done, he might well have come to a different conclusion. Since, however, the judge

was told that it was not proposed to call Mr. Puri, he concluded that there could be no point in granting the application for a new trial. A

For my part I think that the judge was right on the first point and I have come to a clear conclusion that he was right on the second. As I have already indicated, there was an interval between the hearing on Sept. 28, 1966, and the hearing on May 17, 1967, of some 7½ months. If the defendant had taken the steps in September, 1966, which he took after he lost the case in May, 1967, he could easily have had Mr. Puri's statement in England, if not Mr. Puri in person, by May 17, 1966. This follows from the fact that he obtained the statement from Mr. Puri about four months after he first took any steps to obtain it. I cannot see, particularly as the judge warned him that he ought to get the evidence, any excuse for his not having taken the appropriate steps in time. I cannot for my part understand how there is any real ground for saying that that evidence could not have been available by May 17, 1967. I am singularly unimpressed, as apparently was the judge, by the excuse put forward by the defendant. He said that he was quite prepared to rely on any expert witnesses that were produced by the plaintiff. He said that he could not believe that any expert called by the plaintiff would support the plaintiff. His whole case was that the plaintiff was making a dishonest claim against him and had backed it up by forging a document. It is difficult to believe that a man of intelligence and education could say to himself: "Oh well, I can, of course, safely rely on any expert that this man produces." B C D

On the other point I would have thought that the judge was absolutely right in the view that he took that it was only if Mr. Puri were called before him that there could be any chance that he would come to a different conclusion from the one at which he arrived at the first trial. It is said on behalf of the defendant, first of all, that the report is admissible in evidence—I will deal with that point in a moment—and that accordingly even if Mr. Puri had not been called before the judge, the judge on the strength of Mr. Puri's written report might have come to a different conclusion from that which he had reached on the May 17, 1967. What that argument comes to is that there is a real chance that the judge could have found the plaintiff guilty of forgery and perjury on the written report of Mr. Puri. Even giving the most impressive letter heading that Mr. Puri adopts its full weight, I do not think that any such conclusion is possible. I have no reason to suppose, nor do I think the judge would have supposed, that handwriting experts in Patiala are any more or any less reliable in the views they express than handwriting experts in this country. Questions as to whether or not a document has been forged are very difficult questions to decide and are questions about which there are often different opinions. The judge had had the opportunity of seeing and hearing the plaintiff and seeing and hearing the experts whom he called. It is true that this report of Mr. Puri is extremely detailed, and he gives all the reasons why he has come to the conclusion at which he has arrived. There are many cases, however, in which handwriting experts do just that when they are in the witness box and yet the court is unable to accept their opinion. I entirely agree with the county court judge when he makes it plain, as I think he does, that it could only be if Mr. Puri came to give evidence before him and he heard him cross-examined that there would be any chance that he might reverse his original decision. Now it would be ridiculous in this case to bring Mr. Puri from India. Nor is there any material before this court, certainly no evidence, which makes it seem at all likely that he would be called; indeed, when the matter was before the county court judge he was told that Mr. Puri would not be brought to this country. E F G H

Having regard to the view I take on the two points to which I have referred, it is not necessary for me to express any opinion about the true construction of s. 1 of the Evidence Act, 1938. This, however, is an important point, and since it has been dealt with by LORD DENNING, M.R., I think it right that I should express, at any rate, a provisional view about it. I consider that it is important, if I

A possible, to give a liberal construction to this section. I have formed the provisional view that it is possible to give it such a construction. The material words are:

B “In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on the production of the original document, be admissible as evidence of that fact . . .”

C Pausing there, I would have no doubt at all but that the words are wide enough in circumstances such as these to let in a statement of opinion, providing such a statement would be admissible if made orally in the witness box. The fact about which direct oral evidence is obviously admissible is the fact as to whether or not the postscript was in the handwriting of the defendant. A statement of opinion by a handwriting expert as to whether or not the postscript was in the handwriting of the defendant clearly tends to establish the fact as to whether or not it was in the handwriting of the defendant. It is only if you read into the words of the section which I have recited the words “of fact” after the word “statement”, so that it reads “any statement of fact made by a person in a document”, and so on, that the section would exclude statements of opinion. I can see no compelling reason to read such a limitation into the section. The only doubt that I feel is in regard to the conditions which, according to the language of the section, have to be satisfied before the statement is admitted in evidence. They are

E “(1) if the maker of the statement either—(a) had personal knowledge of the matters dealt with by the statement; or (b) where the document in question is or forms part of a record purporting to be a continuous record, made the statement . . . in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters; . . .”

F That looks perhaps as if the section is referring, at any rate primarily, to statements of fact. I think on the whole, however, that the word “statement” may cover statements of opinion as well as statements of fact although the conditions may appear to be particularly designed to meet the case where the statement concerned is a statement of fact. The written statement of opinion must, as I have already indicated, certainly be of a kind which would be receivable in evidence if given orally. In any event I should have thought that in a matter of G this kind, a statement of opinion by a handwriting expert, when he sets out the facts on which his opinion is founded, is a statement in respect of which the person making it has personal knowledge of the matters dealt with in the statement. Even if a written statement of opinion by an expert be admissible in evidence, it may be of little weight if there is evidence to the contrary. In H such circumstances it is difficult to see how the court could normally accept one opinion rather than the other without hearing the witnesses and hearing their evidence tested in cross-examination.

I Without expressing any concluded view on the matter, I am, however, inclined to agree with LORD DENNING, M.R., that this written statement of Mr. Puri would be admissible in evidence. Nevertheless, for the reasons which I have given, I consider that the judge came to a correct conclusion. He exercised his discretion properly, and I would dismiss the appeal.

EDMUND DAVIES, L.J.: I concur with SALMON, L.J., in thinking that this application should be dismissed. I am particularly struck by the fact that at an early stage the defendant, who is clearly a man of intelligence and education, was confronted by a situation in which not only had witnesses been called to support the plaintiff's testimony that he had lent money to the defendant but there had been produced a letter, the greater part of which was admittedly in his handwriting and to which, if the defendant was right, someone had appended



a forged and most damaging postscript. In those circumstances, albeit he had not at that time applied for or obtained legal aid, he must have realised the gravity of the situation. The judge then warned him of the desirability of his being legally aided; but he let no less than 7½ months elapse before the next hearing of the court, and it was only after judgment was entered against him that he took any steps to obtain that testimony which is now the basis of his application for a new trial. A

What excuse does he advance for that extremely long delay? He says that he was relying on the expert testimony of the plaintiff's own witnesses. It is indeed strange for the defendant to express confidence in the quality of the testimony which the plaintiff (who, according to the defendant, had forged his admission of a debt) was likely to adduce. I think this applicant has wholly failed to show anything like the due diligence which could reasonably be expected in the circumstances. On that and the other grounds adverted to by SALMON, L.J., I would dismiss this application. B

SALMON, L.J., has dismissed it, however, even though he concluded that the written opinion of Mr. Puri might well be admissible under the Evidence Act, 1938. It is not necessary for me to express a final conclusion about that matter, but I respectfully entertain substantially greater doubts than SALMON, L.J., appears to entertain on the point. As at present advised, it would appear to me that the whole structure of the Act of 1938 points to and deals with written evidence as to *facts*, as opposed to written evidence relating to *opinion*. I entirely agree that a liberal approach to and construction of the Act of 1938 is desirable, but nevertheless I do venture to draw attention to one or two features of this legislation. Section 6 in dealing with the word "statement" does not, it is true, provide an all-inclusive definition, but what it does is to furnish a useful pointer to the area intended to be covered by the Act of 1938. It provides that C

" 'statement' includes any representation of fact, whether made in words or otherwise."

Section 1 opens with these words: D

"In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and [I agree that these following words are important] tending to establish that fact shall . . ."

in certain circumstances be admissible as evidence. Then one gets these important provisions: First, "(1) if the maker of a statement either (a) has had personal knowledge of the matters dealt with by the statement". I ask myself: does that sound like a reference to an opinion or to a statement of fact? I am inclined to think that it refers to the latter. Again, the second requirement is that "(b) where the document in question is or forms part of a record purporting to be a continuous record . . .", the person responsible therefor "made the statement . . . in the performance of a duty to record information supplied to him . . ." That provision again appears to me to be far more appropriate to statements of fact than to statements of opinion. E

There are two Australian cases where the liberal construction which LORD DENNING, M.R., has firmly adopted was received with favour. The first is *Warner v. Women's Hospital* (5), where SNOLL, J., said that one important question (which he did not have to decide finally) was whether "statements" within the meaning of s. 3 of the Act obtaining in Australia (which is in wording identical with the Act of 1938) excluded statements of opinion. Without expressing a firm conclusion, he expressed the view that in all probability the Act did extend to expressions of opinion and was not restricted to statements of fact. F

A In *Leuchan v. Queensland Trustees, Ltd.* (6), HART, J., was firmly in favour of the view that the Act did apply to statements of opinion, saying:

"The word 'statement' is, I think, wide enough to include a request or a statement of intention or a statement of opinion, as in my view the Act should be widely and liberally construed."

B The Law Reform Committee in its thirteenth report, entitled "Hearsay evidence in civil proceedings", which was issued in May, 1966, (7) expressed themselves, as I see it, as being clearly of the opinion that the Evidence Act, 1938, deals only with facts. A distinction is drawn in para. 13 of that report between evidence of facts on the one hand and evidence of opinion on the other. The opening sentence is in these words: "The Evidence Act, 1938 deals only with *facts* of which direct oral evidence would be admissible", the word "facts" being italicised. The remainder of the paragraph contrasts facts on the one hand with opinions on the other.

C Finally, in CROSS ON EVIDENCE (3rd Edn.), p. 495, there is a passage on this matter (to which reference has already been made by LORD DENNING M.R.). Having stated that there is no doubt that the word "fact" in s. 1 is wide enough to cover opinion, he goes on to raise what I regard as a matter important to be borne in mind. The question is: what is the object of the exercise? In the present case it is not to establish that Mr. Puri holds a certain opinion, but that the opinion of Mr. Puri is well-founded and should be adopted by the court. Having referred to the Australian authorities, however, PROFESSOR CROSS appears, if I may say so respectfully, to make a point which is not valid. He states (at p. 481) that if the Act is to be regarded as extending to matters of opinion,

E "... it is not easy to see how, as a matter of construction, admissibility could be confined to statements of opinion which would be admissible if given on oath in court. For example, it is difficult to believe that a written statement by someone who saw a motor accident suggesting that one of the drivers was negligent would be admitted under the Act, but once 'statement' is held to include a statement of opinion, it is hard to see how this type of statement could be excluded."

F In my judgment, there would be in those circumstances a clear ground for excluding such a statement, because the opening words of the Act of 1938 are: "In any civil proceedings where direct oral evidence of a fact would be admissible ...". Clearly the opinion of a lay witness as to which of two motor drivers was negligent would not be admissible on oath, and in the same way his signed statement on the matter would be equally inadmissible.

G In view of the reference to the Act of 1938 and the conclusion which has been arrived at by LORD DENNING, M.R., I have thought it right to deal with the matter to the extent that I have. While not expressing any firm opinion, my present view is that the Act of 1938 does not extend to statements which consist of expressions of opinion. Accordingly, for my own part, I doubt whether the report embodying the Puri opinion would be admissible in evidence; but, be it admissible or not admissible, I agree with SALMON, L.J., for the reasons he has given, that this application for a new trial should be refused.

*Appeal dismissed.*

I Solicitors: *Trower, Still & Keeling*, agents for *Thomas Hallam, Grimsdale & Co.*, Oxford (for the defendant).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

## BAKER v. WILLOUGHBY.

[QUEEN'S BENCH DIVISION (Donaldson, J.), February 26, 27, March 11, 1968.]

*Damages—Personal injury—Subsequent further injury to plaintiff, as victim in a robbery, necessitating amputation of limb previously injured—Whether damages for injury originally caused by tortfeasor should be reduced by reason of subsequent greater injury supervening.*

In September, 1964, the plaintiff suffered serious injuries to his left leg in an accident on the highway caused by the negligent driving of a motorist, the defendant, but attributable as to one quarter to the plaintiff's contributory negligence. After prolonged hospital treatment the plaintiff re-entered employment. In May, 1966, he had good functional movement in his left leg, but the medical view at that time was that degenerative changes would develop and would eventually limit his activities. He was less well able as a result of the accident to compete in the labour market, and his earning capacity was reduced. The court would have assessed, before Nov. 29, 1967, the plaintiff's general damages as £1,200 (i.e., £1,600 less £400). On Nov. 29, 1967, in the course of the plaintiff's employment he was an innocent victim of an armed robbery in which he received gunshot wounds necessitating the immediate amputation of his defective left leg. On the question of the amount of damages for the plaintiff's injuries in the traffic accident of September, 1964, which came before the court for assessment in February, 1968.

**Held:** the plaintiff's loss from the traffic accident in September, 1964, was in no way reduced by the amputation of his leg consequent on the injury to him in the robbery on Nov. 29, 1967, and accordingly the damages which would have been recoverable from the defendant immediately prior to his injury in the robbery should not be reduced; the plaintiff's general damages, therefore, would be assessed at £1,200 (see p. 240, letters A and G, post).

Principle in *The Haversham Grange* ([1905] P. 307) applied.  
*The Carslogie* ([1952] 1 All E.R. 20) considered.

[As to the date by reference to which damages are measured, see 11 HALSBURY'S LAWS (3rd Edn.) 237, 238, para. 405; and for cases on the measure of damages in tort, see 17 DIGEST (Repl.) 101, 102, 155-173; 36 DIGEST (Repl.) 199-202, 1048-1070; DIGEST (Cont. Vol. A) 465, 173a.

As to what a defendant may prove in mitigation of damages for a tort, see 11 HALSBURY'S LAWS (3rd Edn.) 291, 292, para. 479; as to the exclusion of collateral matters in mitigation of damages, see *ibid.*, p. 293, para. 481; and for cases on mitigation of damages in tort, see 17 DIGEST (Repl.) 111, 112, 249-259.

As to collateral matters in relation to the assessment of damages, see 11 HALSBURY'S LAWS (3rd Edn.) 240, para. 408.]

## Cases referred to:

*Carslogie, The, Carslogie Steamship Co., Ltd. v. Royal Norwegian Government (Represented by the Norwegian Shipping & Trade Mission)*, [1952] 1 All E.R. 20; [1952] A.C. 292; 42 Digest (Repl.) 939, 7304.

*Haversham Grange, The*, [1905] P. 307; 74 L.J.P. 115; 93 L.T. 733; 10 Asp. M.L.C. 156; 29 Digest (Repl.) 287, 2168.

*Performance Cars, Ltd. v. Abraham*, [1961] 3 All E.R. 413; [1962] 1 Q.B. 33; [1961] 3 W.L.R. 749; Digest (Cont. Vol. A) 465, 173a.

*Williamson v. John I. Thornycroft & Co., Ltd.*, [1940] 4 All E.R. 61; [1940] 2 K.B. 658; 110 L.J.K.B. 82; 36 Digest (Repl.) 223, 1194.

*Yorkshire Electricity Board v. Naylor*, [1967] 2 All E.R. 1; [1967] 2 W.L.R. 1114.



**A Action.**

In this action, commenced by writ dated Aug. 4, 1966, the plaintiff, George Robert Baker, claimed damages against the defendant, Arthur George Willoughby, for personal injuries received and loss caused by the negligent driving of a motor vehicle by the defendant on Sept. 12, 1964. The plaintiff received prolonged hospital treatment for fractures of the lower left leg and left ankle, and subsequently re-entered employment. On Nov. 29, 1967, whilst in the course of his employment by a scrap metal merchant the plaintiff was the innocent victim of an armed robbery in which he received gunshot wounds necessitating the immediate amputation of his defective leg. The plaintiff's action for damages against the defendant came before the court on Feb. 26, 1968, and DONALDSON, J., found that the negligent driving by the defendant was established and that there was contributory negligence on the part of the plaintiff, and HIS LORDSHIP apportioned the liability as to three-quarters to the defendant and one-quarter to the plaintiff. The report is confined to the question whether the measure of damages which the court would have found to be recoverable by the plaintiff from the defendant before the further injury suffered by the plaintiff on Nov. 29, 1967, was in any way altered at the date of the present hearing by reason of that further injury.

*D. E. Hill-Smith* for the plaintiff.

*Derek Wood* for the defendant.

*Cur. adv. vult.*

Mar. 11. DONALDSON, J., read the following judgment: In this action the plaintiff claims damages for personal injuries sustained when he was knocked down by a car driven by the defendant. The accident occurred on the Croydon Road, Mitcham, at about 8 a.m. on Sept. 12, 1964. [HIS LORDSHIP then reviewed the facts disclosed by the evidence of the witnesses relevant to the accident, and, after finding that the defendant was liable for the injuries suffered by the plaintiff by reason of the defendant's negligent driving but that the plaintiff contributed to the accident by his own negligence to the extent of twenty-five per cent., continued:] As a result of this accident the plaintiff suffered fractures of the lower left leg and left ankle. He was admitted to hospital and detained there for some six months after which he was discharged on crutches. During his stay in hospital the leg was manipulated on three occasions under an anaesthetic and fragments of bone were fixed with screws. The plaintiff's leg was in plaster for three months after his discharge from hospital. In all he seems to have been on crutches but able to put varying amounts of weight on the leg for some six months. He was seen by a consultant orthopaedic surgeon in May, 1966, who reported as follows:

"[The plaintiff] suffered a severe fracture of the distal end of the left tibia and fracture of the shaft of the fibula. These have at last united with slight deformity and he now has, for practical purposes, a good range of functional movement. Owing to the slight displacement of the posterior malleolus and the fact that he is a large heavy man, he will probably develop degenerative changes in the ankle joint. These changes are expected eventually to limit his activities and it is possible, but not probable, that further surgery will be required in some years' time."

At this time the plaintiff was complaining of pain around the ankle, occasional shooting pain up the back of his leg from the ankle when walking, swelling of the foot and ankle at the end of the day and limitation of movement. Both the latter facts were confirmed by physical examination. The consultant examined the plaintiff again at the end of November, 1967, although the report is dated Dec. 4, 1967, and reported that he saw no reason to change his original opinion. At that time the plaintiff continued to have pain and stiffness in his ankle first thing in the morning and after resting. He could not run. He could walk well

over a mile and could go upstairs, but had to be careful when going down stairs. A

At the time of the accident the plaintiff was self-employed in a somewhat ill-defined capacity. He told me that he engaged in street trading and minor demolition work. Following the accident he took a job hosing down lorries and thereafter as a member of a cable laying gang in which capacity he had to do a good deal of digging. This work was too heavy for him and he was out of work for six months. He then took employment in the business of a scrap metal merchant. B In this capacity he put in a five-hour day sorting light metals and assisting generally and found that this was within his capabilities. It was agreed that his special damage to the date of the hearing amounted to £3 9s. 6d. but it is clear that he was less well able to compete in the labour market than he was before his accident and was thus abnormally exposed to the risk of unemployment. C It is perhaps surprising that being only able to work a five-hour day and having been unemployed for six months, he should have so small a claim for special damage, but there may be a number of explanations for this. In all the circumstances I think that it must be accepted that as a result of the accident the plaintiff's earning capacity was reduced, although it is undoubtedly difficult to quantify this reduction with any accuracy.

Thus far there is little to distinguish this action from hundreds of others D which come before the courts each year and if it had been tried before Nov. 29, 1967, I should have awarded the plaintiff £1,200 as general damages, this sum being £1,600 less twenty-five per cent. on account of contributory negligence. In assessing these damages I should have taken account of pain, discomfort and the restrictions on the enjoyment of life which he had experienced up to the date of the hearing and my appreciation of the pain, discomfort, restrictions and loss E of earning potential which he might be expected to suffer thereafter. The case, however, was not tried before Nov. 29, 1967, and it is clear law that a court must not speculate where it knows: see *Williamson v. John I. Thornycroft & Co., Ltd.* (1). In assessing damages I should, of course, have taken account of the fact that the plaintiff would not live for ever and that in twenty-five years or so he would have retired. It would never, however, have occurred to me to contemplate the possibility F that the plaintiff would be the innocent victim of a robbery whilst in the course of his employment by the scrap metal merchant and that he would suffer gunshot wounds in his defective leg necessitating immediate amputation. Yet this is in fact what happened on Nov. 29, 1967.

What is the effect on the damages to which the plaintiff is entitled? For the plaintiff it is said that this subsequent misfortune makes no difference. For the G defendant it is said that I must only concern myself with loss suffered before Nov. 29, 1967, and that thereafter all loss is merged in and flows from the loss of the leg in the course of the robbery—in other, and less attractive words, I should treat the plaintiff as fully recovered from his motor accident injuries on Nov. 29, 1967. Counsel for the parties have been unable to refer me to any case in which a similar situation has been considered by the courts, but reliance is H placed by counsel for the plaintiff on the decision of the Court of Appeal in *Performance Cars, Ltd. v. Abraham* (2). In that case a motor car suffered damage to a front wing which necessitated a re-spray. Before the wing was re-sprayed, it was involved in a further accident in which the same wing suffered different damage the repair of which also necessitated a re-spray. The owner of the motor car recovered judgment for the cost of the re-spray from the driver who had been I responsible for the first accident. This judgment was unsatisfied and he then sought, unsuccessfully, to recover the cost of the re-spray from the driver responsible for the second accident. The reason why the plaintiff was unsuccessful was stated by LORD EVERSHED, M.R., in these words (3):

(1) [1940] 4 All E.R. 61; [1940] 2 K.B. 658.

(2) [1961] 3 All E.R. 413; [1962] 1 Q.B. 33.

(3) [1961] 3 All E.R. at p. 416; [1962] 1 Q.B. at p. 40.

- A "In my judgment in the present case the defendant should be taken to have injured a motor car that was already injured in certain respects, that is, in respect of the need for re-spraying; and the result is that to the extent of that need or injury the damage claimed did not flow from the defendant's wrongdoing."
- B Counsel for the plaintiff therefore submits that although the robbers could, if sued, take credit for the fact that they destroyed the plaintiff's defective leg and not his good one, the loss of the leg does not affect the amount of the damages which the plaintiff can recover from the defendant. Counsel for the defendant submits that it is for the plaintiff to prove that he has suffered or will suffer a loss and that that loss flows from the act of the defendant. Thus, he says, the plaintiff will fortunately suffer no degenerative changes or further pain in his
- C left leg and any reduction in earning capacity or loss of the amenities of life will flow from the amputation for which the defendant was in no way responsible. Accordingly the court should assess damages on the basis of a temporary incapacity which happily ceased on Nov. 29, 1967.
- D The defendant's argument may be thought more ingenious than attractive, but it is certainly worthy of serious consideration. Support for it is said to be provided by the decision of the House of Lords in *The Carslogie, Carslogie Steamship Co., Ltd. v. Royal Norwegian Government* (4). In that case a ship (The Heimgar) was damaged in collision with The Carslogie, the latter being wholly to blame. The Heimgar was temporarily repaired so as to make her seaworthy and it was estimated that permanent repairs would taken ten days to effect. The owners were under no obligation to effect these repairs at once, but they decided
- E to send her to New York with a view to their being effected at that port. On the voyage The Heimgar suffered heavy weather damage as a result of which she became unseaworthy and immediate repairs became necessary. These latter repairs occupied thirty days and The Carslogie collision repairs were effected concurrently. The dispute between the parties concerned the liability of The Carslogie for ten days' detention of the vessel and the decision was that her owners were not
- F liable.
- G This decision has to be contrasted with that of the Court of Appeal in *The Haversham Grange* (5), which was approved by the House of Lords in *The Carslogie* (4). There a ship, The Maureen, was involved in two successive collisions, both of which rendered her unseaworthy and necessitated immediate repairs involving her detention. The Haversham Grange was responsible for the second collision. Both repairs were effected simultaneously and the repair of the damage caused in the second collision did not increase the period during which the vessel was detained. The owners of the vessel which was involved in the first collision were held responsible for the detention of The Maureen to the exclusion of any liability on the part of the owners of The Haversham Grange.
- H The distinction between these two cases is this. In both cases the plaintiff had to prove that the act of the defendants had deprived them of the use of a profit earning chattel. In *The Carslogie* (4) the vessel had been made seaworthy by temporary repairs and was therefore a profit earning chattel. Whether such a loss occurred depended on when the repairs were effected. In fact they were effected at a time when the vessel for extraneous reasons had ceased to be a profit
- I earning chattel. The plaintiffs therefore failed to prove such deprivation. In *The Haversham Grange* (5), by contrast, the vessel ceased to be a profit earning chattel at the time of the first collision and remained in this state at all material times thereafter, the second collision having no effect on this aspect of the matter. The plaintiffs therefore succeeded in proving such deprivation by the act of the ship involved in the first collision.

(4) [1952] 1 All E.R. 20; [1952] A.C. 292.

(5) [1905] P. 307.



Applying the reasoning underlying these decisions to the facts of the present case, I have to ask myself what loss the plaintiff has proved. If, as I have already found, he has proved a loss valued at £1,600, subject to the effect of the shooting and amputation, have these events in any way reduced his loss? In my judgment they have not. It seems to me that a distinction has to be made between a supervening event which prevents an anticipated loss occurring and one which causes a greater loss, whether or not of precisely the same kind, in which the anticipated loss is merged or submerged. An example of the first category of supervening event would be the creation in November, 1967, of a new category of employment offering exceptionally high wages which was restricted to those suffering from the plaintiff's disabilities. Had this surprising event occurred, I should have had no hesitation in holding that the plaintiff's loss and corresponding entitlement to damages had thereby been reduced. An example of the second category of supervening event would be provided if a man were so injured that he had to purchase a special shoe for the injured foot and subsequently lost the foot and so did not have to buy special shoes. It seems to me that in such a case the true view is that the loss which he suffered by the amputation is reduced by the saving which he made on shoe leather, but not that his original loss was in any way reduced. If the supervening event takes the form of the death of the plaintiff, as might well have occurred, in the present case, the usual consequence will be a diminution in the liability of the defendant. As most people would regard death as involving a greater loss to the plaintiff than many kinds of injury, this result may seem to be anomalous and to indicate some error in the approach which I have formulated. I accept that there is an anomaly, but not that it flows from any error in my approach. The explanation lies in the fact that the law takes a remarkably pessimistic view of future prospects of happiness, as is demonstrated by the level of awards of damages for loss of expectation of life. If death supervenes, the plaintiff has, in the contemplation of the law, had the good fortune to have a relatively minor loss substituted for a more major one, with the necessary consequence that the amount of the defendant's liability to the plaintiff, or his estate, is reduced. When the contemplation of the law and that of the public are at variance, it is the law which suffers—and rightly so in a matter of this kind. In *Yorkshire Electricity Board v. Naylor* (6), LORD DEVLIN suggested that this was an area in which there was scope for reform of the law. I respectfully agree.

As, in my judgment, the plaintiff's actual and prospective loss flowing from the defendant's negligent act has not been reduced by the subsequent loss of his leg, I consider that he is entitled to judgment. I should say that the agreed special damages, as a result of my judgment are reduced to seventy-five per cent.

*Judgment for the plaintiff* (7).

Solicitors: *Parlett, Kent & Co.* (for the plaintiff); *Michael Stone & Co.* (for the defendant).

[*Reported by K. DIANA PHILLIPS, Barrister-at-Law.*]

(6) [1967] 2 All E.R. 1 at p. 12.

(7) Judgment was for £1,202 10s.

# THORNTON v. FISHER & LUDLOW, LTD.

[COURT OF APPEAL, CIVIL DIVISION (Danckwerts, Diplock and Sachs, L.JJ.), February 28, 1968.]

*Factory—Lighting—Roadway in Factory—Lighting equipment sufficient but light not turned on in early morning before full daylight—Employee going to work at 6.45 a.m. tripped on coil of wire in roadway and fell—Whether breach of obligation to make effective provision for securing and maintaining sufficient lighting—Factories Act, 1961 (9 & 10 Eliz. 2 c. 34), s. 5 (1).*

*Factory—Passage—Freedom from obstruction—Roadway thirty feet wide in factory area—Employee coming to work in early morning tripped on coil of wire in roadway—Pavement of roadway normally obstructed—Roadway not swept at night—Whether roadway a “passage” or “gangway”—Factories Act, 1961 (9 & 10 Eliz. 2 c. 34), s. 28 (1).*

In the half-light of early morning, at 6.45 a.m. in October, a cleaner, employed by the defendants, occupiers of a factory, was on her way to work in the factory. She was walking on a factory roadway, thirty feet wide. She was not on the pavement, because the pavement was usually obstructed. She tripped over a coil of wire, one end of which had been forced into the tarmac of the roadway. She fell and was injured. There were sufficient and suitable lights along a wall by the roadway, but they were not turned on. The roadway was used by numerous vehicles during the day and to a lesser degree during the night and early morning. Twenty men were employed by the occupiers of the factory under a supervisor between 7 a.m. and 6 p.m. daily to sweep the six miles of factory roadway and free it from all pieces that might be found on it. The roadway was not swept or freed during the night. The cleaner sued the occupiers of the factory (her employers) for breach of statutory duty under s. 5 (1)\* and s. 28† of the Factories Act, 1961, and at common law for negligence.

**Held:** (i) the defendants were liable to the cleaner for damages in respect of her injury for the following reasons:

(a) because by not ensuring that the lighting was turned on they had failed to make “effective provision” for securing and maintaining sufficient lighting in a part of the factory, and were thus in breach of s. 5 (1) of the Factories Act, 1961 (see p. 243, letter G, p. 245, letters C and E, and p. 246, letters B and H, post).

(b) (per DIPLOCK and SACHS, L.JJ., DANCKWERTS, L.J., expressing no opinion) the defendants had been guilty of negligence at common law either in not having turned on the lights or in having failed to take steps to see that the wire was not on the roadway (see p. 246, letters A and D, post; cf. p. 243, letter H, post).

(ii) (per DANCKWERTS, and SACHS, L.JJ., DIPLOCK, L.J. dissenting) the occupiers of the factory were not in breach of any duty under s. 28 (1) of the Factories Act, 1961, because, giving the words “floors, passages or gangways” therein their ordinary meaning, the roadway was not within that meaning (see p. 244, letters F and H, and p. 247, letter D, post; cf. p. 245, letter I, post).

Appeal allowed.

[As to the lighting of factories, see 17 HALSBURY’S LAWS (3rd Edn.) 103, 104, para. 171; as to access to floors, passages, stairs, etc., see *ibid.*, pp. 84, 85, para. 142; and for cases on the subject see 24 DIGEST (Repl.) 1064-1066, 265-277.

For the Factories Act, 1961, s. 5 (1), s. 28 (1), see 41 HALSBURY’S STATUTES (2nd Edn.) 248, 271.]

\* Section 5 (1) is set out at p. 242, letter I, post.

† Section 28 (1) is set out at p. 243, letter I, post.

Case referred to:

*Kimpton v. Steel Co. of Wales, Ltd.*, [1960] 2 All E.R. 274; [1960] 1 W.L.R. 527;  
Digest (Cont. Vol. A) 591, 262a.

### Appeal.

This was an appeal by the plaintiff by notice dated Sept. 5, 1967, against an order of His Honour JUDGE SUNDERLAND made in Birmingham county court on Aug. 1, 1967, in favour of the defendants in an action for damages for personal injuries for negligence and breach of statutory duty. The grounds of appeal were: (i) that the judge was wrong in law in holding that the roadway where the plaintiff's accident occurred was not a floor, passage or gangway within the meaning of s. 28 (1) of the Factories Act, 1961; (ii) that he ought to have held that the defendants were in breach of s. 5 (1), s. 28 (1) and s. 29 (1) of the Act of 1961; and (iii) that he ought to have found negligence on the part of the defendants, their servants or agents. The defendants served a respondents' notice dated Jan. 19, 1968, that they intended to support the judgment of the county court judge on the following additional grounds; that on the evidence they had done all that was reasonably practicable to comply with their duty both at common law and under the Factories Act, 1961, if and in so far as the Act of 1961 applied.

*John D. Stocker, Q.C.*, and *D. H. Stemberge* for the plaintiff.

*R. G. Rougier* for the defendants.

**DANCKWERTS, L.J.:** This is an appeal from a judgment of His Honour JUDGE SUNDERLAND at Birmingham county court given on Aug. 1, 1967. It relates to an accident which the plaintiff suffered in a fall. She was a cleaner employed at the defendant company's factory, and she was on her way with four other cleaners to work at 6.45 a.m. on Oct. 14, 1965. At 6.45 a.m. there was about half an hour, or perhaps a little more, before sunrise; I think that it was said by someone that there was a half light. She was proceeding along what was plainly a roadway thirty feet wide on her way to work. The roadway had a pavement, but the pavement at the material time was obstructed by various objects as shown by the photographs taken at another time, but which give a very fair impression of what the situation was like. In the two photographs all kinds of things are shown, trolleys and other things, on the pavement, so that it was quite impracticable for the five women to proceed along the pavement, and they were driven, therefore, to proceed along the road. The road was one on which during the day numerous vehicles passed, and even during the night and early morning it appears that vehicles to a lesser degree passed along it.

As the plaintiff proceeded on her way, she caught her foot in what has been described as a coil of wire which was lying on the roadway with one end apparently forced into the tarmac of the roadway, presumably by a heavy lorry, or something of that sort, which was passing by. Of course, the fact that it was attached at one end made it more dangerous and more likely to cause a person to trip than if it had been absolutely free. The plaintiff tripped over the wire, lost her shoe around which apparently the wire wound, fell on her face and broke a bone in her elbow. She was injured and therefore out of action for a time. The county court judge dismissed the claim, but he assessed the damages at £400 general damage, and £27 10s. 3d. as special damage. In dismissing the action, the judge considered the various grounds which were put forward, and we must consider those grounds, and consider whether the judge was right or wrong.

The first ground was based on s. 5 (1) of the Factories Act, 1961, and also on common law negligence. It is obvious that on this point the two run rather closely together, and I will first consider the provisions of s. 5 (1). The terms of that subsection are:

"Effective provision shall be made for securing and maintaining sufficient and suitable lighting, whether natural or artificial, in every part of a factory in which persons are working or passing."



**A** The plaintiff, of course, was "passing", and the roadway was part of the premises of the factory. The light, as I have said, was half daylight, or half light. Along the wall of the factory past which the plaintiff was going there were lamps rather high up on the wall; someone suggested, I think, that they might be five hundred watts, or something of that sort, and they were thirty yards apart. But they were not turned on, and that was the basis of the claim which was made under that subsection.

The lights, when they were turned on, would provide sufficient light, according to the evidence, so that the plaintiff might well have seen the piece of wire and avoided it. The question is whether the lighting, if it is to be treated as "sufficient and suitable" if it was turned on, was within the mischief of that subsection, so that the liability falls on the defendants because the lights either had been turned off too early, or because they had not been turned on. The evidence, so far as it went, was that sometimes the lights were turned on at this time of the morning when apparently the cleaners always came on duty, and sometimes not. One of the troubles in regard to this case is that the note of the evidence, as so often happens in a county court case, is not the same as a shorthand note taken at the hearing of the action, and questions from which one might derive further information either were not asked or perhaps they were not recorded. There is, for instance, no real evidence whatever about the nature of the wire which caused the plaintiff to trip, whether it was stout wire or whether it was very thin wire. I can only draw the conclusion that perhaps it was moderately thick wire used for some purpose or other in the factory. It may have been dropped by a vehicle, or it may have been dropped by someone connected with the factory; there was no evidence whatever on the point. The evidence whether the plaintiff could have seen the wire or not, had the lights been on, is not very strong perhaps, but on the whole I think that one can fairly reach the conclusion that at any rate she would have had a better chance of seeing the wire if the lights had been on. The evidence was that in the condition of half light she could not really see the wire, and would not be likely to see the wire unless she had been looking down at her feet. Anyhow, she tripped and fell.

The point which really arises is that, assuming that there was sufficient and suitable lighting provided by the lamps to which I have referred, was it effective within the meaning of s. 5 of the Act? I have come to the conclusion that it was not. It seems to me, on the construction of this subsection, that "effective" means lighting which is functioning effectively, and lighting which may be admirable in construction and in the provision of proper bulbs and so on, is not effective when it is not turned on. Therefore it appears to me that there was a breach of s. 5 (1) of the Factories Act, 1961, and therefore that is sufficient to give the plaintiff a cause of action.

There is also the question whether there was negligence at common law. I do not need to rely on that since I have already given a reason for allowing the appeal on the construction of the subsection. It seems to me that there might possibly be a cause of action at common law, the question being whether it was reasonably foreseeable by the defendants that an accident of this kind would happen in the conditions which existed. I prefer not to express an opinion on the point in the circumstances.

One other section was relied on by the plaintiff, and that was s. 28 (1). That section has at the beginning in black print the words: "Floors, passages and stairs", and provides:

"All floors, steps, stairs, passages and gangways shall be of sound construction and properly maintained and shall, so far as is reasonably practicable, be kept free from any obstruction and from any substance likely to cause persons to slip."

Assuming that the subsection applies, the question was whether it was reasonably practicable, and whether proper precautions were taken by the defendants, to

keep it free from any obstruction. There is no doubt whatever that the wire was an obstruction, and I should have said a dangerous obstruction. A

The evidence on behalf of the defendants was that there was a man who had under him twenty men whose job it was to sweep the roadway and to pick up all pieces, whatever they might be, that might be found on it. Their hours of working were from 7 a.m. until 6 p.m. There were about six miles of roadway on the premises of the defendants, and each of the men was given a certain length to keep free from objects and to sweep. It appears, however, that work went on at the factory at night, and therefore there were thirteen hours, I think, at a time when work might be going on and things might be dropped owing to vehicles coming by when there was no sweeping or picking up of anything that might be there. Therefore it appears to me that it is probably not true to say that it was not reasonably practicable to deal with this incident, or to say when the coil of wire actually fell or was dropped, whichever it was, by, for instance, further shifts of men working through the night, which of course would be more expensive; but it may be that the expense would not have been so great in view of the risk which was entailed by the possibility of objects being left on the roadway. I do not think that I need decide that question because I propose now to deal with the construction of the section. B C D

At first glance it would appear to me that "floors, passages and stairs", if effect is to be given to those words (those being the opening words in the black print) show that "all floors, steps, stairs, passages and gangways" are matters which were inside the buildings of the factory. It has been argued (and there is some force in the contention) that it must also include things which are outside the factory premises, indeed which might be just outside the entrance to a factory, and so on. The question, however, in whether the words of the section do apply to this roadway in the circumstances of the case. As to the words which are really material, it has not been seriously argued that the word "floors" applies, and I do not think that the roadway was a "floor", anyway. The words to be considered accordingly are "passages and gangways". E

Counsel for the plaintiff has called our attention to the definitions given in the OXFORD ENGLISH DICTIONARY, which are these. "Passage" is defined there apparently as: F

"That by which a person or thing passes or may pass, way, road, path or channel especially when serving as an entrance or exit."

The definition of gangway is: "A road, thoroughfare or passage of any kind, a passage in a building." Notwithstanding the definition of the words in the dictionary, certainly in common language I should not have said that this roadway thirty feet wide, with a pavement running along it, was a "gangway." We are told that "gangway" is derived from a Scottish or other term meaning a "going-way", a way in which you go. That seems to me a bit archaic in the circumstances, and I should not have expected the draftsman of the Act of 1961 to use it in that way. "Passage" is perhaps more easy because "passage" may well mean something on which people pass; but I should have thought that the ordinary common-place use of "passage" is not usually used in connexion with a roadway thirty feet wide. "Passage" in ordinary use, I should have thought, suggested something narrower, in the same way as the description with which one is quite familiar, narrow passages going through various places, or between walls or between other bits of land, as the case may be. That, however, does not suggest to me, at any rate, a roadway of this kind; and therefore, so far as s. 28 (1) is concerned, I should come to the conclusion that it is not within the provisions of s. 28 (1) of the Act of 1961. However, as I am of the opinion that it was the failure to turn on the lights that was the effective cause of the accident that occurred, in my view the appeal must be allowed and judgment entered for the plaintiff in the sum of £427 10s. 3d. G H I

**A** **DIPLOCK, L.J.:** I agree that this appeal should be allowed, and will add a word or two as to my view of the construction of the sections of the Factories Act, 1961, which we have been discussing during the course of today. The county court judge took the view that s. 5 requires only the provision of a "sufficient and suitable" lighting installation in the factory, and so far as that section is concerned it did not matter twopence whether it was ever turned on or not.

**B** I do not so read the section. What it provides is that:

"Effective provision shall be made for securing and maintaining sufficient and suitable lighting, whether natural or artificial, in every part of a factory in which persons are working or passing."

**C** I draw attention to the present tense of those last words, which is to be contrasted with the words in s. 29 of the Act of 1961, which refer to places "at which any person has at any time to work". It seems to me to be plain on the words of the section, and as a matter of common sense, that the section is concerned with the lighting being on as well as the installation being there. In my view what the section requires of the occupier of the factory is that the artificial lighting installation must itself be "sufficient and suitable", and that the employers

**D** must either take all practicable steps to ensure that the lights are switched on whenever the natural lighting is insufficient for persons who are working or passing, or must provide switches reasonably accessible to any persons who are working or passing for whom such artificial illumination is required so that they may switch it on themselves.

**E** As I read the judgment of the county court judge, it was his view that had the lights been on the probability is that this accident would have been avoided. There is thus sufficient causal connexion between the breach of statutory duty and the accident, and I would allow the appeal on that ground. That would make it unnecessary for me to go on to consider the construction of s. 28 of the Act of 1961; but as DANCEWERTS, L.J., has expressed his view as to the construction, I cannot resist putting my weight (such as it is) in the scale on the other side.

**F** I need not read the familiar s. 28 again except to draw attention to the last words, "be kept free from any obstruction and from any substance likely to cause persons to slip". I think that it is necessary, if we can, to give to that section a construction which will give effect to a sensible policy on the part of Parliament, and not one which is merely whimsical; and the policy, as I see

**G** it, in this section is that all parts of the factory on which persons stand or pass, at any rate on foot, must be "of sound construction and properly maintained . . . so far as is reasonably practicable". Whether a particular part of the factory falls within the word "passages" seems to me to depend on what it is used for. The evidence here is that because of the obstruction of the pavement (which would be the natural place for persons to pass on foot) it was necessary for pedestrians

**H** coming along to do their work in the factory to walk down the roadway. The evidence was that at that time in the morning the pavement was normally obstructed, and that it was the roadway that was normally used by pedestrians. In my view it does not matter whether the path which they take is thirty feet wide or two feet wide. Provided that it is a part of the factory which is normally used for persons to pass along on foot, it falls within the definition of "passage"

**I** in s. 28 of the Factories Act, 1961. If I am right about that—the county court judge took a different view—it follows that the plaintiff would be entitled to succeed on that ground also, because there is a finding of fact by the county court judge that the defendants had not shown that it was not reasonably practicable to remove or prevent the obstruction.

Finally just one word about common law negligence. There was ample evidence that it was foreseeable that objects would fall off into the road by night as well as by day. Twenty men were engaged during the day time on picking them up. I should put the case of common law negligence against the defendants very



simply. Either they ought to have turned on the lights so as to make smallish objects of this kind visible and avoidable by persons passing down the roadway or they ought to have taken steps to see that such objects were not there. On all three grounds, therefore, I would allow the appeal. A

**SACHS, L.J.:** I agree that the county court judge took too narrow a view of the provisions of s. 5 (1) of the Factories Act, 1961. I agree too with the constructions placed on that section by my lords. The practical result is that an employer must provide sufficient and suitable artificial lighting where natural light is not of itself sufficient and suitable. B

In the present case, having regard to the existence along the roadway of available lighting, which was not in action at the material time, there seems to be no material difference in the end between the duty under s. 5 (1) and the common law duty to take proper care for the safety of employees. To my mind, when employees are going to work on a dull and dark October morning half-an-hour before sunrise, it is simply stupid not to turn on lights which can assist (and in this case would have assisted) those going to work in observing anything on the road, be it patches of oil, small pieces of material, or even larger objects. In those circumstances it seems to me that the defendants were in breach of their common law obligation to take care, and also in breach of their obligations under s. 5 (1) to provide sufficient and suitable lighting. C D

I have had more difficulty than my lords as regards whether on the facts of the case the absence of added artificial lighting in the half-light at that time of the morning was a cause of the accident. That hesitation is due to the three following factors: (i) This court knows very little indeed of the size and shape of the piece of wire which, so far as the plaintiff's evidence is concerned, is described in the judge's own notes as a coil of wire, in notes which he approved as a piece of wire which caught round the shoe and was coiled, and by another witness as follows: "I pulled a piece of wire off her shoe; it was stiff and round her shoe". (ii) Account has to be taken of the natural instinct not to look at the ground in a way that leads one to see pieces of wire, and the evidence of the defendants' expert that: E F

"If a person is not looking down, she would not be able to see the wire, but if looking down it could be seen. I think that this is the sort of accident that could happen in full light."

(iii) The courts must be on guard not to put an impracticably high burden on employers with regard to small objects which can drop on to a roadway; indeed, for a plaintiff to recover against an employer in respect of an isolated piece of wire in a roadway must come near to a high water-mark in this class of case. Having said that, however, it seems to me that there is at any rate a clear inference to be drawn on the evidence that there was a reasonable chance that the additional lighting might have prevented the accident; and I do not disagree with the view that there were sufficient chances to make that likelihood a probability. It follows to my mind that this appeal succeeds both at common law and on breach of duty under s. 5 (1) of the Factories Act, 1961. G H

In view of the course which this appeal has taken and the careful arguments which have been addressed to the court on the point, it seems proper to add my views in regard to the interpretation of s. 28 (1) of the Act of 1961. This is a section which has as its statutory side-note the words: "Floors, passages and stairs." Whether the spot which is marked "X" on the photograph is or is not a floor, passage or gangway seems to me to be to a considerable degree a matter of impression; and I have in mind a passage in *Kimpton v. Steel Co. of Wales, Ltd.* (1) where **SELLERS, L.J.**, said: "I think that the whole Act has regard to what is the ordinary description of things in a factory", and the later passages which illustrate the desirability of looking at a word in its ordinary meaning. I

(1) [1960] 2 All E.R. 274 at p. 276.

- A When once one has seen the photograph which is numbered 1 in the bundle before me, and looks at the thirty feet roadway extending far into the distance as part of a network, one was told, of roadways, I find myself on first impression at least in agreement with what was said by the county court judge: "Equally it seems to me that this thirty feet roadway cannot be described as a passage or gangway in any ordinary sense", having previously likewise dismissed the submission that
- B this roadway was a "floor".

- Turning from first impressions, one can look at the statute as a whole, remembering, of course, that its primary object is the protection of workmen, but on the other hand that its provisions are of a penal nature; and then one finds that there are provisions relating to the protection of workmen in relation, under s. 29, to means of access and their place of work. So means of access, which this
- C roadway undoubtedly was, and places of work are not left out of the ambit of carefully framed provisions in the statute. Then one turns to the additional specific provision which, as already mentioned, is side-noted. "Floors, passages and stairs". For my part I can see no reason, when one has found that Parliament has in s. 29 provided precautions with regard to the relevant areas, to proceed to strain the words in s. 28 beyond the bounds of normal language. That then,
- D albeit obiter, is my view of the point and it follows that to my mind that thirty feet road was not a floor, passage or gangway within the meaning of those words in the latter section. For the reasons already given, I agree that this appeal should be allowed.

*Appeal allowed. Leave to appeal to the House of Lords refused.*

- E Solicitors: *Sharpe Pritchard & Co.*, agents for *F. A. Greenwood & Co.*, Birmingham (for the plaintiff); *E. P. Rugg & Co.*, agents for *William F. Hatton & Co.*, Birmingham (for the defendants).

[*Reported by F. A. AMIES, Esq., Barrister at-Law.*]

F

## PRACTICE DIRECTION.

### PROBATE, DIVORCE AND ADMIRALTY DIVISION (DIVORCE).

- G *Magistrates—Husband and wife—Appeal—Delay—Legal aid—Need to avoid unnecessary delay on appeals to Divisional Court.*

- The attention of courts of summary jurisdiction, legal aid committees and practitioners is drawn to the importance of avoiding delay in appeals to the Divisional Court from magistrates exercising their matrimonial jurisdiction.
- H A successful appeal generally means that people of small means have either been wrongly denied, or wrongly ordered to pay maintenance. Some delay may be unavoidable, due to the necessity of compliance with procedures for legal aid, but every effort should be made to mitigate even this and to ensure that no further or other delay takes place.

By direction of the President.

- I Apr. 23, 1968.

COMPTON MILLER,  
Senior Registrar.

## GILBERT &amp; PARTNERS (a firm) v. KNIGHT.

[COURT OF APPEAL, CIVIL DIVISION (Harman, Davies and Widgery, L.J.J.),  
February 7, 1968.]

*Contract—Quantum meruit—Existing contract—Additional work—Need for implication of new contract and thus to get rid of old contract—Contract by surveyor to arrange, supervise, etc. specified building work estimated to cost £600 for fee of £30—Additional work bringing cost to £2,283 ordered by building owner and supervised by surveyor—No request by surveyor for increasing fee until after work completed—Whether surveyor entitled to more than £30 agreed fee.*

In August, 1965, a surveyor agreed with an owner of a house to prepare drawings, to arrange tenders, to obtain necessary consents and to settle the accounts for certain proposed alterations to the house, and to supervise the work of alteration, the cost of which he estimated at roughly £600, for a fee of £30, which would cover possible extras but not other work. In April and May, 1966, when the builder had started work, the owner ordered some more work, which brought the total cost to £2,283. The surveyor supervised the additional work, but did not say anything about a fee for doing so until after the work was finished, when he submitted an account for £135, being the agreed £30 plus 100 guineas, a scale fee for supervising the additional work. The owner paid only the agreed £30.

**Held:** the surveyor was entitled to the agreed fee of £30 only, because, although the fee was agreed in relation only to the work originally estimated and possible extras to it, no charge by way of quantum meruit for supervising the additional work ordered in 1966 was recoverable unless a new contract to pay a fee in respect of that work could be implied, and no such implication could be made as the parties had never discharged the original contract for one lump sum fee of £30 (see p. 250, letter I, p. 251, letters B and I, and p. 252, letter C, post).

Principle stated by LORD DUNEDIN in *The Olanda* ([1919] 2 K.B. at p. 730) applied.

Appeal dismissed.

[As to when payment may be recovered on a quantum meruit for work voluntarily done, see 8 HALSBURY'S LAWS (3rd Edn.) 226, para. 390; and for cases on quantum meruit see 12 DIGEST (Repl.) 129-131, 802-816.]

As to entitlement of architects and surveyors to payment for work done, see 3 HALSBURY'S LAWS (3rd Edn.) 539 para. 1081, and p. 541, para. 1088; and for cases on the subject, see 7 DIGEST (Repl.) 377-381, 155-187.]

Cases referred to:

*Olanda, The, Stoomvaart Maatschappij Nederlandsche Lloyd v. General Mercantile Co., Ltd.*, (1917), [1919] 2 K.B. 728, n.; 41 Digest (Repl.) 352, 1453.

*Steven v. Bromley & Son*, [1919] 2 K.B. 722; 88 L.J.K.B. 1147; 121 L.T. 354; 41 Digest (Repl.) 573, 3518.

### Appeal.

This was an appeal by a firm of surveyors, Gilbert & Partners, against the decision of His Honour JUDGE IFOR LLOYD, Q.C., at Wandsworth County Court, dated June 29, 1967, dismissing their action against the defendant, Mrs. R. Knight, for 100 guineas on a quantum meruit in respect of additional work which they had done for her in connexion with further alterations to her house at 19, Cavendish Road, Balham, beyond the alterations originally ordered for her.

Mr. K. B. Tyrrell, a partner in the plaintiff firm, had arranged to do surveyor's work in respect of alterations at a house, 19, Cavendish Road, Balham, which the defendant was buying. The fee for the work was agreed at £30, which Mr. Tyrrell confirmed to the defendant by letter dated Aug. 25, 1965, which is set out at p. 249, letter H, post. Further alterations were arranged subsequently.



A For the whole work the plaintiff claimed £135, of which £105 (the difference between the total claimed and the fee of £30) was claimed on a quantum meruit. This ground was pleaded in the plaintiffs' reply as follows—

"4. On the defendant's express instructions further works and/or alterations were carried out at the premises and the defendant expressly or impliedly requested the plaintiffs to perform professional services in respect thereof. The plaintiffs rendered these services, full details of which have been delivered to the defendant and the services were accepted by the defendant.

"5. It was implied by the said request that the plaintiffs would be entitled to be paid at a reasonable remuneration in respect of the services."

C The trial judge decided that the contract between the plaintiffs and the defendant was to be found in the letter dated Aug. 25, 1965, he held that the plaintiffs had agreed to an inclusive fee of £30 for the work, that they had bound themselves thereby to do all surveyor's work in supervising the whole of the alterations at 19, Cavendish Road for that sum, and that a claim by way of quantum meruit did not lie. By notice dated Aug. 4, 1967, the plaintiffs gave notice of appeal, from the judgment of the trial judge specifying, among other grounds of appeal, that he was wrong in law in not holding that the plaintiffs were entitled to remuneration on a quantum meruit basis for the professional services set out in para. 4 of the reply.

*N. R. Hannah* for the plaintiffs.

*Richard Rampton* for the defendant.

E HARMAN, L.J.: In August, 1965, the defendant, Mrs. Knight, was minded to purchase a house, 19, Cavendish Road, Balham, to make some alterations to it, and to use it partly to live in herself and partly to make a living by letting out lodgings of some sort or other. She got in touch with the plaintiffs, a firm of chartered surveyors, and asked them to carry out a survey for her before she entered into the contract. That they did, and for that they were paid

F a sum of £24, which included testing the drains. At about the same time there was a meeting between the lady and a Mr. Tyrrell, one of the partners in the plaintiff firm, on the site of the house. She showed him what alterations she wanted done. They were alterations to the ground floor—very largely altering the lounge and turning an old conservatory into an extension of that room. He agreed to prepare drawings, to arrange for tenders, to settle the accounts, and to supervise the work. He estimated rather roughly that it would cost about

G £600. He said that he would charge her a fee of £30, and to that she agreed. The result of that agreement is embodied in a letter, which is included in the correspondence, in these terms:

H "Dear Madam, Further to our recent meeting at the above address [that is 19, Cavendish Road] I confirm your instructions to prepare drawings, etc. and obtain the necessary consents for the alterations to the above house. I will then prepare a brief specification, supervise the works and settle the account on your behalf. As agreed I confirm that my fee for carrying out this work is to be £30."

I Apparently there was a good deal of difficulty about finding a builder, and also a certain amount of delay with the local authorities, who of course under modern conditions had to give their consent to the alterations, and it was not until April, 1966, that an estimate was received from a firm called Spa Lodge, Ltd., to do the work. That estimate for the work came to £662, and they added a further £400 or so for work of decoration and kitchen equipment, a prime cost estimate, the articles in question not having been ordered and in fact never in the upshot being ordered.

During April and May, 1966, the work was begun. By that time the defendant decided that she wanted some more work, and a second estimate was prepared.

That was done by the builders. There was no specification by the plaintiff surveyors, although no doubt they were familiar with what was going on because Mr. Tyrrell was visiting the place every now and again. During those months of April and May, the appetite growing by what it fed on, the defendant required still further work to be done and then there was another estimate of £600, bringing the total amount (taking off the electrical work not done) to £2,283 in all. A

Mr. Tyrrell never said anything more to the defendant about charges; she never said anything more to him; the matter went on until October, 1966, when the work was finished; and the plaintiffs submitted an account in November, 1966, for £135, with a covering letter: B

"I enclose for your attention our account in respect of the services provided for the alterations to the above property. Yours faithfully." C

To that the defendant promptly replied—and this is the only letter that she wrote during the whole transaction—

"Dear Sir, In reference to your account dated Nov. 15, 1966, I would draw your attention to your letter dated Aug. 25, 1965, agreeing the sum of £30 for charges in connexion with the alterations at No. 19, Cavendish Road. It would appear that this letter has escaped your attention." D

In other words, the defendant says: You agreed an all-in fee and an all-in fee you shall have; and £30 she afterwards paid, leaving the 100 guineas outstanding, in respect of which the present action is brought.

The judge came to the conclusion that, on the true construction of the contract, the contract was for all the work that should be done, whenever it was done, on this house, and that the plaintiffs can get no more. I think that the conclusion to which he came is right. It is not quite the way in which I should have put it. This no doubt was a contract for £30, a lump sum for doing the work then contemplated and possibly extras but not other work: that was in August, 1965. E

The most attractive way in which one can put the surveyor's case, I think, is to say that that was one contract: there was another contract, and a new one, made in April, 1966, and that was to do with supervision of the further and different work at a further and different sum, namely, something approaching a scale fee. It is agreed that the defendant did not know anything about scale fees. She was not to know that that is the way that surveyors charge. She did know that they had agreed in fact not to take the scale fee—because £30, although it is said to represent between five and six per cent. on the £600, does not cover the rest of the first estimate, which is another £400 or £500, and the plaintiffs agreed that they would have had to supervise that for the original figure. The question is whether, having agreed a lump sum figure and to charge by lump sum, the surveyors can now change their tune and say that that was for *that* contract, but that for *this* contract they are going to charge in a different form, namely, on a scale. F G H

LORD DUNEDIN makes an observation on this subject which seems to me really pertinent in *The Olanda* (1) in the House of Lords, a report of which is set out at the end of *Steven v. Bromley & Son* (2). He said this (1):

"As regards quantum meruit where there are two parties who are under contract quantum meruit must be a new contract, and in order to have a new contract you must get rid of the old contract." I

I do not think that these parties did get rid of the old contract: there it was still outstanding, not having been discharged—it was never mentioned—and I think the defendant was entitled to assume that it was still running between them and that she would not be asked for a different sum on a different basis. Mr. Tyrrell very frankly admitted that it was an error on his part not to remind

(1) [1919] 2 K.B. 728, n. at p. 730.

(2) [1919] 2 K.B. 722.

A her. He might so easily have done so when he wrote to her and said "Of course, now you are undertaking this new work if you want me to supervise it you must remember that I am a professional man and shall charge a professional fee". He did not do so. I think that she was entitled to suppose, and did suppose, that the lump sum which she had agreed to pay would cover whatever alterations she wanted done to this house.

B It is perhaps rather a hard case on the plaintiffs, but if it is a case of hardship to them or hardship to her, it is they who should suffer because it is they after all who are professionals and she is not. I do not see that there was any such "getting rid of the old contract", as LORD DUNEDIN puts it, as to entitle them to their quantum meruit under a new contract—because a new contract there must be, as quantum meruit played no part in the old one.

C Consequently, though perhaps not for the reasons given by the judge, I would dismiss this appeal.

DAVIES, L.J.: I agree. The evidence of these two parties as to what was said in 1966 can be summarised quite shortly from the judge's note. In his evidence, Mr. Tyrrell said, referring to the "extras", as we have conveniently called them, which were ordered in 1966:

D "The question of my fees for these extra works was not discussed. I always assumed that she would not expect me to continue with all this extra work for the original fee . . . Till Nov. 15, 1966, I did not tell the defendant I was going to charge more than the £30 I had agreed. It was an unfortunate lapse on my part."

E The defendant, dealing with the negotiations in August, 1965, said:

"Estimate No. 1 was what I wanted done. I did say to Mr. Tyrrell about all the other oddments that I might want to be done when fee of £30 was mentioned."

F Then she said this, which I think must be referring to 1966 when the extras were ordered (I am altering the note slightly):

"I understood when I wanted other work done upstairs the plaintiff was to supervise it for the same price because he did not mention it to me."

And finally she said:

G "Columns 2, 3 and 4 [those are the extras] were not discussed with Mr. Tyrrell in August, 1965, when the fee of £30 was agreed. Those items I asked to be done at a later stage or stages. I agree the £30 fee was in respect of the items in column 1. I think all the other work should be covered by the £30 since Mr. Tyrrell did not say anything to me."

H In order to make a person liable on a quantum meruit there has to be a necessary implication that the person liable is agreeing to pay. In the ordinary way if one employs a professional man to give professional services it is a necessary implication, unless anything to the contrary is expressly said, that the employer (to use that word) will pay a reasonable remuneration for those services. But in this case the cardinal point is that there had been this previous agreement to do some work for a lump sum of £30, and I for myself cannot see that there is any necessary implication that, when the work was going to be extended, or increased, in the absence of any express mention of it the defendant should be liable to make any further payment to the plaintiffs. If Mr. Tyrrell had said, in 1966, that he had only agreed to do the other work for £30, and that if the defendant wanted him to do the extra work he would have to have a further figure or scale fees, the defendant (this is pure speculation) might have done one of two things. She might have said that if that was going to be added to the cost of it she was not going on. Alternatively, she might have said that there was the builder, who, no doubt would be very pleased to do this extra work,



and that she would carry on with the builder without Mr. Tyrrell's intervention at all. What she *would* in fact have said we do not know. A

Like HARMAN, L.J., I do not quite agree with the ground on which the county court judge based his decision; but in essence I think that it was right and that he reached the right conclusion on the issues in the case. Sympathy no doubt one may have for the plaintiffs; but, after all, they have only themselves to blame for undertaking this extra work without specifically mentioning that they proposed to charge, if they wanted to do so. I think it is very likely that the defendant, in her letter of Nov. 22, 1966 (which HARMAN, L.J., has read), when she was presented with this bill, was quite right in saying: "It would appear that this letter [that is the letter of Aug. 25, 1965] has escaped your attention." Mr. Tyrrell had probably forgotten all about his lump sum agreement and thought that he was working all the time at the scale fee. I agree with what HARMAN, L.J., has said and that this appeal fails. B

WIDGERY, L.J.: I agree with both judgments, and there is nothing which I can usefully add. C

*Appeal dismissed.*

Solicitors: *Sidney Davidson & Co.* (for the plaintiffs); *Claremont, Haynes & Co.* (for the defendant). D

[Reported by HENRY SUMMERFIELD, Esq., Barrister-at-Law.]

## GIBSON v. UNION OF SHOP, DISTRIBUTIVE AND ALLIED WORKERS.

[CHANCERY DIVISION (Buckley, J.), February 22, 23, 1968.] E

*Declaration—Discretion to grant—Period of suspension from office almost expired—Declaration sought that trade union's decision to expel member, and subsequent decision on appeal to suspend him were ultra vires and void—Substantial issue not academic in character, when action brought—Whether declaration should be granted.* F

The plaintiff was a member of the defendant trade union. On Jan. 10, 1966, his branch of the union purported, in exercise of disciplinary powers, to expel him. He appealed to the executive council of the union and on Mar. 13, 1966, it allowed the appeal to the extent of substituting for the sentence of expulsion, suspension of the plaintiff from office in his branch and from acting in any representative capacity on behalf of the union for a period of two years from Mar. 13, 1966. An appeal by him against this decision of the executive council was dismissed on May 8, 1966. The plaintiff brought an action seeking a declaration that the decisions of Jan. 10, 1966, Mar. 13, 1966, and May 8, 1966, were ultra vires and void and an injunction to restrain the union from acting on the decisions. The two-year period of the plaintiff's suspension would end three weeks from the date on which the trial opened. On a preliminary question whether, in view of the approach of the end of the two-year suspension, declaratory relief should in any event be granted, G

**Held:** if, when an action was instituted the plaintiff had, or might have had, a good ground of complaint involving substantial legal issues, not of an academic character, the lapse of time between the issue of the writ and the time when, having regard to the business of the court and the necessary preparatory steps, the action came on for trial, did not disentitle the plaintiff to declaratory relief (see p. 254, letters B and G, post). H

I

- A** [As to declaratory judgments, see 22 HALSBURY'S LAWS (3rd Edn.) 748, 749, para. 1610; and for cases on the subject, see 30 DIGEST (Repl.) 172-175, 228-240.

As to remedies for improper expulsion from a trade union, see 38 HALSBURY'S LAWS (3rd Edn.) 356, 357, para. 615.]

### Action.

- B** This was an action by the plaintiff Peter Charles Gibson begun by writ issued on Nov. 29, 1966. He claimed (i) a declaration that the decision of the South West London branch of the defendant union made on or about Jan. 10, 1966, purporting to expel the plaintiff from membership of the union was ultra vires and void; (ii) a declaration that the decision of the executive council of the union made on or about Mar. 13, 1966, purporting to substitute for the aforesaid invalid penalty the penalty that the plaintiff be suspended forthwith from any offices of the branch and from acting in any representative capacity on behalf of the union for a period of two years therefrom was ultra vires and void; (iii) a declaration that the decision of the executive council of the union made on or about May 8, 1966, dismissing an appeal of the plaintiff from the decision last aforesaid and re-affirming such decision was ultra vires and void; and (iv) an injunction restraining the union, by itself, its servants or agents or otherwise from acting on the aforesaid decisions or any of them. Judgment was given first on a preliminary point.

*D. J. Turner-Samuels* for the plaintiff.

*P. R. Pain, Q.C.*, and *I. A. Macdonald* for the defendant union.

- E** BUCKLEY, J.: This is an action brought by the plaintiff who is a member of the defendant trade union, and by his statement of claim he alleges that on Jan. 10, 1966, the branch of the union of which he is a member purported to expel him from membership of the defendant union. He disputes the validity of the resolution of the branch on certain grounds which are stated in his statement of claim.

- F** The plaintiff appealed from that decision of his branch to the executive council of the defendant union and on Mar. 13, 1966, the executive council, according to the statement of claim, allowed the appeal in this sense, that it substituted for the sentence of expulsion, the suspension of the plaintiff from office in the branch and from acting in any representative capacity on the part of the union for a period of two years from Mar. 13, 1966. The plaintiff disputes the validity of that decision of the executive council on the grounds that are stated in the statement of claim. He appealed against that decision of the executive council under machinery which I assume exists in the constitution of the defendant union. That appeal came before the executive council on May 8, 1966, and was dismissed by the executive council. The plaintiff disputes the validity of that decision of the executive council, again for reasons which are set out in the statement of claim.

- H** In this action he is seeking a declaration that the decision of the branch made on Jan. 10, 1966, was ultra vires and void, a declaration that the decision of the executive council made on Mar. 13, 1966, was ultra vires and void, and a declaration that the decision of the executive council made on May 8, 1966, was ultra vires and void, and he seeks an injunction restraining the defendant union from acting on any of those decisions. The two-year period of the plaintiff's suspension under the decision of the executive council of Mar. 13, 1966, will come to an end today three weeks, on Mar. 13, 1968, and the preliminary points are taken on opening the trial of this action (i) that no useful purpose can be served by trying the action because the primary relief which is sought by the plaintiff is declaratory relief, and because the end of the period of suspension is now so near at hand that no practical results will follow from declaring the suspension to be invalid; and (ii) that the case is not one in which the court ought to make a declaration and, perhaps a fortiori, is not one in which the court ought to grant any such injunction as is claimed.

I have been referred to a number of authorities but I do not think that it is necessary for me to go through them, for the problem turns on the question how the court ought to exercise its discretionary power of granting declaratory relief. I can easily understand why, if a plaintiff starts an action seeking declaratory relief in respect of some question of such a kind that no legal results will flow from the declaration which he seeks, the court will be disinclined to entertain his action and to grant any relief in it; and I can understand that the action would be dismissed as being one which it would serve no useful purpose to try. If, however, when the action is instituted the plaintiff has or may have a good ground of complaint, not of an academic character but involving substantial legal issues, it seems hard that, when the case comes on for trial, he should be faced with the suggestion that it ought not to be tried because by then the relief which he seeks has become much less important or has ceased to have practical implications, owing to the lapse of time between the date when he issued the writ and the time when, having regard to the business of the court and the necessary preparatory steps, the action comes on for trial.

In the present case, even today I do not think that it could be said that the question raised in this action is strictly an academic one, for the period of suspension, although it has only a short time to run, is still current and there are three weeks during which, if the decision of the executive council is allowed to stand, the plaintiff will be inhibited by that decision from doing things which otherwise it is possible that he might have been able to do in his capacity as a member of the union. I will say at once that counsel for the union says he cannot see that any such occasion will arise within the period of the next three weeks and counsel for the plaintiff agrees that, so far as he can foresee at the present time, nothing is likely to occur within the next three weeks in respect of which the plaintiff would be in any way affected by the fact that the suspension is in operation. Nevertheless, the issue between the parties is not in this case a purely and exclusively academic one. Moreover, the powers that are here said to have been improperly exercised by the defendant union are disciplinary powers and the question whether they were rightly or wrongly exercised, I think, may well have repercussions which are not in the nature of legal results flowing from that disciplinary action but are repercussions which might affect the plaintiff in his union in the future; if, for instance, he desires to seek office in the future in the union. It would be a hardship on him if he were not now allowed to have the issues which he seeks to raise in the action tried, notwithstanding that the only relief which he seeks is of a declaratory nature supported by the claim for an injunction which can operate, if it is granted at all, only until Mar. 13, 1968. Accordingly, I think that the preliminary point must fail and the action should proceed to trial.

*Ruling accordingly.*

[His LORDSHIP then heard the action and on Feb. 27, 1968, made a declaration that the decisions of the branch committee or of the executive council on Jan. 10, Mar. 13 and May 8, 1966, were void.]

Solicitors: *B. M. Birnberg & Co.* (for the plaintiff); *Blatchfords* (for the defendant union).

[*Reported by JENIFER SANDELL, Barrister-at-Law.*]



## A GOODCHILD v. GREATNESS TIMBER CO., LTD.

[COURT OF APPEAL, CIVIL DIVISION (Lord Denning M.R., Salmon and Edmund Davies, L.J.J.), March 1, 1968.]

*Limitation of Action—Extension of time limit—Discretion—Principle governing determination whether leave should be granted—Reasonable prospect of winning action and obtaining adequate damages on known position, if competently advised—Preliminary issue without evidence directed—Severe injury to plaintiff in 1961—Deterioration in 1965—Plaintiff alleged want of knowledge of future deterioration before 1965—Limitation Act 1963 (c. 47), s. 1 (3), s. 7 (4).*

The three year limitation period for bringing an action for personal injuries should not be extended under s. 1 of the Limitation Act 1963 unless a reasonable person, competently advised, in the position of the plaintiff would not have realised within the three years that he had a “worth-while” cause of action: time should not be extended simply because the plaintiff’s injury turns out after the three years to be more serious than he previously realised (see p. 257, letters B and F, and p. 258, letter B, post).

On Feb. 1, 1961, the plaintiff, while employed by the defendants, tripped and fell when walking across a bridge on the defendants’ premises. He fractured his right shoulder and was unable to work for three months. He received out-patient treatment for nearly two years. In December, 1965, the condition of his right shoulder deteriorated and he returned to hospital for further treatment. On Nov. 4, 1966, the judge granted leave on the plaintiff’s ex parte application under s. 1 of the Limitation Act 1963. In reply to the defendants’ plea that the action was statute-barred the plaintiff pleaded that the fact that the condition of his right arm would deteriorate was outside his actual or constructive knowledge until December, 1965, and that it was a fact of decisive character for the purposes of s. 1 (3) of the Act of 1963. On appeal from an order reversing the master’s order directing that the point raised by the reply should be tried as a preliminary issue without evidence,

**Held:** in the circumstances of the present case the court might be able to say, without further evidence, that any reasonable person in the position of the plaintiff had known everything material to enable him to bring a worth-while action within three years of the accident; the point was, therefore, suitable to be tried by way of preliminary issue without evidence and the order of the master would be restored (see p. 257, letter I, p. 258, letter A, and p. 259, letter A, post).

Per CURIAM: leave for the purposes of s. 1 of the Limitation Act 1963 should not be given as of course, and the evidence in support of an application for such leave should be very carefully scrutinised (see p. 257, letter I, and p. 258, letters E and I, post).

[As to the extension of the limitation period in certain cases, see SUPPLEMENT to 24 HALSBURY’S LAWS (3rd Edn.) para. 381; and for cases on the subject, see DIGEST (Cont. Vol. B) 501, 502, 2022a, 2022aa.

For the Limitation Act 1963 s. 1, s. 2, s. 7, see 43 HALSBURY’S STATUTES (2nd Edn.) 614, 615, 618.]

## I Case referred to:

*Cozens v. North Devon Hospital Management Committee*, [1966] 2 All E.R. 799; [1966] 2 Q.B. 330; [1966] 3 W.L.R. 279; Digest (Cont. Vol. B) 500, 1933a.

**Interlocutory Appeal.**

This was an appeal by the defendants Greatness Timber Co., Ltd., by notice dated Jan. 29, 1968, from an order of CANTLEY, J., dated Jan. 17, 1968, reversing an order made by Master DIAMOND, dated July 6, 1967, ordering that the following preliminary question or issue without evidence be tried: whether the fact set

out in para. 2 of the reply was a fact of a decisive character as defined in s. 7 (4) A of the Limitation Act 1963 and, if not, whether the present proceedings were maintainable by the plaintiff, having regard to the provisions of the Limitation Acts, 1939 and 1954. The grounds of appeal were among others, (i) that the judge was wrong in holding that the court in trying the issue might require to hear evidence, and that, even if the court might require to hear evidence that was a reason for dismissing the defendants' application for a preliminary trial B of the issue and (ii) that the judge gave insufficient weight to the fact that the trial of the issue would result in a substantial saving of costs to the parties.

*A. R. A. Beldam* for the defendants.

*P. J. Cox, Q.C.*, and *R. J. Merrett* for the plaintiff.

**LORD DENNING, M.R.:** The plaintiff, Mr. Goodchild was an office C manager employed by the defendants, the Greatness Timber Co., Ltd., at Westerham in Kent. On Feb. 1, 1961, he tripped and fell as he was walking across a concrete bridge in the timber yard. He broke his right shoulder. He was unable to work for three months. But his employers paid him his full salary. Then he went back to work. He received out-patient treatment for nearly two years. The plaintiff did not make any claim for damages for some years. The D three years period of limitation expired. Still he made no claim. He retired from work. Then nearly five years after the accident in December, 1965, he had greatly increased pain in his arm and shoulder. It considerably affected his daily activities. So he went back to hospital and received further treatment.

On Nov. 7, 1966, he sought to issue a writ against his employers for damages E for the accident in 1961. It was far outside the period of limitation. It was getting on for six years instead of three years. So under the Limitation Act 1963 he applied *ex parte* to the judge for leave. He put in an affidavit by a doctor which said:

"In my opinion the right shoulder became increasingly painful in about December, 1965, and it is also my opinion that this deterioration in his condition could not have been foreseen by the intended plaintiff and that F such symptoms were due to his original injury in February, 1961."

The judge gave leave *ex parte*. When the writ was served, the defendants would have liked to challenge it, but owing to the decision of this court in *Cozens v. North Devon Hospital Management Committee* (1), they could not G challenge it at that time.

The action proceeded. A statement of claim was delivered alleging that the employers were negligent in failing to provide a safe means of access across the bridge. It gave particulars of injuries. The defence pleaded that the action was barred by statute. The reply said:

"2. The fact that the said condition of the plaintiff's right arm would deteriorate was at all times until December, 1965 outside the actual or H constructive knowledge of the plaintiff . . . 3. The said fact was of a decisive character and was included in the facts relating to the cause of action herein."

The defendants ask that this point raised by the reply should be tried as a preliminary issue without any evidence. The question which they suggest is:

"In view of the injuries set out in the particulars of injuries in the statement of claim, whether the fact set out in para. 2 of the reply is capable I of being a fact of a decisive nature as defined in the statute?"

Master DIAMOND made an order for trial of the preliminary issue without evidence. CANTLEY, J., reversed it and gave leave to appeal to this court. Now it comes before us to determine.

(1) [1966] 2 All E.R. 799; [1966] 2 Q.B. 330.

- A** We have had to consider the Limitation Act 1963 on several occasions. It is very difficult to understand. The particular section here in question is s. 7 (4) which defines which facts are of a "decisive character". I can best explain it by stating the way in which it should be applied. Take all the facts known to the plaintiff, or which he ought reasonably to have ascertained, within the first three years, about the accident and his injuries. Assume that he was a
- B** reasonable man and took such advice as he ought reasonably to have taken within those three years. If such a reasonable man in his place would have thought he had a reasonable prospect of winning an action, and that the damages recoverable would be sufficiently high to justify the bringing of an action—in short, if he had a "worth-while action"—then he ought to have brought the action within the first three years. If he failed to bring an action within those three years, he is
- C** barred by the statute. His time will not be extended under the Limitation Act 1963 simply because he finds out more about the accident or because his injuries turn out to be worse than he thought. His time will only be extended if a reasonable man in his place would not have realised, within the first two or three years, that he had a "worth-while action". Then, if it should turn out after the first two or three years that he finds out facts which make it worth while
- D** to bring an action, he must start it within twelve months after he finds out those facts. Then, and then only, will the time limit be extended so that he is not barred.

In this case the plaintiff knew all the material facts relating to his accident and injuries within the first three years, save this: he says that he did not know the "extent of the personal injuries" within s. 7 (3) (b) of the Act of 1963.

- E** Those words, however, are intended to apply to cases where a man has an injury which he reasonably believes is trifling (e.g., a knock on the head) and it is not worth-while to bring an action for it: but then after three years it is found to be far more serious than anyone realised (e.g., to cause a tumour). In such a case the newly found "extent of the injuries" is a fact of a material and decisive character. His time will be extended. But if the injury was from the beginning
- F** fairly serious, or at any rate sufficiently serious to make it worth while to bring an action, then he must bring it within the first three years. The time will not be extended simply because it turns out after three years to be more serious than he at first thought.

- Applying these considerations here, taking the affidavits and the medical reports as they stand, it seems to me that the court, without further evidence,
- G** may be able to say that the plaintiff (or any reasonable person in his position) knew everything which was material within the first three years to bring a worth-while action. He had a badly broken shoulder with a comminuted fracture; he was off work for three months; he was attending hospital for two years. He ought to have brought his action within the first three years. The fact that it has got much worse lately is not a new fact of a decisive character such as to
- H** warrant an extension of time.

- The point is so short that I think it would be advantageous to deal with it as a preliminary point. It must be remembered that DONALDSON, J., granted leave ex parte. The defendants were not heard. By allowing the defendants to take it as a preliminary point, we can enable them to be heard at an early stage without all the expense of witnesses, and so forth: and thus achieve in substance
- I** the result which SALMON, L.J., thought in *Cozen's* case (2) was so desirable. I would add, however, that when application is made for leave under the Limitation Act 1963, a judge in chambers should not grant leave as of course. He should carefully scrutinise the case to see whether it is a proper one for leave. In this difficult case I find myself in agreement with the master. I would reverse the order of the judge and restore the order of the master for a preliminary issue without evidence in a slightly modified form of question. I would allow the appeal accordingly.



**SALMON, L.J.:** I agree. This is a difficult case. The difficulty is due chiefly to the obscure way in which the Limitation Act 1963 has been drafted. Although I appreciate the cogent reasons on which the judge based his decision, on the whole I have come to the conclusion that the order of Master DIAMOND ought to be restored. This, I think, may well dispose of the whole issue in respect of the Limitation Act 1963. A

In my view s. 7 (4) of that Act of 1963 means that if at any particular time within the period of limitation a reasonable person in the plaintiff's position on the facts known to him would have concluded that there was a reasonable prospect of his succeeding in an action, and that as a result there would be an award of damages sufficient to justify bringing the action, then if he does not issue a writ within that period, the action is statute-barred. On the admitted facts, there seems much to be said for the view that the present is such a case. A reasonable man who concludes that there is such a prospect may nevertheless elect not to bring an action. He may do this for many reasons. For example, it may be because of the regard he has for the defendants or perhaps because he is averse to litigation. If, however, he should appreciate as a reasonable man that the damages would be sufficient to justify bringing the action, his election not to do so, in my view, prevents him from bringing it after the three years have expired. I would accordingly allow the appeal. B  
C  
D

I want to add only this, and I do not intend it as any criticism of the judge who made the order on the plaintiff's ex parte application for leave under s. 2 of the Act of 1963. It has now been decided that defendants have no right to go back to the High Court to challenge such orders (*Cozens v. North Devon Hospital Management Committee* (3)). Accordingly, it is particularly important that when such an application is made, the order should not follow as a matter of course. The evidence in support of the application ought to be very carefully scrutinised, and, if that evidence does not make it quite clear that the plaintiff comes within the terms of the Limitation Act 1963, then either the order ought to be refused or the plaintiff ought perhaps to be given an opportunity of supplementing his evidence. It must, of course, be assumed for the purpose of the ex parte application that the affidavit evidence is true; but it is only if that evidence makes it absolutely plain that the plaintiff is entitled to leave that the application should be granted and the order made, for, as I ventured to point out in the *Cozen's* case (3), such an order may have the effect of depriving the defendant of a very valuable statutory right. It is not in every case in which leave has been given ex parte on inadequate evidence under s. 2 that the defendant will be able to mitigate the injustice which this may have done him by obtaining an order for the trial of a preliminary issue. E  
F  
G

**EDMUND DAVIES, L.J.:** Were the order of the judge to stand, the provisions of the Limitation Act 1963 would not only qualify in a restricted way the operation of the earlier statute of limitation but would also go largely to nullify it in a substantial number of cases. It would enable an injured person, whenever he discovered that his injuries were more serious in their consequences than he had at first realised, to institute proceedings even though his initial injuries were clearly such as to have well merited an action within the usual three years statutory period. In my judgment, the wording of s. 7 (4) prohibits any such implementation of the Act of 1963. H

I desire to say nothing as to the original granting of leave by DONALDSON, J., on the ex parte application of the plaintiff, but I do desire to concur in and respectfully underline the observations which have just been made by SALMON, L.J., in relation to the care called for on the hearing of such an application, for there is a real risk of prejudice resulting to a defendant who is being sued after a long period of years. DONALDSON, J., of necessity came to his decision on I

**A** an ex parte basis. Now that the whole material has been examined and this court has had the advantage of hearing counsel on both sides, I concur with my lords in holding that this appeal should be allowed and the master's order restored.

*Appeal allowed.*

**B** Solicitors: *E. P. Rugg & Co.* (for the defendants); *Montagu's and Cox & Cardale* (for the plaintiff).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

## **C** MILK MARKETING BOARD *v.* HALL AND OTHERS.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Ashworth and Blain, JJ.), March 25, 1968.]

*Food and Drugs—Sale—Milk not of the substance demanded—Warranty as defence—Milk Marketing Board—Milk sold by farmers to board under warranty—Milk purchased by wholesaler from board under warranty—Pasteurisation, testing and bottling by wholesalers—Subsequent sale to retailer—Sale by him to sampling officer—Excess of penicillin in milk—Board brought into proceedings consequent on defence of wholesalers relying on warranty—Whether defence of warranty by farmers available to board—Food and Drugs Act, 1955 (4 & 5 Eliz. 2 c. 16), s. 115 (1).*

**E** In the defence afforded by s. 115 (1)\* of the Food and Drugs Act, 1955, the temporal element which is enacted in para. (c) of sub-s. (1), namely that the food was "then" in the same state, refers to the time of the "alleged offence" specified in para. (b), viz., if the offence is a sale by a retailer, the time of that sale; the reference is not to the time of the act or default of another person brought before the court on proceedings against him, not the retailer, by virtue of s. 113 (3)† of the Act of 1955 (see p. 263, letters C, E and G, post).

**F** The appellant board purchased five lots of milk from five farmers, in each case under a written warranty that it was pure new milk, sweet, clean, marketable with all its cream and without the addition of any preservatives. The same day the board sold it to wholesalers, the Central Dairies, under the same warranty. The board had no reason to suppose that the milk was otherwise than as warranted. Central Dairies broke bulk, pasteurised, tested and bottled the milk and sold it to a retailer on the same day. The retailer sold two bottles of the milk on the next day to the first respondent, a sampling officer. The milk was found to contain an excess of penicillin, which had got into the milk from one of the five farms, but it was not known which farmer had supplied the milk. Under s. 113 (3)† of the Food and Drugs Act, 1955, Central Dairies proved that they had exercised all due diligence and had purchased the milk from the appellants under a written warranty, and, pursuant to s. 113 (1) the board were brought before the court. On appeal by the board against conviction,

**H** Held: the board were rightly convicted for the reason stated at letter E, above (see p. 263, letters F and G, post).

**I** Appeal dismissed.

[As to the standard of quality for milk and the position where milk is sold in the condition in which it was given by cows, see 17 HALSBURY'S LAWS (3rd Edn.) 534, 535, paras. 1002, 1003; and for cases on the subject, see 25 DIGEST (Repl.) 145-149, 592-619.

\* Section 115 (1), so far as material, is set out at p. 262, letters G and H, post.

† Section 113 (3) is set out at p. 262, letter B, post.

As to the defence of warranty in proceedings for offences under the Food and Drugs Act, 1955, see 17 HALSBURY'S LAWS (3rd Edn.) 598, para. 1154. A

For the Food and Drugs Act, 1955, s. 113, s. 115, see 35 HALSBURY'S STATUTES (2nd Edn.) 194, 197.]

### Case Stated.

This was a Case Stated by justices for the county of Salop sitting at Oswestry in respect of their adjudication as a magistrates' court on Dec. 29, 1967. On Oct. 4, 1966, an information was preferred by the respondent, George Raymond Hall against Elwynne Owen-Jones and Elmira Francis Jones, the second respondents (hereinafter called "Central Dairies") that on Sept. 14, 1966, John Edward Jones of 4, Stanley Place, Salop Road, Oswestry in the county of Salop did unlawfully sell to the prejudice of the respondent, the purchaser, certain food namely milk which contained penicillin and which was not of the substance demanded by the purchaser contrary to s. 2 of the Food and Drugs Act, 1955. The Salop county council, the food and drugs authority concerned, being reasonably satisfied that the offence was due to the act or default of Central Dairies and that the said John Edward Jones could establish a defence under s. 113 (1) of the Food and Drugs Act, 1955, Central Dairies were summoned to answer the said information in accordance with s. 113 (3) of the Food and Drugs Act, 1955. Central Dairies in turn alleged that the contravention was due to the act or default of the appellant, the Milk Marketing Board, and applied that the board be brought before the court to answer the charge pursuant to the said section. On Nov. 25, 1966, the justices started to hear the said information against Central Dairies and held that Central Dairies had a defence under s. 115 of the Food and Drugs Act, 1955. Accordingly they dismissed the information against Central Dairies and the board. The present respondent appealed by way of Case Stated and on the hearing of the appeal\* on July 6, 1967, it was ordered by the High Court that the Case be remitted to the justices with the opinion of the High Court that they were wrong in finding that Central Dairies had a defence under the said s. 115 and that they should continue the hearing under s. 113 (1) of the Act of 1955. On Sept. 29, 1967, the justices continued the hearing under s. 113 (1) of the Act of 1955, and found the following facts. (a) The respondent was at all material times the Assistant County Public Health Inspector of Salop County Council and an authorised sampling officer; (b) Central Dairies ("the dairies") carried on business at all material times as a wholesale dairy; (c) at about 12.30 p.m. on Sept. 14, 1966, the respondent in his capacity as sampling officer purchased two pint bottles of Channel Islands pasteurised milk from one John Edward Jones, a milk retailer ("the retailer") of 4, Stanley Place, Salop Road, Oswestry; (d) before and after purchasing the same the respondent observed all the required statutory formalities; (e) the respondent properly took samples of the milk and submitted the same to the public analyst who found that it contained penicillin in excess of the recommended limit of 0.05 international units per millilitre; (f) the penicillin was present in the milk when the respondent purchased the same; (g) the penicillin was present when the milk came from the cow; (h) the retailer had purchased the said milk from the dairies on Sept. 13, 1966; (i) the dairies had purchased the said milk from the board on Sept. 13, 1966; (j) property in the milk passed to the dairies when the board delivered the milk in churns to Central Dairies' premises; (k) between the time of purchase of the milk by the dairies and the time when they sold and delivered the same to the retailer, the dairies had bulked the milk from separate churns, pasteurised the milk, tested and bottled the same; (l) the dairies had proved that the contravention of s. 2 of the Act of 1955 was due to the act or default of the board and that the dairies had used all due diligence to secure that the provisions in question were complied with; (m) the board had bought the milk in churns from five farmers. The contracts between the board and these five farmers were in substantially identical terms. In the case of each

\* See *Hall v. Owen-Jones and Jones (trading as Central Dairies)*, [1967] 3 All E.R. 209.



A of the five contracts the appellants bought the milk with a written warranty that each and every consignment of milk should at the time when the property passed to the appellants be pure new milk, sweet, clean and marketable with all its cream and without the addition of any preservative. Further, there was a written warranty contained in labels attached to each churn in the following terms: "Warranted Pure New Milk, sweet clean and marketable with all its cream and without the addition of any preservative".

B In the case of each of the five contracts the property in the milk passed to the board, at the directed place of delivery, which was the dairies' premises, and at the same place and point of time property in the milk passed from the board to the dairies; (n) the board had complied with the formalities required by s. 115 (2) (a) of the Act of 1955; (o) at the time when the board sold the milk to the dairies the board had no reason

C to suppose that the milk was otherwise than as warranted; (p) at the time when the retailer sold the milk to the respondent the board had no reason to suppose that the milk was otherwise than as warranted; (q) at the time when the board sold the milk to the dairies the milk was in the same state as when they purchased it; (r) at the time when the retailer sold the milk to the respondent the milk was not in the same state as when the board had purchased it having in the meantime been

D bulked from the separate churns and pasteurised tested and bottled by the dairies.

In view of the justices' finding set out in para. 3 (l) hereof they dismissed the information against the dairies and continued with the hearing against the board.

On behalf of the board it was contended before the justices that they had established a defence of warranty under s. 115 of the Act of 1955, and that the word "then" in s. 115 (1) (c) referred to the time of the board's act or default to which the contravention of the Act of 1955 was due namely their sale of the milk to the dairies. On behalf of the respondent it was contended that the board had not established a defence of warranty under s. 115 of the Act of 1955 on the grounds that—(a) the word "then" in para. (c) of s. 115 (1) referred to the time of the offence of which the board might be convicted namely the sale by the

E retailer to the respondent at which time the milk was not in the same state as when the board purchased it; and (b) that the warranty defence was not available to the board where separate lots of milk were bought from different persons although each lot was bought with the appropriate warranty.

The justices were of opinion that the board had proved what was required by s. 115 (1) (a) and (b), but they were of opinion that they had not proved what was

G required by s. 15 (1) (c) since in their view the word "then" in sub-s. (1) referred to the time of the sale by the retailer to the respondent at which time the milk was not in the same state as when the board had purchased it. Accordingly they convicted the board and fined them £25 and ordered them to pay £75 costs to the respondent and £140 costs to the dairies.

The questions for the opinion of the High Court were—1. Whether the justices

H were right in law holding that the word "then" in s. 115 (1) (c) of the Food and Drugs Act, 1955, referred to the time of the sale by the retailer to the respondent; 2. Whether the justices were right in law in holding that the board had proved what was required by s. 115 (1) (a).

*David Kemp* for the appellants.

*A. F. B. Scrivener* for the respondent.

I

**LORD PARKER, C.J.:** On Sept. 13, 1966, the Milk Marketing Board ("the board") purchased five lots of milk from five farms. That milk was subject in each case to a warranty that it was pure new milk, sweet, clean and marketable with all its cream and without the addition of any preservatives. The same day the board sold that milk to Central Dairies ("the dairies"), again under the same warranty. The property in each case passed at the same time, namely on delivery to the dairies. The dairies broke bulk, pasteurised and bottled the milk, and in due course sold the bottled milk to one John Edward

Jones, a retailer. That was all on Sept. 13, and on the next day, Sept. 14, the retailer sold two bottles of milk to the present respondent, the sampling officer. That milk was found to have an excess of penicillin and it is quite clear that the penicillin got into the milk in the case of one of the five farmers, a man unknown.

This was a case in which the prosecution have availed themselves of s. 113 (3) of the Food and Drugs Act, 1955, which provides that:

"Where it appears to the authority concerned that an offence has been committed in respect of which proceedings might be taken under this Act against some person [in this case the retailer] and the authority are reasonably satisfied that the offence of which complaint is made was due to an act or default of some other person and that the first-mentioned person could establish a defence under sub-s. (1) of this section, they may cause proceedings to be taken against that other person without first causing proceedings to be taken against the first-mentioned person."

That is all I need read at the moment of that section, and that having been done, the dairies in turn alleged that the contravention was due to the act or default of the present appellant, the board, and accordingly pursuant to s. 113 (1) of the Act of 1955 the board were brought before the court.

Now, in these proceedings the dairies relied on the warranty under which the board had sold the milk to them, and the justices upheld that defence, namely the defence of warranty. On appeal to this court by way of Case Stated, it was held (1) that the justices were wrong, in that a warranty defence is only available if the milk was in exactly the same state when sold as when it was purchased. The court held that it was not in such a state, because the dairies had broken bulk, had pasteurised and had bottled the milk. Accordingly the matter went back to the justices to consider the position of the board.

In the case which has now been stated, the justices come to the conclusion that the dairies had used all due diligence to secure that the provisions of the Act of 1955 were complied with, but the board sought to say that they were entitled to rely on the warranties which they had received from the farmers. The justices held that they could not avail themselves of the warranty defence, and accordingly convicted the board. The question is whether the board were rightly convicted. That in turn depends on the proper construction of s. 115 of the Food and Drugs Act, 1955, and in particular sub-s. (1). Subsection (1) is in these terms

"Subject to the provisions of this section, in any proceedings for an offence under this Act . . . being an offence consisting of selling . . . it shall be a defence for the defendant to prove—

"(a) that he purchased it as being an article or substance which could lawfully be sold or otherwise dealt with as aforesaid, or, as the case may be, could lawfully be so sold or dealt with under the name or description or for the purpose under or for which he sold or dealt with it, and with a written warranty to that effect, and

"(b) that he had no reason to believe at the time of the commission of the alleged offence that it was otherwise, and

"(c) that it was then in the same state as when he purchased it."

The sole question is as to the time to which the word "then" refers. The magistrates held that "then" refers to the alleged offence in sub-s. (1) (b) and that the alleged offence could only be the offence resulting from the sale by the retailer to the sampling officer. If that is right, then at that stage the milk was not in the same state as when the board purchased it, and the warranty defence is not available.

In this appeal counsel for the appellant has urged that this construction does produce in certain cases a very unfair result and he says, amongst other things,

(1) See *Hall v. Owen-Jones and Jones (trading as Central Dairies)*, [1967] 3 All E.R. 209.

A that one should if possible give the words a construction which will result in testing the defendant's state of mind, whether he had reason to believe or not, in relation to a time when the article in question is under his control. I confess that I sympathise with that view and in addition sympathise with the board, for, unless that is right, they are quite clearly going to be in grave difficulty in relying on the warranty, because, when ultimately the bottled milk is sold, it is really impossible then to know from which farm and which farmer the milk in the bottles originally emanated, so that they will be unable to bring the farmer before the court and secure his conviction and their own acquittal.

B Having said that, however, there is no doubt that one has got to construe the section and in my judgment the construction is perfectly plain. In s. 115 (1) (c) the word "then" clearly refers back to the words "alleged offence" in para. (b) and the word "offence" in para. (b) clearly refers back to the opening words of the section "in any proceedings for an offence". The proceedings for an offence related to the sale by the retailer to the sampling officer. The matter is made almost plainer when one realises that under the third party procedure in s. 113, when a third party is brought before the court, he can only be convicted of the offence, i.e., the original offence. The words in s. 113 (1) are

D "... if, after the contravention has been proved, the original defendant proves that the contravention was due to the act or default of that other person, that other person may be convicted of the offence ...",

E the offence being the last selling, in this case by the retailer to the sampling officer. In my judgment there is no means of getting away from that, and I find it quite impossible to accede to counsel for the appellant's suggestion that the words "then" and "alleged offence" in s. 115 (1) should be given a completely different meaning, namely meaning act or default as opposed to contravention, the act or default of the person who is brought before the court. In my judgment that would amount to a complete re-writing of the subsection and I am unable to accede to the argument. In my judgment the justices came to the right conclusion. This appeal is dismissed.

F ASHWORTH, J.: I agree that in the Food and Drugs Act, 1955, if counsel for the appellant were right, s. 115 (1) (b) would have to be construed as meaning that "he had no reason to believe at the time when he sold the article that it was otherwise than in the same state". That does involve not interpretation, but re-writing, the subsection, and for reasons given by LORD PARKER, C.J., I share his views.

H BLAIN, J.: I agree. I will add only this, that in s. 115 (1) of the Food and Drugs Act, 1955, Parliament appears to have made it plain that to constitute the defence, the defendant has to prove three things: (a) goes to his act or default, (b) goes to his state of mind in so far as it is a matter of knowledge and (c) is absolute and has nothing to do with the state of mind.

*Appeal dismissed.*

Solicitors: *Eldis & Fairbairn* (for the appellants); *Sharpe, Pritchard & Co.* (for the respondent).

[Reported by S. A. HATTEEA, Esq., Barrister-at-Law.]



NOTE.

## Re VICKERS &amp; BOTT, LTD.

[CHANCERY DIVISION (Pennycuick, J.), February 26, 1968.]

*Company—Registration—Restoration of name to register—Service of petition—Name of company struck off register in 1963—Sum of money subsequently becoming payable to company—Creditors' petition for restoration of company's name to register.*

[As to the procedure for restoration of a company's name to the register, see 6 HALSBURY'S LAWS (3rd Edn.) 789, para. 1591; and for cases on the subject see 10 DIGEST (Repl.) 1142, 7950-7957.]

For the Companies Act, 1948, s. 353 (5), (6), see 3 HALSBURY'S STATUTES (2nd Edn.) 727.]

Case referred to:

*Kenyon (Donald), Ltd., Re*, [1956] 3 All E.R. 596; [1956] 1 W.L.R. 397; Digest (Cont. Vol. A) 200, 7949a.

**Petition.**

The Commissioners of Customs and Excise as creditors presented a petition under s. 353 (6) of the Companies Act, 1948, for the restoration of the above-named company's name to the register of companies. The company had been ordered to be compulsorily wound-up on Apr. 11, 1949, and a liquidator was subsequently appointed. In the course of the winding-up dividends were paid to preferential creditors (including the commissioners) amounting to six shillings in the pound. On May 11, 1960, the liquidator was released pursuant to s. 251 of the Companies Act, 1948, and on May 28, 1963, at the completion of the winding-up the company's name was struck off the register of companies under s. 353 (5) of the Act of 1948. Subsequently a sum of £700 became payable to the company by way of dividend in a bankruptcy.

*L. J. Bromley* (for *J. P. Warner*): It is submitted that it was correct that the petition was not served on anyone. When the company's name is restored the company will continue in liquidation with the Official Receiver as liquidator. There is no letter exhibited in evidence from the Treasury Solicitor relating to bona vacantia. It is submitted that where a petition under s. 353 (6) is presented by a Crown department the question whether the Treasury Solicitor has any objection is an internal one to be dealt with by inter-departmental consultation. In fact there is no objection.

No special order relating to limitation of actions is required in view of the wording of s. 353 (6); *Re Donald Kenyon, Ltd.* (1) is distinguishable.

**PENNYCUICK, J.:** It does not apply where the company is already in liquidation.

*L. J. Bromley:* I ask that the name of the company be restored to the register of companies and that the commissioners' costs of the petition be taxed and included in the expenses of the winding-up.

**PENNYCUICK, J.:** Yes, I will make that order.

Solicitors: *Solicitor, Commissioners of Customs and Excise* (for the petitioners).

[Reported by JENIFER SANDELL, Barrister-at-Law.]

A

## APPLEBY v. SLEEP.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Ashworth and Blain, JJ.), March 22, 1968.]

B

*National Health Service—Pharmaceutical services—Supply of medicine or drug—Contractual relationship between chemist and National Health Service Executive Council that of contract for services—Supply of drug by chemist against a prescription—Whether a sale to executive council—Sliver of glass in bottle of medicine—Whether offence of selling drug not of the nature, etc. demanded—National Health Service Act, 1946 (8 & 10 Geo. 6 c. 81), s. 38—National Health Service (General Medical and Pharmaceutical Services) Regulations 1966 (S.I. 1966 No. 1210), reg. 23, Sch. 4, Pt. 1—Food and Drugs Act, 1955 (4 & 5 Eliz. 2 c. 16), s. 2 (1).*

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A woman took to the pharmacy of the respondent, who was a registered pharmaceutical chemist, a National Health prescription for Penicudural syrup obtained from her family doctor. She was supplied with a bottle of the syrup. When on the following Monday her child came to take a dose, she saw a lump in the medicine as it came out of the bottle. The lump was a piece of glass. The respondent was charged with selling to the prejudice of the National Health Service Executive Council, the purchaser thereof, a drug which was not of the quality demanded by the purchaser in that it contained a sliver of glass contrary to s. 2\* of the Food and Drugs Act, 1955. Under the scheme of the legislation, s. 38† of the National Health Service Act, 1946, taken in conjunction with reg. 23† of the National Health Service (General Medical and Pharmaceutical) Regulations 1966 and the terms of service in Pt. 1 of Sch. 4 to those regulations, the council were under a duty to provide pharmaceutical services; only those chemists who applied and joined were included in the list of chemists willing to serve, and each became liable to the terms of service in Pt. 1 of Sch. 4, and was under obligation to supply persons with drugs or medicines on presentation of the necessary prescription, payment being made pursuant to reg. 26 and in accordance with the drug tariff. On appeal from dismissal of the charge,

**Held:** the true contractual relationship between the respondent and the executive council was that of a contract for services, and what the respondent was paid was remuneration for services; there was not a sale of the drug by the respondent to the executive council, and accordingly the charge under s. 2 of the Food and Drugs Act, 1955, had been rightly dismissed (see p. 269, letters B, G and I, and p. 270, letter A, post).

Appeal dismissed.

[As to arrangements for pharmaceutical services, see 27 HALSBURY'S LAWS (3rd Edn.) 604, 605, para. 1124.]

H

For the National Health Service Act, 1946, s. 38, see 15 HALSBURY'S STATUTES (2nd Edn.) 372.

For the Food and Drugs Act, 1955, s. 2, see 35 HALSBURY'S STATUTES (2nd Edn.) 97.]

### Case Stated.

I

This was a Case Stated by the justices for Hampshire in respect of their adjudication as a magistrates' court, sitting at Hythe on Oct. 11, 1967. On June 30, 1967, an information was preferred by the appellant Fred Roper Appleby, clerk to the Rural District Council of New Forest, Hampshire, against the

\* Section 2, so far as material, provides: "(1) if a person sells to the prejudice of the purchaser any . . . drug which is not of the nature, or not of the substance, or not of the quality, of the . . . drug demanded by the purchaser, he shall . . . be guilty of an offence."

† Section 38, so far as material, is set out at p. 267, letters E to H, post. Regulation 23 and Sch. 4, Pt. 1, so far as relevant are set out at p. 268, letters B to F, post; reg. 26, so far as material, is set out at p. 268, letters G to I, post.

respondent, Ernest Charles Sleep, charging that he sold to the prejudice of the National Health Service Executive Council for Hampshire the purchaser thereof a certain drug, namely, thirty millilitres of Penedural syrup which was not of the quality of the drug demanded by the purchaser in that the syrup contained a sliver of glass, contrary to s. 2 of the Food and Drugs Act, 1955. The following facts were found. On Apr. 7, 1967, Mrs. A. R. Magee took a national health prescription obtained from her family doctor to the Ferry Pharmacy at 19, High Street, Hythe, which was at all material times owned by the respondent. She was handed a bottle of Penedural syrup as called for in the prescription form. The prescribed dose was four half-teaspoon doses daily for her child. At 5.30 p.m. on the following Monday, Mrs. Magee saw a lump in the medicine as it came out of the bottle which she found to be a piece of glass. The respondent was at all material times a registered pharmaceutical chemist and included in the pharmaceutical list and was engaged under a contract with the National Health Service Executive Council for Hampshire. The contract, in accordance with reg. 23 of the National Health Service (General Medical and Pharmaceutical Services) Regulations 1966, incorporated the terms of service contained in Part 1 of Sch. 4 to these regulations. Payment was made to the respondent in respect of the drug in accordance with the drug tariff, which payment included the price of the drug, i.e., 54d.

It was contended by the respondent that there was no definition of sale in the Food and Drugs Act, 1955; it was necessary to refer to the Sale of Goods Act, 1893; s. 1 of the Sale of Goods Act provided that a contract for the sale of goods was a contract whereby the seller transferred or agreed to transfer the property in goods to the buyer for a money consideration called the price; in *Pfizer Corp'n. v. Ministry of Health*\* in the court of first instance, Court of Appeal and House of Lords, it had been held that the supply of drugs to a patient under a national health service prescription was not a sale to the patient; the National Health Service Act, 1946, and the above-mentioned regulations referred throughout to a "supply" and not to "sale"; the contract between the respondent and the National Health Service Executive Council was a contract of service and not a contract for sale; the property in the drug did not pass to the National Health Service Executive Council, but passed to the patient (see *Pfizer Corp'n. v. Ministry of Health*, per WILLMER, L.J., and DIPLOCK, L.J.); as the property in the drug did not pass to the National Health Service Executive Council, there was no sale to the council. Section 135 (2) of the Food and Drugs Act, 1955, provided (in some cases) that the supply of food should be deemed to be a sale. That section did not extend to drugs. It was contended by the appellant that the meaning of "sale" in the law relating to food and drugs was wider than the definition of "sale" in s. 1 of the Sale of Goods Act, 1893. Section 18 of the Pharmacy and Poisons Act, 1933, referred only to "sales"; s. 19 of that Act exempted from s. 18 certain supplies in certain circumstances. The supplies not exempted were by implication included in s. 18 and were considered to be sales for the purpose of that Act. Further, in s. 19 (3), proviso (a) of the same Act, as amended by the National Health Service Act, 1946, s. 76, and Sch. 10, Pt. 1, the section actually referred to the supply of medicines, on prescription, under the Act of 1946. If the definition in s. 1 of the Sale of Goods Act, 1893, was held to apply, then there was a sale within that section under which it was agreed that the property in the goods should pass to the buyer (i.e., the National Health Service Executive Council). Under s. 18 of the Sale of Goods Act, 1893, r. 5 (1), the property in unascertained goods sold by description passed to the buyer when the goods of that description were unconditionally appropriated to the contract. Any property released by the National Health Service Executive Council in favour of the patient was conditional on the patient using the drug in accordance

\* [1963] 1 All E.R. 590; revsd., C.A., [1963] 3 All E.R. 779; affd., H.L., [1965] 1 All E.R. 450.



A with the prescription. The definition in s. 135 (2) of the Food and Drugs Act, 1955, was included for the purpose of meeting the case where food was supplied, such as sauce and sugar in restaurants, and no payment was made. *Pfizer Corp. v. Ministry of Health*\* was concerned with whether there had been a sale by a national health hospital to the patient. It was not considered whether there was a sale to anyone else. The prosecution accepted that there was no sale

B to the patient in the present case.

The justices upheld a submission by the respondent that there was no case to answer and dismissed the information, and the appellant now appealed.

The authority and cases noted below† were cited during the argument.

A. F. B. Scrivener for the appellant.

R. I. S. Bax, Q.C., and J. R. Peppitt for the respondent.

C LORD PARKER, C.J.: Let me say at once, before turning to the very short facts of the case, that the sole question here was whether there ever was a sale by the respondent chemist to the National Health Service Executive Council. The short facts were that, on Apr. 7, 1967, a Mrs. Magee took a national health prescription obtained from her family doctor to the respondent's pharmacy.

D She was then handed a bottle of Penedural syrup as called for by the prescription form, and, when her child came to take it, Mrs. Magee saw a lump in the medicine as it came out of the bottle, which she found to be a piece of glass.

One starts here with the National Health Service Act, 1946. Section 38 of that Act provides:

E “(1) It shall be the duty of every Executive Council in accordance with regulations to make as respects their area arrangements for the supply as from the appointed day, whether at a health centre or otherwise, of proper and sufficient drugs and medicines and prescribed appliances to all persons in the area who are receiving general medical services . . . and the services provided in accordance with the arrangements are in this Act referred to as ‘pharmaceutical services’.

F “(2) Regulations may make provision for securing that arrangements made under this section will be such as to enable any person receiving general medical services to obtain proper and sufficient drugs and medicines and prescribed appliances, if ordered by the medical practitioner rendering those services, from any persons with whom arrangements have been made under this section, and to enable any person receiving general dental

G services to obtain prescribed drugs and medicines, if ordered by the dental practitioner rendering those services, from any persons with whom such arrangements have been made, and the regulations shall include provision—

H (a) for the preparation and publication of lists of persons who undertake to provide pharmaceutical services; and (b) for conferring a right, subject to the provisions of this Part of this Act relating to the disqualification of practitioners, on any person who wishes to be included in any such list to be so included for the purpose of supplying such drugs, medicines and appliances as that person is entitled by law to sell . . .”

Section 39 (2) provides:

I “Except as may be provided by regulations, no arrangements for the dispensing of medicines shall be made with persons other than persons who are registered pharmacists or are authorised sellers of poisons within the meaning of the Pharmacy and Poisons Act, 1933, and who undertake that

\* [1965] 1 All E.R. 450.

† BENJAMIN ON LAW OF SALE OF PERSONAL PROPERTY (8th Edn. 1950), pp. 1, 7, 327, 329; *Berry v. Henderson*, (1870), L.R. 5 Q.B. 296; *R. v. Wood Green Profiteering Committee*, *Ex p. Boots Cash Chemists (Southern) Ltd.*, (1920), 122 L.T. 120; *Watson v. Coupland*, [1945] 1 All E.R. 217; *Pfizer Corp. v. Ministry of Health*, [1963] 1 All E.R. 590; [1964] Ch. 614; [1963] 3 All E.R. 779; [1964] 1 Ch. 633; [1965] 1 All E.R. 450; [1965] A.C. 512.

all medicines supplied by them under the arrangements made under this Part of this Act shall be dispensed either by or under the direct supervision of a registered pharmacist or by a person who for three years immediately before Dec. 16, 1911, acted as a dispenser to a medical practitioner or a public institution.” A

The regulations in question now are the National Health Service (General Medical and Pharmaceutical Services) Regulations 1966 (1). Regulation 23 in Part 7 dealing with chemists provides that: B

“The arrangements which a council are required by s. 38 of the Act to make for the supply of drugs and medicines and prescribed appliances to persons receiving general medical services, and of prescribed drugs and medicines to persons receiving general dental services, shall incorporate the terms of service contained or referred to in Part 1 of Sch. 4 to these regulations.” C

Part 1 of Sch. 4 contains a number of paragraphs, the more important of which are these:

“3 (1) A chemist shall supply with reasonable promptness to any person who presents an order for drugs or appliances on a prescription form provided for the purpose by a council and signed by a practitioner on the medical list of a council or by his deputy or assistant such drugs as may be so ordered.” D

“9 (1) A chemist is required to furnish to the council or to such other person or body as they may direct, on dates to be appointed by the Minister, the forms on which the orders for drugs and appliances supplied by him were given, arranged in such manner as the council may direct, together with a statement of accounts containing such particulars relating to the provision by him of pharmaceutical services as the council, with the approval of the Minister, may from time to time require . . .” E

“(4) Payment shall be made for drugs and appliances in the manner provided for in the drug tariff for the time being in force and the payment to be made for containers and in respect of dispensing fees shall be calculated in the manner set forth therein.” F

I turn back to Part 7 of the regulations themselves, and the only other regulations to which I need refer are reg. 26 and reg. 31. Regulation 26, which is headed “Prices and standards of drugs and appliances”, provides:

“For the purpose of enabling arrangements to be made for the supply of drugs and appliances of proper quality, the Minister shall cause to be prepared a statement (in these regulations referred to as ‘the drug tariff’) which shall include—” G

“(a) the prices on the basis of which the payment for drugs and appliances ordinarily supplied is to be calculated; (b) the method of calculating the payment for drugs not mentioned in the drug tariff; (c) the method of calculating the payment for containers; (d) the dispensing or other fees payable in respect of the supply of drugs and appliances . . .” H

“The prices referred to in para. (a) of this regulation may be fixed prices or may be subject to monthly or other periodical variation to be determined by reference to fluctuations in the cost price of drugs and appliances.” I

Regulation 31 (1) provides that:

“A practitioner or chemist shall properly submit applications for the payment of fees, allowances and remuneration which are required to be claimed under these regulations on the appropriate form and in the appropriate manner.”

A Pausing there, it is clear that the scheme here is that the council are under a duty to provide services. For that purpose they have to draw up a list of chemists willing to serve; only those chemists are included who apply to go on the list and join the service, and any chemist who does so becomes liable to the terms of service set out in Part 1 of Sch. 4 to the regulations. Further, he is under an obligation to supply any person with the drugs or medicine who presents the necessary prescription. In return he gets payment from the council according to the drug tariff in respect of each supply against a prescription.

As I have said, the sole question here is whether there can properly be said to have been a sale by the chemist to the council. The first thing that is clear is that there will have been no sale by the chemist to the patient, the person presenting the prescription. Not only has that been so held (2), but it is clearly the case, because the patient is not paying for the medicine or drugs, and that is so even if there is a prescription charge. It does not, however, follow that, because there is not a sale to the patient, albeit there is a supply (and for my part I think that the property passes to the patient), there is a sale to anyone else. The way, however, counsel for the appellant puts it is this. He says that notionally, when the chemist puts down the drug or medicine on the counter he has passed the property to the council, and that he then under his terms of service on behalf of the council supplies, or delivers, that drug or medicine to the patient. He says that the contract here between the council and the chemist is a purchase by the council of the drug or medicine on the prescription form, that there is an undertaking to pay, and that the property passes as soon as the goods are appropriated, and, as he would say, as soon as they are put on the counter.

For my part, I find that the idea of property passing to the council is a notional idea and not in any sense realistic, and I think that where I differ from counsel for the appellant is in his general approach. He says: never mind the scheme, never mind the services that were set up and to be rendered; if in the performance of those services he can find any transaction which falls within the definition of a sale, then there has been a sale, and, if there has been a sale to the council, then s. 2 of the Food and Drugs Act, 1955, applies. I myself do not think that that is the right approach. I think that one must take a broader view and say: what was the real relationship between the council and the chemist? As I see it, it was a contract for the rendering of a service; after all, it was pharmaceutical services which were being dealt with. Any chemist who came on the list undertook the obligations to perform services. He entered into an obligation (and I need not read the provisions in any detail) to supply with reasonable promptness any order appearing on a prescription form; he undertook to keep open for certain periods, and he undertook to supply free of charge containers for the drugs or medicine. His payment is referred to as a payment in para. 9 of Part 1 of Sch. 4 to the regulations for pharmaceutical services; under reg. 26 of the regulations it is not a price for the medicine or drugs that he is being paid, but a sum calculated, true by reference to the basic price of the medicine or drugs, but only calculated thereon, and being such as will be remuneration for his general services. Indeed, reg. 31 to which I have already referred, dealing with overpayments, refers again to remuneration.

In my judgment, the contract embraced in the statutory scheme between the council and chemists was a contract for services, and what was being paid was remuneration for the services; it was in no sense a contract to pay the price of goods plus certain outside services. That being so, as it seems to me, the transaction does not fall within s. 2 of the Food and Drugs Act, 1955, and the justices were right in dismissing this information. I agree with them, and I would dismiss this appeal.

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(2) *Pfizer Corp. v. Ministry of Health*, [1965] 1 All E.R. 450.



ASHWORTH, J.: I agree.

BLAIN, J.: I agree.

*Appeal dismissed.*

Solicitors: *Sharpe, Pritchard & Co.*, agents for *F. R. Appleby*, Lyndhurst, clerk to New Forest Rural District Council (for the appellant); *Lamartine, Yates & Lacey* (for the respondent).

[*Reported by N. P. METCALFE, Esq., Barrister-at-Law.*]

**R. v. HASTINGS LICENSING JUSTICES, *Ex parte*  
JOHN LOVIBOND & SONS, LTD. AND OTHERS.**

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Ashworth and Blain, JJ.),  
March 19, 1968.]

*Certiorari—Costs—Party not appearing—Matter litigated until after applicants' briefs delivered—Costs awarded against respondents, who did not appear on motion, up to date of notifying that they no longer contested the matter.*

*Licensing—Jurisdiction—Consent to alteration of premises—Old building, an hotel, completely demolished at time of application—Proposed replacement by a supermarket—"Premises" referred only to buildings—No jurisdiction to grant consent under Licensing Act 1964 (c. 26) s. 20.*

At a time when application was made by site-owners for the transfer of a justices' licence for a hotel and for consent to carrying out alterations to the hotel, the site-owners had demolished the hotel with a view to building a supermarket on the site. On application for certiorari to quash the justices' order giving consent, pursuant to s. 20\* of the Licensing Act 1964, to carrying out alterations to the hotel,

**Held:** the consent that justices could give under s. 20 was a consent to the alteration of premises, and, as the term "premises" in the context clearly referred to buildings and the buildings had been demolished, there was no power under s. 20 to give consent; accordingly an order of certiorari to quash the consent given would be granted (see p. 272, letters E and F, post).

Per CURIAM: the proper application in the circumstances was one under s. 6 of the Act of 1964 for a provisional grant of a licence in respect of buildings about to be constructed.

[As to consent by justices to alterations to licensed premises, see 22 HALSBURY'S LAWS (3rd Edn.) 547-549, paras. 1085-1087; and as to the issue of prerogative orders to quash justices' decisions, see *ibid.*, p. 613, paras. 1264, 1265; as for cases on the subject of consent, see 30 DIGEST (Repl.) 47-48, 356-365; and for cases on granting of orders of certiorari, see *ibid.*, p. 74, 572-574.]

For the Licensing Act 1964, s. 4, s. 6, and s. 20, see 44 HALSBURY'S STATUTES (2nd Edn.) 488, 489, 509.]

Case referred to:

*R. v. Birmingham Union Guardians*, (1874), 44 L.J.M.C. 48; sub nom. *Lullow Union Guardians v. Birmingham Union Guardians*, 31 L.T. 587; 16 Digest (Repl.) 391, 1825.

**Motion for certiorari.**

This was an application by way of motion on behalf of John Lovibond & Sons, Ltd., and others for an order of certiorari to quash an order made by the licensing justices for the licensing district of Hastings on June 13, 1967, by which they had granted consent to alterations of Castle Hotel, Hastings, which were the

\* Section 20, so far as material, is printed at p. 271, letter I. to p. 272, letter A, post.

A property of Tesco Stores, Ltd., and in respect of which that company then held a justices' on-licence. Application had been made for a protection order under s. 10 of the Licensing Act 1964 and such order had been granted on Mar. 14, 1967, in respect of the hotel and in favour of the nominee of the respondent company, Tesco Stores, Ltd. The proposed demolition of the Castle Hotel had been mentioned in May, 1967, to the licensing justices, before the demolition was completed. The licensing justices on June 13, 1967, heard the application, the Castle Hotel having been demolished prior to that date. At the hearing, according to the affidavit filed in the proceedings for certiorari on behalf of the applicants, their solicitors attempted to intervene, seeking to object to the application on the ground that the building to be altered no longer existed. The chairman of the licensing committee ruled that they had no right to intervene, and the justices then made an order granting their consent to the proposed structural alterations (viz., to build a supermarket on the site of the hotel). The justices then dismissed an application for a new off-licence to be granted in favour of the nominee of the respondent company and in respect of the premises to be built.

*K. G. Jupp, Q.C., and F. M. Drake for the applicants.*

D The respondents did not appear and were not represented.

LORD PARKER, C.J.: In Hastings there was until recently a large hotel, the Castle Hotel; it was acquired by the respondents, Tesco Stores, Ltd., the well known supermarket company, with a view to demolition and the erection of a supermarket, part of which at the corner was to be an off-licensed shop. With this in view, they applied on June 13, 1967, to the licensing justices for the licensing district of Hastings for three things: first, for the transfer to their nominee, Mr. Charles William Wales, of the full licence then in the name of the nominee of the Castle Hotel; secondly, they asked for consent under s. 20 of the Licensing Act 1964 to certain alterations, the so-called alterations being set out on a plan which disclosed the building of a supermarket; thirdly, they applied for a new off-licence in respect of what was to be the corner shop. By doing that, they put themselves in a very strong position to meet all eventualities. It appears that probably what they hoped for was to get the transfer, to get consent to alterations, and then if they got the off-licence, they would surrender the licence that they had obtained by transfer. On the other hand, if they were refused the off-licence, they had, for what it was worth, the transfer of the licence and the consent to the alterations.

G In fact, at the time when this application was made, on June 13, 1967, not only had demolition of the Castle Hotel commenced, but it had been completed, and what was there was a bare site. It is in those circumstances that counsel for the applicants now moves on behalf of three well known off-licensees in Hastings for an order of certiorari to quash that part of the decision of the justices given on June 13, as gave liberty to Charles William Wales on behalf of the respondents, to carry out alterations to the Castle Hotel.

H Two things are said: it is said in the first instance that there were no premises capable of being altered, because it was a bare site; and secondly, and in any event, that the so-called alterations could not properly be called alterations in that they amounted to the complete replacement by a building of a wholly different character, a supermarket, as opposed to an hotel. In my judgment I it is inevitable that an order of certiorari should go to quash that consent. It seems to me that it is quite clear that where "premises" is used in the Act of 1964, though it is not defined, it clearly refers to "buildings". Section 20 (1) itself provides:

"No alteration shall be made to premises for which a justices' on-licence is in force if the alteration—(a) gives increased facilities for drinking in a public or common part of the premises; or (b) conceals from observation a public or common part of the premises used for drinking; or (c) affects

the communication between the public part of the premises where intoxicating liquor is sold and the remainder of the premises or any street or other public way; . . .”

If it is not made clear by the section itself, it seems to me it is made abundantly clear by s. 4 (2), which provides that:

“ . . . licensing justices shall not grant a new justices’ on-licence for premises unless the premises are in their opinion structurally adapted to the class of licence required.”

Finally s. 6 (1) provides that:

“ Where licensing justices are satisfied, on application made by a person interested in any premises which are—(a) about to be constructed or in the course of construction for the purpose of being used as a house for the sale of intoxicating liquor (whether for consumption on or off the premises); or (b) about to be altered or extended or in the course of alteration or extension for that purpose (whether or not they are already used for that purpose); that the premises, if completed in accordance with plans deposited under this Act, would be such that they would have granted a justices’ on-licence or a justices’ off-licence for the premises, they may make a provisional grant of such a licence for those premises.”

That again makes it clear that “ premises ” is referring to buildings, and secondly it shows what the proper application by the respondents was in this case, namely what they did do by their third application, to apply under s. 6 for a provisional grant of a licence in respect of buildings which had then not been completed, and were about to be constructed. That being so, it seems to me perfectly clear that the justices, in giving their consent to the so-called alterations, exceeded their jurisdiction, and that part of their order must be quashed.

ASHWORTH, J.: I agree.

BLAIN, J.: I agree.

*Order of certiorari granted.*

Jupp, Q.C.: I ask for costs in this court. I refer to 11 HALSBURY’S LAWS (3rd Edn.) at p. 80 and *R. v. Birmingham Union Guardians* (1). The matter was litigated by the respondents until Dec. 14, 1967, when they stated by letter that they were taking no further part. Leave to move for certiorari was obtained on Aug. 29, 1967. At the hearing before the licensing justices the respondents gave no assistance to my clients when attempt was made on their behalf to intervene and thus we had to come to this court; by the time that the letter of Dec. 14 was received, our briefs had been delivered.

LORD PARKER, C.J.: It is very rare that this court makes any award in regard to costs on an application for one of the prerogative orders, unless the party has appeared and contested the application. Counsel for the applicants has, however, pointed out in the present case that the respondents, no doubt under a bona fide misconception as to their rights under the licensing Acts, succeeded in persuading the magistrates to adopt the same misconception and have fought this case, as it were, up to Dec. 14 when they wrote saying they were no longer contesting the application. There is a precedent for making an award of costs in such a case: see *R. v. Birmingham Union Guardians* (1). In those circumstances the court feels that the proper order to make is that the respondents, Tesco Stores, Ltd., do pay the applicants’ costs up to Dec. 14.

*Order of certiorari granted.*

Solicitors: *Martineau & Reid*, agents for *Wood, McLellan & Williams*, Chatham (for the applicants).

[Reported by OM. P. MIDHA, Barrister-at-Law.]



A

R. v. TRENT RIVER AUTHORITY AND ANOTHER,  
*Ex parte* NATIONAL COAL BOARD.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Ashworth and Blain, J.J.), March 21, 22, 1968.]

B

*Land Drainage—Drainage rates—Underground land—Application for determination that no rate should be levied in respect of land more than seven\* hundred feet below surface—Whether a horizontal section of underground land could be a portion of the district within the Land Drainage Act, 1930 (20 & 21 Geo. 5 c. 44), s. 24 (7).*

C

Application was made for a determination that no drainage rate should be levied in respect of an underground section of land lying some five hundred feet below the surface of a portion of the district of an internal drainage board\*. On application for certiorari to quash a decision of the river authority, on appeal to them, rejecting the application on the ground that s. 24 (7)† of the Land Drainage Act, 1930, did not confer jurisdiction to make such a determination,

D

**Held:** the words "any portion of the district" in s. 24 (7) of the Act of 1930 referred only to a definable portion of surface land within the district together with all that was above or below that portion of surface land; accordingly the river authority's decision contained no error in law, and certiorari would not be granted (see p. 275, letter H, post).

E

[As to exemption from drainage rates, see 39 HALSBURY'S LAWS (3rd Edn.) 708, para. 1026.

For the Land Drainage Act, 1930, s. 24, see 13 HALSBURY'S STATUTES (2nd Edn.) 574.]

**Motion for certiorari.**

F

This was an application by way of motion by notice dated Nov. 10, 1967, on behalf of the National Coal Board to remove into the High Court and quash a decision given by the first respondents, the Trent River Authority, on June 27, 1967, whereby the first respondents dismissed the appeal of the applicant against the refusal of the second respondents, the Newark Area Internal Drainage Board, to make an order under s. 24 (7) of the Land Drainage Act, 1930, exempting from drainage rates a portion of the second respondents' district comprising land situated more than five hundred feet below the surface, and containing

G

certain underground coal workings of the applicant's. The relevant part of the decision of the river authority is set out at p. 274, letter H, to p. 275, letter C, post. The second respondents had demanded the drainage rates from the applicant in an amount of £1,388 19s. 2d. in respect of the year ending Mar. 31, 1964, and in respect of the applicant's underground coal workings within the area of the second respondents. The substantial question before the court was whether a horizontal section of land below the surface could constitute a portion of a drainage district for the purposes of s. 24 (7) of the Land Drainage Act, 1930.

H

The case noted below‡ was cited during the argument.

D. G. Widdicombe, Q.C., and M. F. C. Fitzgerald for the applicant, the National Coal Board.

I

Hugh Forbes, Q.C., and Michael Mann for the first respondents, the Trent River Authority.

\* The application specified five hundred feet. The underground workings of the National Coal Board were one thousand feet below the surface. They derived no benefit from the land drainage to provide which rates were leviable. On appeal to the river authority the depth of the horizontal section of underground land for which the applicant claimed exemption was seven hundred feet below the surface, or six hundred feet below Ordnance datum.

† Section 24 (7) is set out at p. 274, letter C, post.

‡ *Tiverton and North Devon Ry. Co. v. Loosemore*, (1884), 9 App. Cas. 480.

*W. J. C. Tonge* for the second respondents, the Newark Area Internal Drainage Board. A

**BLAIN, J.**, delivered the first judgment at the invitation of **LORD PARKER, C.J.**: The application for certiorari is made on the footing that the decision of the first respondents shows an error of law on the face of it, but before reading that decision itself, it may be helpful to look at the very few statutory provisions which give rise to it, and to this motion. B

First of all, s. 24 (3) of the Land Drainage Act, 1930, which I need not read, confers powers on the drainage boards to assess and levy drainage rates on occupiers of hereditaments within the boards' drainage districts (1). Section 24 (7), which is the subsection that falls to be construed, reads thus as enacted:

"A drainage board, after consultation in the case of an internal drainage board with the catchment board, may by order determine that no rates shall be levied by them on the occupiers of hereditaments in any portion of the district which, in their opinion, either by reason of its height above sea level or for any other reason, ought to be exempted wholly from rating." C

For the words "catchment board" one must now read "river authority" as the result of subsequent statutory transfers of functions (2). That alteration is not a matter which is in issue, merely the authority with whom consultation should be held before any determination is made. The words which fall to be construed are the words "any portion of the district". D

The applicant applied to the second respondents under s. 24 (7) of the Act of 1930 for an order determining that no rates should be levied on the occupiers of hereditaments in a portion of the second respondents' district comprising subterranean land wholly lying more than some specified depth (a matter of some hundreds of feet) below the surface. This, of course, is land which includes the applicant's workings. That application was refused by the second respondents. When such a request is refused by an internal drainage board, s. 27 of the Land Drainage Act, 1961, provides a right of appeal to the river board (as it then was), the river authority as it now is. So the applicant appealed to the first respondents, being the relevant river authority in that part of the country, and the appeal was heard on Feb. 27, 1967, by a sub-committee of that authority duly appointed for the purpose. The sub-committee's report was adopted by the first respondents and the appeal was dismissed. E

In that report, adopted by the first respondents, reasons for the decision were very properly given, and a speaking record was thus created, the document which counsel for the applicant contends shows an error or errors of law on the face of it. The speaking part of that record reads as follows: F

"The appeal is made by the [applicant] against the refusal of the [second respondents] to make an order under s. 24 (7) of the Land Drainage Act, 1930, determining that no rates shall be levied by them on the occupiers of hereditaments in a specific section of underground land in the district. The order which the [applicant] now seeks relates to all land within the Dover Beck 'arm' of the drainage district lying more than seven hundred feet below the surface or, alternatively, lying more than six hundred feet below ordnance datum. The appeal raises, apparently for the first time, a point of law of some importance—namely, whether a section of land below, and not including, the surface can be considered to be a portion of a drainage district for the purposes of s. 24 (7) of the Act of 1930. We were greatly assisted in reaching our decision on this matter by the arguments put forward G

(1) See 13 HALSBURY'S STATUTES (2nd Edn.) 574. The basis of assessment for drainage rates was modified by s. 22 of the Land Drainage Act, 1961; 41 HALSBURY'S STATUTES (2nd Edn.) 671. H

(2) River boards were established by the River Boards Act, 1948, s. 1; and the Water Resources Act 1963, s. 3 and s. 5 provided for the establishment of river authorities and the transfer to them of the functions of river boards. I

- A by counsel appearing for the [applicant] and by the clerk of the [second respondents]. We have had regard to the words used in the subsection and also to the tenor of the Act as whole and of the land drainage statutes generally. In reaching our conclusion on this aspect of the appeal we have been influenced by the fact that drainage areas in general are defined only by reference to the surface of the land although there is no doubt that the surface carries with it everything that is above and below. The example cited in s. 24 (7)—namely, height above sea level—can, in our view, relate only to the surface of land and our conclusion is that any order sought under the section must relate to an area of surface land. We hold, therefore, that the order sought by the [applicant] cannot properly be made and the appeal accordingly fails.”
- C The point at issue falls within a very small compass, and may perhaps be summarised thus. First, the area administered by a drainage board is defined and delineated by reference to surface boundaries. Secondly, internal drainage districts, that is to say districts administered for drainage purposes by internal drainage boards, are also defined and delineated by reference to surface boundaries. Under s. 24 (7) of the Act of 1930, as I have recited, a drainage board may determine not to levy rates on the occupiers of hereditaments in “any portion of the district”—I emphasise those words—which in the opinion of the drainage board ought to be exempted from rating. The applicant contended that a section of land below and not including the surface can be considered by the internal drainage board, and on appeal by the river board, to be a portion of a drainage district for the purposes of s. 24 (7).
- E The second respondents contended, and the first respondents found, that drainage districts are defined by reference to the surface of land, albeit they include also all that is above and below such surface areas. Therefore, said the second respondents, the phrase “portion of the district” in the subsection refers necessarily to a portion of the surface area of the district, together with all that is above and below that portion. For my part I cannot escape the fact that
- F Parliament in the subsection has empowered the making of an order not for the exemption from rating of hereditaments as such, were that in consequence, but for exemption of occupiers of hereditaments in any portion of the district which, in the opinion of the first respondents, ought to be exempted. The word “which” refers back not to the noun “hereditaments” but to the noun “portion”. Thus it is the portion of the district which may be exempted, the prohibition on
- G lifting of rates on occupiers of hereditaments within that portion, being consequential, whether they be above or below ground.
- In my view a drainage district comprises an area of land delineated by surface boundaries, and comprising that surface land within those boundaries together with all that is above and below. It follows that a portion of such a drainage district comprises a definable portion of such surface land together again with all that is above and below that portion. Assuming this view to be correct, the river authority’s decision contained no error of law on the face of it or at all, and indeed is correct in law, in holding that the order sought by the applicant could not have been made, and in dismissing the appeal from the decision of the second respondents. I would reject the motion and refuse to make the order which is prayed.

I ASHWORTH, J.: I agree.

LORD PARKER, C.J.: I also agree.

*Application refused.*

Solicitors: *Donald H. Haslem*, agent for *Laurence C. Jenkins*, Arnold, Notts. (for the applicant); *Ian Drummond*, Nottingham (for the first respondents); *Hancock & Willis*, agents for *Tallents*, Newark (for the second respondents).

[Reported by N. P. METCALFE, Esq., Barrister-at-Law.]



Re BANFIELD (*deceased*). LLOYDS BANK, LTD.  
v. SMITH AND OTHERS.

[CHANCERY DIVISION (Goff, J.), October 24, 25, November 21, 1967.]

*Charity—Religion—Residuary bequest to a community house—Gift for the furtherance of the work and purposes of the community—Community of persons leading simple pious lives—Object to do the will of God by practical Christianity—Community open to persons of any creed or who had none—Help given to any member of the public in need—Whether valid charitable gift for advancement of religion—Whether valid charitable gift for purpose beneficial to the public.*

By a residuary gift in a testatrix' will, dated Aug. 24, 1959, she gave half of the residue of her estate to the Pilsdon Community House. There was no trust deed or other written instrument establishing or regulating the Pilsdon Community House. A pamphlet and various letters written by the first defendant from time to time showed that the object and purpose was to found a community where persons could lead a simple pious life together. The court found that the community was a religious community existing to do the will of God in practical Christianity. The community was open to persons of all creeds and to those who had none. It received and tended the needs of those members of the public who needed help for a variety of reasons, e.g., drug addiction, drink, having been in prison, or loneliness; and members went out to offer help where required.

**Held:** the gift in favour of Pilsdon Community House was in law a valid charitable gift for the following reasons—

(i) because it was a gift for the furtherance of the work and purposes of the community, not a gift to the community itself, and the purposes of the community were in law charitable purposes, as being for the advancement of religion, and as having the requisite public element (see p. 278, letter C, p. 279, letter I, to p. 280, letter A, and p. 281, letter F, post).

*Re Thackrah* ([1939] 2 All E.R. 4) distinguished.

*Re Wedgwood* ([1914] 2 Ch. 245) applied.

*Inland Revenue Comrs. v. Baddeley* ([1955] 1 All E.R. 525) distinguished.

*Neville Estates, Ltd. v. Madden* ([1961] 3 All E.R. 769) considered.

(ii) even if the purposes of the community were not for the advancement of religion, they were charitable purposes as being within the fourth class of the classification in *Pemsel's* case, viz., other purposes beneficial to the community (see p. 280, letter D, post).

*Income Tax Special Purposes Comrs. v. Pemsel* ([1891-94] All E.R. Rep. 28) and *Re Chaplin* ([1933] Ch. 115) applied.

[As to gifts for religious purposes being charitable, see 4 HALSBURY'S LAWS (3rd Edn.) 221, 222, para. 501; and for cases on the subject, see 8 DIGEST (Repl.) 331, 332, 127-131, 334, 148-156, 340, 341, 226-234.]

As to the requisite public element in charitable gifts, see 4 HALSBURY'S LAWS (3rd Edn.), para. 488.

As to other purposes beneficial to the community being charitable, see 4 HALSBURY'S LAWS (3rd Edn.) 226, 227, para. 506; and for cases on the subject, see 8 DIGEST (Repl.) 342-345, 253-263, 355-357, 342-365.]

Cases referred to:

*Chaplin, Re, Neame v. A.-G.*, [1933] Ch. 115; 102 L.J.Ch. 56; 148 L.T. 190; 8 Digest (Repl.) 324, 83.

*Cocks v. Manners*, (1871), L.R. 12 Eq. 574; 40 L.J.Ch. 640; 24 L.T. 869; 36 J.P. 244; 8 Digest (Repl.) 325, 86.

*Estlin, Re, Pritchard v. Thomas*, (1903), 72 L.J.Ch. 687; 89 L.T. 88; 8 Digest (Repl.) 323, 77.

- A** *Gilmour v. Coats*, [1949] 1 All E.R. 848; [1949] A.C. 426; [1949] L.J.R. 1034; 8 Digest (Repl.) 325, 87.  
*Income Tax Special Purposes Comrs. v. Pemsel*, [1891-94] All E.R. Rep. 28; [1891] A.C. 531; 61 L.J.Q.B. 265; 65 L.T. 621; 55 J.P. 805; 8 Digest (Repl.) 312, 1.
- B** *Inland Revenue Comrs. v. Baddeley*, [1955] 1 All E.R. 525; [1955] A.C. 572; [1955] 2 W.L.R. 552; 39 Digest (Repl.) 334, 726.  
*James, Re, Grenfell v. Hamilton*, [1932] All E.R. Rep. 452; [1932] 2 Ch. 25; 101 L.J.Ch. 265; 146 L.T. 528; 8 Digest (Repl.) 324, 82.  
*Mann, Re, Hardy v. A.-G.*, [1900-03] All E.R. Rep. 93; [1903] 1 Ch. 232; 72 L.J.Ch. 150; 87 L.T. 734; 8 Digest (Repl.) 344, 257.
- C** *Marchant, Re, Weaver v. Royal Society for the Prevention of Cruelty to Animals*, (1910), 54 Sol. Jo. 425; 8 Digest (Repl.) 414, 1074.  
*Neville Estates, Ltd. v. Madden*, [1961] 3 All E.R. 769; [1962] Ch. 832; [1961] 3 W.L.R. 999; Digest (Cont. Vol. A) 95, 212a.  
*Oxford Group v. Inland Revenue Comrs.*, [1949] 2 All E.R. 537; 31 Tax Cas. 221; 28 Digest (Repl.) 316, 1386.
- D** *Thackrah, Re, Thackrah v. Wilson*, [1939] 2 All E.R. 4; 8 Digest (Repl.) 341, 231.  
*Warre's Will Trusts, Re, Wort v. Salisbury Diocesan Board of Finance*, [1953] 2 All E.R. 99; 8 Digest (Repl.) 332, 131.  
*Webster, Re, Pearson v. Webster*, [1912] 1 Ch. 106; 81 L.J.Ch. 79; 105 L.T. 815; 8 Digest (Repl.) 418, 1097.
- E** *Wedgwood, Re, Sweet v. Cotton*, [1914] 2 Ch. 245; 83 L.J.Ch. 731; 111 L.T. 436; 8 Digest (Repl.) 414, 1071.  
*Williams Trustees v. Inland Revenue Comrs.*, [1947] 1 All E.R. 513; [1947] A.C. 447; [1948] L.J.R. 644; 176 L.T. 462; 28 Digest (Repl.) 14, 49.

### Adjourned Summons.

- By an originating summons, issued on Mar. 8, 1966, the plaintiffs, Lloyds Bank, Ltd., executors of the will of the testatrix, Violet Lucy Banfield deceased, sought the determination by the court of the following questions. 1. Whether on the true construction of the will and in the events which had happened the gift of one half of the residuary estate of the testatrix to Pilsdon (in the will called "Pilson") Community House, c/o Rev. C. Percy Smith (the first defendant herein) was a valid charitable gift. 2. (a) If question 1 were answered in the affirmative, whether the first defendant or some other person, and if so who, could give a valid receipt for the gift; and (b) if question 1 were answered in the negative, whether the testatrix died intestate in respect of the property comprised in the gift or how otherwise the same ought to be applied.

- The first defendant was the Reverend Charles Percy Smith, Warden of the Pilsdon Community House; the second defendant was Mary Kathleen Frances Chaplin, one of the next of kin of the testatrix. The third defendant was Her Majesty's Attorney-General. By the order, dated Nov. 21, 1967, made on the summons the second defendant was appointed to represent the testatrix' next of kin for the purposes of this application.

- I** *W. G. H. Cook* for the plaintiffs.  
*J. H. Hames* for the first defendant.  
*L. J. Bromley* for the second defendant (representing the next of kin).  
*N. C. H. Browne-Wilkinson* for the Attorney-General.

*Cur. adv. vult.*

Nov. 21. GOFF, J., read the following judgment: the principal question raised by this originating summons is whether a gift of half of the residuary estate of the testatrix to the Pilsdon Community House is a valid charitable gift. The residuary gift is very short and consists of no more than:

"The residue to be equally divided between The Pilson Community House, care of Rev. C. Percy Smith of Pilsdon House, Bridport, Dorset, and the United Nations Refugee Fund."

In that quotation "Pilson" is obviously a mistake for "Pilsdon". The Rev. C. Percy Smith is the first defendant. The second defendant is a representative of the class of next of kin, and the third defendant is Her Majesty's Attorney-General, representing charity generally. There is no trust deed or other instrument or writing of any kind establishing or regulating the Pilsdon Community House, and the next of kin say that this gift fails in any event as being a gift to a body which does not exist, in support of which they cite the first of the Oxford Group cases, *Re Thackrah, Thackrah v. Wilson* (1). In my judgment, however, that case is clearly distinguishable, since in my view this is a purpose gift. It is a gift for furthering the work and purposes of the community and not a gift to the community as such. This conclusion is amply supported by the review of the cases which BENNETT, J., made in the *Thackrah* case (2) itself, where he said: "On the language of this will, there is no trust for anybody. It is a gift to the society." In *Re Mann, Hardy v. A.-G.* (3), it was plainly a gift made by the testatrix for a purpose, the purpose being the benefit of a village institute. That was a good charitable purpose, and there was no difficulty in holding, as FARWELL, J., did hold, that that was a gift for a charitable purpose, and one to which effect could and ought to be given. The language of the will used by the testatrix in that case is poles asunder from the language that the testatrix has used in the will that I have to consider here. The second case relied on and referred to is *Re Webster, Pearson v. Webster* (4), where the terms of the gift were as follows:

"I give and bequeath unto the Ormond Home for Nurses any money that comes to me now from my father and will come from my mother also the furniture—my relations having taken out anything they may wish to have. Arrangements must also be made to carry on the home for the next few months with Mrs. Bell in charge. The money that comes in from the district goes towards the expenses of the upkeep and debts not paid by me must be paid. If necessary a committee might be formed of Dr. Hall Walker and several local Chelsea doctors."

On that language, of course, it not being possible to make a bequest to such a thing as a home—to bricks and mortar—JOYCE, J., had no difficulty in concluding, and it is the basis of his decision, that what the testatrix intended to do was to devote her property to certain purposes which were charitable. The language of the will was such that, on its fair construction, the gift was to her trustee for charitable purposes. The third case, *Re Wedgwood, Sweet v. Cotton* (5), also before JOYCE, J., was a case of a testatrix giving a legacy of £1,000 to "Saint Mary's Home for Women and Children, of 15, Wellington Street, Chelsea". Again, one cannot give a sum of money to a home. A home is bricks and mortar. On that language, JOYCE, J., was able to hold, and he did hold, that the gift was for the purpose of the work carried on at the nursing-home, and so, those purposes being charitable, he was able to give effect to them by means of a scheme.

This being so, the absence of any written constitution becomes irrelevant (see *Re Marchant, Weaver v. Royal Society for the Prevention of Cruelty to Animals* (6)). Even so, the gift must still fail for perpetuity or uncertainty unless the work and purposes of the community are charitable in the legal sense. The next of kin say that they are not. They submit that the evidence, which consists of a letter dated Mar. 1, 1965, from the first defendant's solicitors, in which they purport to set out the objects of the community, an open Christmas

(1) [1939] 2 All E.R. 4.

(2) [1939] 2 All E.R. at p. 7, letter G.

(3) [1900-03] All E.R. Rep. 93; [1903] 1 Ch. 232.

(4) [1912] 1 Ch. 106.

(5) [1914] 2 Ch. 245.

(6) (1910), 54 Sol. Jo. 425.



A letter, written by the first defendant in December, 1964, and a pamphlet, being mainly other letters written by him at various times, show that the object and purpose was to found a community where persons could lead a simple pious life together. They say further that such a community is not charitable, either as not being within the spirit and intendment of the Statute of Elizabeth, or as not having a sufficient element of benefit to the public.

B In my judgment, however, that submission cannot be accepted. It is true that in *Inland Revenue Comrs. v. Baddeley* (7) VISCOUNT SIMONDS said:

“... its purpose is to establish what is well enough called a community centre in which social intercourse and discreet festivity may go hand in hand with religious observance and instruction. No one will gainsay that this is a worthy object of benevolence, but it is another question whether it is a legal charity, and it appears to me that authority which is binding on your lordships puts it beyond doubt that it is not.”

I think that that is a reference to *Williams' Trustees v. Inland Revenue Comrs.* (8). Further, in *Neville Estates, Ltd. v. Madden* (9), CROSS, J., said:

“In *Inland Revenue Comrs. v. Baddeley* (10), on the other hand, no one sought to argue—indeed it was manifestly impossible to argue—that the trust was for the advancement of religion. No doubt it had a religious flavour in that the beneficiaries were confined to Methodists or persons likely to become Methodists, and the premises and the activities in which the beneficiaries were to engage were to be under the control of the leaders of a Methodist Mission. Nevertheless the activities in themselves were directed predominantly to the social and not to the religious well-being of the beneficiaries.”

In that case, however, the activities in themselves were directed predominantly to the social and not to the religious well-being of the beneficiaries. Here the purpose appears to me to be religious; the social side is merely ancillary.

F The Pilsdon Community, as I see it, is much more than a place where social intercourse and discreet festivity, if festivity there be, go hand in hand with religious observance and instruction. It exists to dedicate everything to God, even the most humble workaday tasks, and to do the will of God in practical Christianity. This is reiterated repeatedly in the pamphlet; for example, on p. 9:

G “Pilsdon is a religious community concerned primarily with discovering what is meant by the will of God and trying to do it,”  
and p. 16:

“Principally we are a religious community of men and women who have taken no specific vows, but who have agreed that prayer and work and practical charity should be our supreme purpose.”

H Again, the time-table on p. 7 shows that the whole of every day is geared to a programme of worship and prayer.

A religious body may, and usually does, engage in a number of subsidiary activities which are not purely religious, but it does not thereby lose its religious character, and a trust in favour of such a body simpliciter is a good charitable trust, but the income can only be applied to those activities of the body which are purely religious (see per TUCKER, L.J., in *Oxford Group v. Inland Revenue Comrs.* (11)).

I In those circumstances, in my judgment, despite the fact that it opens its doors to all creeds and to those who have none, the purpose of the community,

(7) [1955] 1 All E.R. 525 at p. 530; [1955] A.C. 572 at p. 586.

(8) [1947] 1 All E.R. 513; [1947] A.C. 447.

(9) [1961] 3 All E.R. 769 at p. 780; [1962] Ch. 832 at p. 852.

(10) [1955] 1 All E.R. 525; [1955] A.C. 572.

(11) [1949] 2 All E.R. 537 at p. 539.

and therefore, the purpose of this gift, is a valid charity for the advancement of religion provided it be sufficiently public. At that stage the next of kin craved in aid *Cocks v. Manners* (12) and *Gilmour v. Coats* (13), but those dealt with cloistered nuns whose community was essentially introspective and existed for the purpose of sanctifying the souls of the members, and had no impact on the public save the benefit of the example of the pious life and the benefit of intercessory prayer, which were too intangible to be recognised and evaluated by a court of law.

The present case, however, is quite different. If the first hurdle of spirit and intendment can be surmounted, I see no difficulty in the second. This community is by means closed. It receives and tends the needs of those members of the public who need help for divers reasons, such as drug addiction, or drink, or having been in prison, or even loneliness or mere failure to stand up to the strains of life. This is succinctly stated in the letter of Mar. 1, 1965, and whilst that was written after the question had been raised, and to support a claim, and therefore it must be approached with some caution, it appears to me to be fully borne out by the pamphlet. Moreover, the members go out to offer help where required, for example, the distraught widow (mentioned on p. 17) and the work of restoring the church (see p. 28).

If, however, I am wrong in the view that this is a religious charity it is still, in my judgment, valid as a public purpose charity within the fourth class of LORD MACNAGHTEN'S classification in *Income Tax Special Purposes Comrs. v. Pemsel* (14).

For the reasons which I have already given the work is clearly, I think, of general public benefit, but that alone is not enough for it must still be shown to be within the spirit and intendment of the Statute of Elizabeth (see *Williams' Trustees v. Inland Revenue Comrs* (15)). In my judgment, however, providing a temporary home of rest and the comfort of friendship to those who need it is a charitable purpose; see *Re James, Grenfell v. Hamilton* (16) and in particular *Re Chaplin, Neame v. A.-G.* (17), where the words of the gift were:

"To provide a home of rest that shall afford the means of physical and/or mental recuperation to persons in need of rest by reason of the stress and strain caused or partly caused by the conditions in which they ordinarily live and/or work."

MAUGHAM, J., said (18):

"It must, I think, be admitted that in the present case the testator's object is not merely to provide for the relief of poverty, and I think the same was true in *Re James* (19). Accordingly, the objects, if they are to be held charitable, must be justified on grounds other than the relief of poverty. In *Re James* (19) the trust was for the establishment of a home of rest for the sisters of a community, the clergy of the diocese of Truro, and such persons as the Mother Superior of the community should nominate and appoint; and the testatrix bequeathed money, the interest of which was to be applied to repair the house and maintain and support the inmates. FARWELL, J., following *Re Estlin, Pritchard v. Thomas* (20) said (21): '... prima facie in my judgment the words "home of rest" themselves indicate something in the nature of a hospital, although not strictly a hospital—

(12) (1871), L.R. 12 Eq. 574.

(13) [1949] 1 All E.R. 848; [1949] A.C. 426.

(14) [1891-94] All E.R. Rep. 28 at p. 55; [1891] A.C. 531 at p. 583.

(15) [1947] 1 All E.R. 513 at p. 518; [1947] A.C. 447 at p. 455.

(16) [1932] All E.R. Rep. 452 at p. 454; [1932] 2 Ch. 25 at p. 30.

(17) [1933] Ch. 115.

(18) [1933] Ch. at pp. 117, 118.

(19) [1932] All E.R. Rep. 452; [1932] 2 Ch. 25.

(20) (1903), 72 L.J.Ch. 687.

(21) [1932] All E.R. Rep. at p. 454; [1932] 2 Ch. at p. 31.

- A that is to say, a home which is to provide relief for those who are in need of it, not by means of medicine or medical attendance, but by providing them with the means and possibility of rest. That, in my view, is in a true sense providing for the impotent, and accordingly to provide a home of rest is *prima facie* a good charitable object.' In the case before me I have stronger reasons than had FARWELL, J., for coming to the same conclusion.
- B In the will with which he had to deal it was only by reasonable implication that it could be shown that the home intended was something in the nature of a hospital. In the present case the object of the home is to 'afford the means of physical and/or mental recuperation' to persons whose need is a real need of rest. Following FARWELL, J., I come to the conclusions that the home contemplated by the testator is a home such as is described in the judgment in *Re James* (22), and I accordingly decide that the trusts are valid charitable trusts."
- C

The next of kin say that the lonely and the wayfarers are not objects of charity, but in my judgment they cannot be considered in isolation. The work must be looked at as a whole, and so regarded it seems to me fairly and squarely within the principle of the cases I have just mentioned.

- D The next of kin also relied on the decision of HARMAN, J., in *Re Warre's Will Trusts*, *Wort v. Salisbury Diocesan Board of Finance* (23) that a retreat house is not a charity. His lordship there referred to the functions of such a place as religious activity or inactivity, and that is the crux of the matter. Such a house exists for private meditation and improvement only, and is therefore lacking in the necessary public element. Pilsdon is quite different, as it opens out to reach the public. No doubt the retreat is practised on particular occasions as part of the religious discipline of the community (see the reference to the quiet day from Maundy Thursday evening to Good Friday evening on p. 21 of the pamphlet) but that is not the be all and end all of the establishment, which has what the home in HARMAN, J.'s case had not, a strong public element.
- E

- F In my judgment, therefore, this half of the residue is given on a valid charitable trust.

*Declaration accordingly.*

- [Counsel having intimated, on the subsidiary question whether a good receipt for the gift could be given by the first defendant, that the first defendant wished to transfer the legal title to the property and all other assets of the community to the diocesan board or other trustees, HIS LORDSHIP ordered by way of scheme that if on or before May 21, 1968 (or such longer period not exceeding a further six months as the Attorney-General might agree) the property of Pilsdon community were transferred to trustees and a declaration of trust were executed declaring charitable trusts for the purposes of the community (which were acceptable to the Attorney-General) the one half of the residuary estate be paid to such trustees to hold on the trusts declared by the declaration of trust. AND if the scheme thus directed should not be effective within the time limited that a scheme for the application of the one half of the residuary estate should be settled by the judge, such scheme to be brought in by the plaintiffs.]
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- H

- I Solicitors: *Sole, Sawbridge & Co.*, agents for *Bone & Pilcher*, Bournemouth (for the plaintiffs); *Lovell, Son & Pitfield*, agents for *Scott Rowe*, Axminster (for the first defendant); *Warren Murton & Co.* (for the second defendant); *Treasury Solicitor*.

[*Reported by R. W. FARRIN, Esq., Barrister-at-Law.*]

(22) [1932] All E.R. Rep. 452; [1932] 2 Ch. 25.

(23) [1953] 2 All E.R. 99.



A

## R. v. PRICE.

[COURT OF APPEAL, CRIMINAL DIVISION (Sachs, L.J., Fenton Atkinson and Cusack, JJ.), March 21, 1968.]

*Criminal Law—Abortion—Corroboration—Direction to jury—Need for precise and clear direction—Issue whether doctor believed that patient was pregnant—Patient believing that she was pregnant with a child whom she did not wish to have.*

B

A married woman ("the patient"), who believed herself to be 3½ months' pregnant with a child whom she did not wish to have, went on Mar. 28, 1967, with a friend to consult the appellant, a doctor who was a stranger to the patient. On leaving, the patient told her friend that the appellant did not think that she was pregnant, and that she was to have a contraceptive device (a Gynokoil) fitted. On Mar. 30 the patient again visited the appellant and the device was inserted. On Mar. 31 the patient went to a police surgeon, who concluded that she was pregnant and would have a miscarriage. At the appellant's trial on a charge of using an instrument with intent to procure miscarriage the issue was what the appellant had believed, and there was conflict of evidence between the appellant and the patient. In summing-up the trial judge warned the jury that they ought to view the evidence of an accomplice (viz., the patient) with particular care and look to see whether there was other, and separate, evidence implicating the accused; but that, having had that warning, they might accept the evidence of an accomplice even without corroboration if they thought it right. The trial judge referred to three matters as possibly constituting corroboration, viz., (a) to the patient's having gone to the appellant in order to have an abortion performed and apparently having obtained something for which she had not asked, namely, a contraceptive device; (b) to a point on which the direction was conceded, on appeal, to have been insufficiently clear and (c) to an alleged lie by the appellant to the police, in regard to which the direction to the jury had not indicated clearly to them, so it was submitted on appeal, how that matter could be corroboration. The trial judge did not mention, as corroboration, evidence that on Mar. 31 a competent medical witness had found the patient's pregnancy to be manifest. On appeal against conviction,

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**Held:** the conviction would be quashed because—

(i) the warning of the need for corroboration was in the circumstances not sufficiently precise, in that it failed, e.g., to refer to the danger of convicting on the evidence of an accomplice and to make it clear that the jury should not act on the patient's uncorroborated evidence unless convinced that she was speaking the truth (see p. 285, letters C and H, post).

H

*Davies v. Director of Public Prosecutions* ([1954] 1 All E.R. 507) applied.

(ii) there had been misdirection in relation to what constituted corroboration (see p. 285, letter H, post).

Per CURIAM: (i) in so far as the matters to which direction (a) above referred were matters which were common ground they could have amounted to corroboration (see p. 285, letter E, post).

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(ii) the statement of the medical witness on Mar. 31 that the patient's pregnancy was manifest was potent corroboration (see p. 285, letter G, post).

Appeal allowed.

[**Editorial Note.** The Abortion Act 1967 (c. 87), which came into force on Apr. 27, 1968, legalises the medical termination of a pregnancy in specified circumstances, which are not such as those that appear to have existed in the

**A** present case. The importance of the present decision, to which the court referred at letter G, *infra*, is thus not necessarily diminished by the Act of 1967.

As to the offence of procuring abortion, see 10 HALSBURY'S LAWS (3rd Edn.) 731, para. 1402.

**B** As to corroboration, see 10 HALSBURY'S LAWS (3rd Edn.) 458-462, paras. 843 to 848; and for cases on the subject, see 14 DIGEST (Repl.) 527, 528, 5108-5116; 534-537, 5182-5217.

As to medical termination of pregnancy, see CURRENT SERVICE to 10 HALSBURY'S LAWS (3rd Edn.), para. 1404A.]

Cases referred to:

**C** *Davies v. Director of Public Prosecutions*, [1954] 1 All E.R. 507; [1954] A.C. 378; [1954] 2 W.L.R. 343; 118 J.P. 222; 38 Cr. App. Rep. 11; 14 Digest (Repl.) 527, 5108.

*R. v. Baskerville*, [1916-17] All E.R. Rep. 38; [1916] 2 K.B. 658; 86 L.J.K.B. 28; 115 L.T. 453; 80 J.P. 446; 12 Cr. App. Rep. 81; 14 Digest (Repl.) 536, 5214.

### Appeal.

**D** The appellant appealed against his conviction on Oct. 13, 1967, at Berkshire Assizes before WALLER, J., and a jury on a charge of using an instrument with intent to procure a miscarriage contrary to s. 58 of the Offences against the Person Act, 1861. The facts are set out in the judgment of the court.

*J. B. R. Hazan\** for the appellant.

**E** *Douglas Draycott, Q.C.*, and *M. T. B. Underhill* for the Crown.

**F** SACHS, L.J., delivered the following judgment of the court: At Berkshire Assizes on Oct. 13, 1967, the appellant, an experienced medical practitioner, was convicted of using an instrument with intent to procure miscarriage. On that conviction he was sentenced to nine months' imprisonment. The conviction was at the end of a trial that commenced on Oct. 10, a Tuesday, and ended on a Friday, Oct. 13, and it appears from material before this court that the jury first retired at 3.05 p.m. and came back at 5.35 to ask whether there could be some additional evidence; retired at 5.40 and came back at 6.10 p.m., asking for certain further directions as to certain evidence; and finally, having retired at 6.15 p.m., came back at 6.50 p.m. and returned a verdict by a majority of ten to two.

**G** The case was one of no little importance in this respect; on the one hand, there was an experienced medical practitioner whose reputation was at stake; on the other hand it was what might be called a Gynecoil case and it has become evident at assizes that the use of a Gynecoil as an instrument has afforded considerable difficulties in the class of case under consideration. The alleged offence was said to have been committed on a Mrs. S. ("the patient").

**H** The appellant admittedly fitted her with this contraceptive Gynecoil device with the aid of an insertion tube and that action did in fact induce, shortly afterwards, a miscarriage. The essential issue for the jury was, did the appellant at the time that he inserted the Gynecoil with the insertion tube know or believe that the patient was pregnant and, accordingly, introduce the instrument with intent to produce a miscarriage, or did he, as it was his case for the defence,

**I** think that she was not pregnant and introduce it for the purpose of allaying anxieties on her behalf as regards the future.

The main dates to be considered are these: Mar. 28, a Tuesday, when the patient and a Mrs. Barnes visited the appellant for the first time; Mar. 30, a Thursday, when the coil was inserted; Mar. 31, when the patient was seen by another doctor who stated in evidence that it was manifestly clear that she was

\* Counsel appearing for the appellant did not appear on his behalf at Berkshire Assizes.

pregnant, and Apr. 1, when in fact the miscarriage occurred because of the introduction of the Gynecoil and the tube on Mar. 30. A

As regards Mar. 28, the patient, who was pregnant with a child whom she desired not to have, went with a friend, a Mrs. Barnes, to consult the appellant, who was a stranger to the former. It is common ground that on this first visit the appellant was told by the patient that she thought that she was pregnant—indeed she thought she was 3½ months pregnant—and that she desired not to have the child. It is also common ground that on that occasion there was talk of going to Harley Street in certain contingencies. Without going into further details, it is to be observed that apparently the patient exhibited most of the classic symptoms of being pregnant. It also appears that when she left the appellant's premises she was told, according to what she passed on to her friend, Mrs. Barnes, that the appellant did not think she was pregnant and that she was going to be fitted with this contraceptive device for which she had not asked. It was in issue whether those statements of the doctor were or were not part of a camouflage for the purpose which he intended to pursue shortly afterwards. B C

Next one comes to Mar. 30 when the patient had in fact secured a loan of seven guineas from her mother, which was the standard price for fitting this particular contraceptive. On that date occurred the insertion of the tube. There was a complete conflict of evidence between the appellant and the patient whether just previously there had been a certain type of examination and whether there had been, prior to that examination, any bleeding. The next morning, Mar. 31, the patient went to the surgeon for the Reading borough police, Dr. Hardy, who, as already indicated, had no difficulty in concluding that she was pregnant and would shortly miscarry. She did in fact miscarry on the next day and, according to the evidence, which was to some extent in dispute but was nonetheless somewhat cogent, the foetus was a ten weeks foetus. D E

In those circumstances, the issue being as to what the appellant believed, and there being very considerable conflict on certain vital points between the appellant and the patient, it became the duty of the trial judge to inform the jury that the patient was an accomplice and to give the jury an appropriate warning. The attention of this court has once more been drawn to the case of *Davies v. Director of Public Prosecutions* (1), and in particular to the speech of LORD SIMONDS, L.C., in that case (2) in which he approved of the line that the Court of Criminal Appeal had taken in the *R. v. Baskerville* (3) case and emphasized very strongly that it was a matter of law that a jury should be warned of the risks of acting on an accomplice's evidence which was not corroborated and the importance of this question of corroboration. At the trial the learned judge dealt with the matter in this way. After stating that the patient was in the position of an accomplice, he went on thus: F G

“And the courts have always warned juries over the years that when they have to take the evidence of an accomplice they ought to view it with particular care and they ought to look to see whether there is other evidence separate from that accomplice which implicates the accused in a material particular. Having said that juries have been told that, having had that warning they may accept the evidence of the accomplice even without corroboration if they think it right...” H

Counsel for the appellant in his helpful submissions has pointed out that that particular passage does not refer in so many words to the dangers of convicting on the evidence of an accomplice, and has further criticised the absence, in those phrases in relation to the patient's evidence, of words making it clear that I

(1) [1954] 1 All E.R. 507; [1954] A.C. 378.

(2) [1954] 1 All E.R. at pp. 511-513; [1954] A.C. at pp. 396-401.

(3) [1916-17] All E.R. Rep. 38; [1916] 2 K.B. 658.



A they should only act on her uncorroborated evidence if fully convinced that the patient was speaking the truth. This court has examined the above passage with anxious care and wishes it first of all to be made clear that there is no magic formula which has to be used with regard to any warning which is given to juries, nor is there such a formula as regards the circumstances in which, despite the absence of corroboration, they can act on the evidence of an accomplice. Nor does this court wish in any way to suggest that it is not open to a judge to indicate in his summing-up that the degree of danger or risk in relying on an accomplice's evidence may not vary considerably according to the circumstances of the particular case. Having said that, however, this court, having regard also to certain matters which are about to be mentioned in relation to the particular directions on items alleged to be corroboration, finds it necessary to say that this particular direction as given by the judge was not on this occasion sufficiently precise and clear on these important issues.

C The next complaint that was made on behalf of the appellant was that the learned trial judge referred to three pieces of evidence as being potential corroboration. Counsel for the appellant attacked each of these pieces in turn as not being capable of being corroboration. As regards the first, it is sufficient to say that in the view of this court it could have amounted to corroboration, for it is stated:

E "... the first thing you may think was the rather unusual picture of her going on the one hand saying that she was pregnant and she went in order to have an abortion performed and coming out from the [appellant's] consulting room in the end with something which she said she did not want and which everybody agrees she did not ask for, namely a contraceptive device."

Insofar as those words referred to matters which were common ground, these matters could, in the view of this court, have amounted to corroboration.

F There then came a second point, on which it had to be conceded on behalf of the prosecution in the course of this argument, that the direction given was not sufficiently clear and might have to some extent misled the jury as to what exactly it meant. Then there was a third point which related to an alleged lie of the appellant to the police who were asking him questions. It is said, and there is something of substance in it, that on that occasion there was not a sufficient indication to the jury as to why or how they could take that matter into account as corroboration. (It is, however, also to be noted that there was one most potent piece of corroboration that was not mentioned to the jury, and that is the evidence that in fact on the day after Mar. 30 a competent medical witness had said that the pregnancy of this woman was something which was manifest.)

H In those circumstances this court has to come to a conclusion whether there was a misdirection in relation to corroboration on one or both of the points which have been raised by counsel for the appellant; first, the question of the warning to be given to a jury in relation to the evidence of an accomplice, and secondly, as regards the individual items which he criticised in relation to the pieces of evidence to which reference has already been made. This court has come to the conclusion that the appellant has established his case on those points and in those circumstances the next matter to be considered is whether there should be an application of the proviso (4). Suffice it to say that in this particular case, having regard to the nature of the issue and having regard to the length of time which the jury took to reach their verdict, this court does not consider that there could be room for the application of the proviso even

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(4) Viz., the proviso to s. 4 (1) of the Criminal Appeal Act, 1907, as amended by s. 4 of the Criminal Appeal Act 1966; 5 HALSBURY'S STATUTES (2nd Edn.) 929 and 46 *ibid.*, 55.

if it granted an adjournment to investigate the matter further. In those circumstances, the conviction is quashed. **A**

*Appeal allowed. Conviction quashed.*

Solicitors: *Registrar of Criminal Appeals* (for the appellant); *Director of Public Prosecutions* (for the Crown).

[Reported by N. P. METCALFE, ESQ., *Barrister-at-Law.*] **B**

## BURNSIDE v. HARRISON MARKS PRODUCTIONS, LTD.

[COURT OF APPEAL, CIVIL DIVISION (Lord Denning, M.R., Russell, L.J., and Cumming-Bruce, J.), March 11, 1968.] **C**

*Practice—Parties—Joinder of parties—Joint contractors—One joint contractor suing alone—Other joint contractor unwilling to sue—No offer of indemnity for costs made by plaintiff to his joint contractor—Joint contractor did not object to being added as defendant, but defendants objected—Absence of offer by plaintiff of indemnity for costs to his joint contractor did not constitute a ground on which defendants could maintain their objection.* **D**

The defendants engaged the plaintiff and T. jointly to write a script for a film and agreed to pay to them £1,000. The script was delivered, but the defendants refused to pay the agreed price on the ground that the script was not good enough for them. The plaintiff sued the defendants. The defendants objected that T. was not co-plaintiff. T. declined to join as plaintiff, and the defendants objected to his being joined as defendant on the grounds (i) that the plaintiff had not offered T. an indemnity for costs, and (ii) that the defendants would be prejudiced because they had a counter claim against both the plaintiff and T. **E**

**Held:** leave would be given to add T. as defendant because— **F**

(i) the rule that one joint contractor could not add the other joint contractor as a party to an action without offering him an indemnity for costs did not give the party contracting with the joint contractors the right to object to the joinder unless such an offer was made (see p. 287, letter E, post).

*Johnson v. Stephens and Carter, Ltd.* ([1923] All E.R. Rep. 701) distinguished. **G**

(ii) the defendants would not be prejudiced by T.'s being joined as defendant, because they could counterclaim against the plaintiff and against T. by making him party to the counterclaim (see p. 287, letter G, post).

Appeal allowed.

[As to joint promisees suing, see 8 HALSBURY'S LAWS (3rd Edn.) 61, para. 101, and 30 *ibid.*, 313, para. 571 text and note (k); and for cases on the subject, see 12 DIGEST (Repl.) 37-39, 137-157.] **H**

As to the effect of non-joinder of parties, see 30 HALSBURY'S LAWS (3rd Edn.) 394, 395, para. 735.

For R.S.C., Ord. 15, r. 4 (2), see SUPREME COURT PRACTICE, 1967, p. 149.]

Case referred to:

*Johnson v. Stephens and Carter, Ltd.* [1923] All E.R. Rep. 701; [1923] 2 K.B. 857; 92 L.J.K.B. 1048; 130 L.T. 106; 50 Digest (Repl.) 455, 1506. **I**

### Interlocutory Appeal.

This was an appeal by the plaintiff, with the leave of the Court of Appeal, from an order of CUSACK, J., refusing the plaintiff leave to join one Templeton, a joint contractor with the plaintiff, as a defendant in the action on the ground that he had not been offered by the plaintiff an indemnity for costs.

*F. S. Bresler* for the plaintiff.

*Alexander Irving* for the defendant company.

**A LORD DENNING, M.R.:** We give leave to appeal in this case.

There was an agreement in writing on Nov. 10, 1965, whereby the defendants a film-producing company, Harrison Marks Productions, Ltd., engaged the plaintiff Mr. Burnside and a Mr. Templeton to write the script for a film which they proposed to call "Double Shadow". The defendants agreed to pay the sum of £1,000 to Mr. Burnside and Mr. Templeton jointly. When the script was delivered, the film company said that it was not good enough for them, and refused to pay the £1,000. Thereupon the plaintiff brought an action alone, by himself, against the defendant. He put in a statement of claim on his own behalf; But the defendants objected. They said that it was a joint contract. They relied on the rule that where a promise is made to two persons jointly, they should both be before the court. The plaintiff's solicitors tried to get Mr. Templeton to join as a co-plaintiff. They wrote to him for his consent. He lives in Virginia. He said: "after having seen the statement of claim, I see no reason to associate myself with this action against the defendants." So his consent was not forthcoming. Thereupon the plaintiff sought to join Mr. Templeton as a defendant. Mr. Templeton did not himself object to being joined as a defendant; but the film company objected. They said that the joinder ought not to be allowed. Their reason was that the plaintiff had not offered Mr. Templeton an indemnity against costs. They relied on the case of *Johnson v. Stephens and Carter, Ltd.*, (1). The judge upheld their objection and refused to allow Mr. Templeton to be joined as a defendant.

I think that the judge's decision proceeds on a misunderstanding of *Johnson v. Stephens and Carter, Ltd.*, (1). That case shows that, when a promise is made to two persons jointly, then one of them cannot ordinarily require the other to join as plaintiff, and cannot add him as a defendant, unless he offers him an indemnity against costs. This, however, is a rule made for the protection of the joint contractor whom it is sought to add as plaintiff or defendant. It is not made for the benefit of the other contracting party who is the defendant to the action. He cannot insist on the indemnity or the offer of it: for it is no concern of his. All that he can require is that both the persons, with whom he made his contract, are before the court. So long as they are both there, even if one is a defendant, he cannot complain; and they are both present in this case, Mr. Burnside as plaintiff and Mr. Templeton as a defendant.

The defendant company suggested that they might be prejudiced because they had a counterclaim against the two of them: and that they should both be plaintiffs for that purpose. I do not think that that is necessary. They can make their counterclaim against Mr. Burnside as plaintiff, and against Mr. Templeton by making him a party to it. The very object of making Mr. Templeton a party is to ensure that all matters arising out of the joint contract can be dealt with once and for all.

I would, therefore, allow the appeal and give leave for Mr. Templeton to be added as a defendant; I would also give leave for the consequential amendments, shown in red on the statement of claim to be made.

**RUSSELL, L.J.:** I agree.

**CUMMING-BRUCE, J.:** I agree.

*Appeal allowed.*

**I** Solicitors: *M. A. Jacobs & Sons* (for the plaintiff); *Berger, Oliver & Co.* (for the defendants).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]



# CHATSWORTH INVESTMENTS, LTD. v. AMOCO (U.K.), LTD. AND OTHERS.

(MEYERS BROS. PARKING SYSTEM (LANCASHIRE), LTD. and MEYERS BROS. PARKING SYSTEM, LTD. Third Parties).

[CHANCERY DIVISION (Cross, J.), February 20, March 12, 25, 1968.]

*Practice—Third party procedure—Notice—Setting aside—Specific performance action on agreement for sub-lease for twenty-one years of part of land on which plaintiffs were erecting multi-storey car park and filling station—Subsequent agreement by defendants for underlease to third parties of multi-storey car park—Defendants issued third party notice for specific performance of agreement for underlease to third parties—Whether relief claimed against third parties substantially the same as relief claimed by plaintiffs against the defendants—Whether third party notice should be set aside—R.S.C., Ord. 16, r. 1 (1) (b).*

In 1963 the plaintiffs, who were negotiating the grant to themselves of a ninety-nine year building lease at Blackpool, entered into an agreement with the defendants for a sub-lease to them of part of the land to be comprised in the building lease, the part being that on which the plaintiffs were building a multi-storey car park and filling station. The date for commencement of the sub-lease was left blank in this agreement, and no such date was entered therein subsequently. In November, 1964, the premises having been erected, the defendants took possession of the land. By an agreement made in March, 1965, the defendants agreed with the third parties that they would operate the car park and would take an underlease thereof for twenty-one years less the last three days. The date for commencement of this underlease was not specified, save as being a day in 1965. The third parties took possession of the car park under this agreement. In June, 1966, the lease that the plaintiffs had been negotiating was granted to them; the land demised included the car park and filling station. The plaintiffs tendered a draft sub-lease to the defendants; in this the date of commencement of the term was specified as Feb. 22, 1965. The defendants having refused to execute it, the plaintiffs in 1967 sued them for specific performance, alternatively for a declaration that the defendants were tenants from year to year. The defendants pleaded that no date for commencement of the sub-lease had been agreed. They issued a third party notice claiming specific performance of the agreement of March, 1965, by the third parties, who were unwilling to take an underlease of the car park; the defendants alleged that the date of commencement of the underlease to the third parties was the date of the commencement of the sub-lease to the defendants, the third parties having been aware (so it was alleged) of the terms of the agreement of July, 1963. On application by the plaintiffs to strike out the third party notice, the third parties supporting the application and undertaking not to challenge in any subsequent proceedings against them by the defendants for specific performance of the agreement of March, 1965, any decision given in the plaintiffs' action on the enforceability of the agreement of July, 1963,

**Held:** assuming that the relief claimed by the defendants against the third parties was connected with the subject-matter of the plaintiff's action, for the purposes of r. 1 (1) (b) of R.S.C., Ord. 16\*, yet in the present case the

\* R.S.C., Ord. 16, so far as material, provides:

"1 (1) Where in any action a defendant who has entered an appearance—(a) claims against a person not already a party to the action any contribution or indemnity; or (b) claims against such a person any relief or remedy relating to or connected with the original subject-matter of the action and substantially the same as some relief or remedy claimed by the plaintiff; or (c) requires that any question or issue relating to or connected with the original subject-matter of the

- A relief claimed against the third parties was not substantially the same as that claimed by the plaintiffs against the defendants and accordingly the third party proceedings were not justified under r. 1 (1) (b); moreover, even if the third party proceedings had been maintainable under r. 1 (1) (b) the court would not, as a matter of discretion, have allowed the question of the enforceability of the agreement of March, 1965, to be tried in the plaintiff's action which related to the agreement of July 1963 (see p. 295, letters D and G, and p. 295, letter I, to p. 296, letter A, post).

*Re Burford* ([1932] 2 Ch. 122) applied.

*Standard Securities, Ltd. v. Hubbard* ([1967] 2 All E.R. 622) distinguished.

[As to claims against a third party, see 30 HALSBURY'S LAWS (3rd Edn.) 445, para. 838; and for cases on the subject, see 50 DIGEST (Repl.) 515, 516, 1869, 1870.]

Cases referred to:

*Burford, Re, Burford v. Clifford*, [1932] 2 Ch. 122; 101 L.J.Ch. 321; 147 L.T. 185; 50 Digest (Repl.) 524, 1944.

*Standard Securities, Ltd. v. Hubbard*, [1967] 2 All E.R. 622; [1967] Ch. 1056; [1967] 3 W.L.R. 214.

### D Procedure Summons.

This was an application in an action begun by writ issued on Nov. 8, 1967, by the plaintiffs, Chatsworth Investments, Ltd., against the defendants, Amoco (U.K.), Ltd., by which the plaintiffs claimed specific performance of an agreement under seal made on July 4, 1963, and damages in lieu of or in addition to specific performance; or, alternatively, a declaration that the defendants were tenants to the plaintiffs of the plot of land referred to in the agreement under a tenancy from year to year at a yearly rent of £17,500 which tenancy had not been determined. The application, which is the subject of this report, was made by the plaintiffs by summons dated Jan. 18, 1968, for an order that a third party notice dated Dec. 4, 1967, should be set aside. The third party notice was issued by the defendants claiming against the third parties that, by an agreement dated Mar. 24, 1965, between three parties, of whom the defendants were the first parties and the third parties (Meyers Bros. Parking System (Lancashire), Ltd.)

[Continued from foot of p. 288.]

action should be determined not only as between the plaintiff and the defendant but also as between either or both of them and a person not already a party to the action; then, subject to para. (2), the defendant may issue a notice... (in this order referred to as a third party notice), containing a statement of the nature of the claim made against him and, as the case may be, either of the nature and grounds of the claim made by him or of the question or issue required to be determined...

"4 (1) If the third party enters an appearance, the defendant who issued the third party notice must, by summons to be served on all the other parties to the action, apply to the court for directions... (3) On an application for directions under this rule the court may—(a) if the liability of the third party to the defendant who issued the third party notice is established on the hearing, order such judgment as the nature of the case may require to be entered against the third party in favour of the defendant; or (b) order any claim, question or issue stated in the third party notice to be tried in such manner as the court may direct; or (c) dismiss the application and terminate the proceedings on the third party notice; and may do so either before or after any judgment in the action has been signed by the plaintiff against the defendant. (4) On an application for directions under this rule the court may give the third party leave to defend the action, either alone or jointly with any defendant, upon such terms as may be just, or to appear at the trial and to take such part therein as may be just, and generally may make such orders and give such directions as appear to the court proper for having the rights and liabilities of the parties most conveniently determined and enforced and as to the extent to which the third party is to be bound by any judgment or decision in the action..."

"6 Proceedings on a third party notice may, at any stage of the proceedings be set aside by the court."

were parties of the second part, the defendants had agreed to grant and the the third parties had agreed to take a lease of a car park on the plot of land. The second company named as third parties in the title of this report, Meyers Bros. Parking System, Ltd., were sureties under the agreement of Mar. 24, 1965. The following statement of fact is summarised from the judgment of Cross, J.

In 1963 the plaintiffs were negotiating with Blackpool Corporation for the grant of a building lease for ninety-nine years of certain land in the borough. On July 4, 1963, before the building lease was granted, an agreement under seal was entered into between the plaintiffs and the defendants providing for the grant by the plaintiffs to the defendants of a lease for twenty-one years of part of the land in question on which the plaintiffs were erecting a multi-storey car park and a filling station. Clause 1 of this agreement provided that the plaintiffs should on the plot of land situate at the junction of Rigby Road and Central Drive, Blackpool, erect premises comprising a multi-storey car park, showrooms and petrol filling and service station in manner mentioned in cl. 1 and cl. 2 thereof. Clause 3 provided that the erection and completion of the premises and the grant of the underlease thereafter referred to should be conditional on the plaintiffs having first obtained all necessary permissions consents licences and approvals and all labour and materials to enable the plaintiffs lawfully so to do.

Clause 4 provided that as from the date on which the plaintiffs' architects should certify to the defendants that the premises had been erected and completed in accordance with the plans referred to in cl. 2 thereof and until the underlease thereafter referred to should be actually granted and taken up in accordance with cl. 5 thereof (which said interim period was thereafter called "the licence period") the defendants should be at liberty to enter on the said premises but as licensees only and whether or not the defendants so entered the said premises the defendants should be liable as from the commencement of the licence period to the end of the licence period for the payment to the plaintiffs of a licence rent equal in the aggregate to and payable in the same manner as the rents reserved by the underlease; that such occupation by the defendants as licensees should be deemed to be subject to the same exceptions and reservations covenants and conditions and other provisions as were contained in the form of underlease annexed thereto so far as they were applicable thereto and not inconsistent therewith so that the plaintiffs should have all the remedies which would be incident to the relationship of landlord and tenant but nothing in this clause contained should vary or affect the application of cl. 5 and cl. 9 thereof respectively; that any money paid for licence rent aforesaid should be reckoned as part payment of any rent that would otherwise be due under the said underlease in respect of the same period. Clause 5 provided that consequent on the issue of the plaintiffs' architects' completion certificate the plaintiffs would grant or cause to be executed an underlease (and the defendants would accept the same and execute a counterpart thereof) of the premises. Clause 6 provided that the underlease should be for a term "commencing on the . . . day of . . . 196- . . ." and should run for twenty-one years and should be in the form annexed thereto with such modification (if any) as any variations in the stages of the plaintiffs' development plans or the interest of the parties thereto or other circumstances might render necessary and agreed to between the parties thereto. No actual date of commencement of the said term of twenty-one years was inserted in the space provided for in cl. 6. In the habendum of the form of draft underlease referred to in cl. 6 of the said agreement space was provided for the date of commencement of the term to be inserted, but no actual date therefor was inserted therein. On July 4, 1963, in a letter accompanying the said agreement, the plaintiffs' solicitors wrote to the defendants' solicitors saying that they would let the defendants' solicitors know, in due course, the date to be inserted in cl. 6. The defendants' solicitors replied acknowledging receipt and saying that they awaited hearing further in due course.



- A** On or before Nov. 22, 1964, the premises were erected and completed in accordance with the plans referred to in cl. 2 of the said agreement and on or before that date the defendants took possession of the plot of land and of the said premises and from the said date the defendants began to pay and the plaintiffs to accept annual payments of licence rent at the rate of £17,500 as provided for in cl. 4 of the agreement.
- B** The defendants alleged that by an agreement in writing dated Mar. 24, 1965, and made between the defendants of the first part, the third parties of the second part and the other company, Meyers Bros. Parking System, Ltd., of the third part, after reciting (a) that the defendants held the plot of land under the agreement of July 4, 1963, (b) that a multi-storey car park and petrol filling and service station and other buildings had been or were in the course of being erected on the said plot of land and (c) that the defendants had agreed to grant and the third parties had agreed to take a lease of certain premises on the plot, viz., the car park (hereinafter called "the premises") being more particularly described in the form of lease attached thereto on the terms and conditions hereinafter and in the lease appearing, the defendants and the third parties agreed as follows. By cl. 1 that the third parties should as soon as reasonably possible after the date thereof enter into the premises with full vacant possession and commence to carry on the business of multi-storey car park operators in a satisfactory and efficient manner. By cl. 2 thereof that until the lease should have been granted or was due to be granted the third parties should be deemed to be licensees of the defendants and that until the lease was actually granted and taken up should be liable for the payment to the defendants in advance of a licence rent equivalent to the rents reserved by the lease and that any money paid for licence rent should be reckoned as part payment of any rent that would otherwise be due under the said lease in respect of the same period. By cl. 3 that the defendants should grant and that the third parties should accept and execute and that Meyers Bros. Parking System, Ltd. should execute a counterpart of the lease of the premises within one month of the date on which the lease referred to in the agreement dated July 4, 1963, should have been granted by the plaintiffs to the defendants. By cl. 5 Meyers Bros. Parking System, Ltd. in consideration of the defendants entering into that agreement thereby covenanted undertook and agreed with the defendants that the third parties should duly perform and observe all the covenants stipulations and agreements on the part of the tenant thereinbefore contained and that in case of default in performance or observance of the covenants stipulations and agreements or any of them as aforesaid Meyers Bros. Parking System, Ltd. should pay and make good to the defendants on demand all losses damages costs and expenses thereby arising or incurred by the defendants.
- C**
- D**
- E**
- F**
- G**

- The draft lease referred to in cl. 3 of the agreement of Mar. 24, 1965, provided as follows. In cl. 1 (2) that the term "the head leases" should mean the lease granted by the lord mayor, aldermen and burgesses of the borough of Blackpool to the plaintiffs and the lease granted by the plaintiffs to the defendants. In cl. 2 that the defendants should demise to the third parties all that multi-storey car park on the upper floors of the building situate at the junction of Rigby Road with Central Drive, Blackpool, for the term of twenty-one years less the last three days thereof commencing on a day in 1965 which was not specified at
- H**
- I** the rents therein provided.

On or about Mar. 24, 1965, the third parties took possession of the premises.

By a lease under seal made June 24, 1966, between the corporation of Blackpool of the one part and the plaintiffs of the other part certain property, including the plot of land and the premises, the subject of the agreement of July 4, 1963, was demised to the plaintiffs by the corporation of Blackpool for the term of ninety-nine years beginning on Jan. 18, 1965, at the rents and subject to the covenants therein mentioned. On or about June 28, 1966, the plaintiffs' solicitors delivered to the defendants' solicitors a further draft underlease for approval

by the defendants' solicitors. In the habendum in the draft the term was expressed to be a term of twenty-one years commencing on Feb. 22, 1965. **A**

The plaintiffs alleged that their solicitors and the solicitors for the defendants agreed the terms of the underlease with the commencing date of Feb. 22, 1965, but that the defendants refused to execute it, the reason being that the third parties found it unremunerative and were unwilling on their part to take up the sub-lease. There would have been no difficulty about a petrol station, which was a remunerative operation. **B**

On Nov. 8, 1967, the writ in this action was issued by the plaintiffs and the statement of claim was delivered on Nov. 21, 1967. It included, among other paragraphs, the following:

" 10. The effect of the [agreement of July 4, 1963], having regard so far as may be necessary to the circumstances particulars whereof are given in para. 11 hereof and taken altogether with or as varied by or having regard to the letters, events and matters referred to in paras. 3 to 9 hereof and to all the correspondence and drafts passing between the plaintiffs' solicitors and the defendants' solicitors from Apr. 25, 1963, until Nov. 23, 1966, was that the plaintiffs and the defendants were bound respectively to grant and to accept and execute a counterpart of an underlease of the plot of land and the premises in the form of underlease and counterpart engrossed by the plaintiffs' solicitors as mentioned in para. 9 hereof, that is to say, for a term of twenty-one years commencing on Feb. 22, 1965. **C**

" 11. The circumstances referred to in para. 10 hereof were (i) The plaintiffs and the defendants at all material times on and prior to July 4, 1963, knew: (a) that the plaintiffs were in negotiation with the [borough council] for the grant to the plaintiffs of a head lease of land and premises comprising the plot of land and the premises; (b) that the date of commencement of the term proposed to be granted by the said proposed head lease had not been agreed between the plaintiffs and the [borough council]; (c) that any modifications in the form of the proposed head lease would have to be reflected in the draft underlease submitted to the defendants' solicitors by the plaintiffs' solicitors under cover of their letter dated Apr. 25, 1963 [and the plaintiffs said that they would refer at the trial to the relevant letters and draft]. **D**

" (2) In the draft agreement for lease submitted to the defendants' solicitors by the plaintiffs' solicitors under cover of their [ . . . letter] the words ' same date as head lease ' appeared in the left-hand margin against the first line of para. 7 (re-numbered 6 in green ink) of the said draft. **E**

" 12. The plaintiffs have at all times since June 24, 1966, been ready, willing and able and hereby offer to grant to the defendants an underlease of the plot of land and the premises for a term of twenty-one years computed as commencing on Feb. 22, 1965, and further upon the terms and conditions of the engrossment referred to in para. 9 hereof but the defendants wrongly refuse to accept the same and execute a counterpart thereof. **F**

" 14. If notwithstanding the plaintiffs' contentions the defendants are not bound to accept and execute a counterpart of an underlease in manner in para. 10 hereof mentioned or at all the defendants are by virtue of the matters alleged in para. 5 hereof tenants to the plaintiffs of the plot of land and the premises under a tenancy from year to year at the yearly rent of £17,500 which said tenancy has not been determined." **G**

The plaintiffs claimed relief as summarised at p. 289, letter E, ante. **H**

On Dec. 4, 1967, the defendants issued a third party notice against the third parties\* and the other company, Meyers Bros. Parking System, Ltd., the sureties **I**

\* Under R.S.C., Ord. 16, r. 1, for which see footnote \* p. 288, letter I, and p. 289, letter G, ante. The third party notice was issued before serving defence, so leave was not necessary (r. 1 (2)).

**A** in the agreement of Mar. 24, 1965. By that notice the defendants claimed against the third parties and sureties specific performance of the agreement of Mar. 24, 1965; and the defendants claimed also damages, further or other relief and costs.

By their defence served on Dec. 5, 1967, the defendants pleaded (by para. 5)—

**B** “The defendants will say that the alleged agreement on the part of the plaintiffs to grant and on the part of the defendants to accept an underlease is void by reason of the absence of any agreement either express or implied as to the commencement date of the said underlease.”

On Jan. 2, 1968, the defendants issued a summons for third party directions. On Jan. 18, 1968, the plaintiffs issued a counter-summons asking for an order\* that the third party notice of Dec. 4, 1967, and all proceedings therein be set aside and terminated and that the application of the defendants for third party directions be dismissed; this is the summons raising the question here reported.

**C** In compliance with third party directions given on Jan. 30, 1968, by Master NEAVE the defendants, on Feb. 1, 1968, delivered the statement of claim against the third parties and sureties, which, among other matters alleged:

**D** “7. The third parties were at all material times aware of the agreement dated July 4, 1963, referred to in para. 1 of the plaintiffs’ statement of claim herein and the terms of the draft lease annexed thereto.

“8. Upon the true construction of the [agreement dated Mar. 24, 1965] and in the foregoing circumstances the date of commencement of the lease therein referred to is the date of commencement of the lease to be granted by the plaintiffs to the defendants of the plot of land.

**E** “9. The defendants have at all times been ready, willing and able to complete such last-mentioned agreement but the third parties have refused to complete the same.

“10. By reason of such refusal the defendants have suffered damage.”

**F** By para. 11 the defendants put forward an alternative claim that the third parties were tenants under a tenancy from year to year.

The plaintiffs’ summons for dismissal of the third party notice was adjourned to CROSS, J.

The cases noted below† were cited during the argument in addition to those referred to in the judgment.

**G** *V. G. Wellings* for the plaintiffs.

*Charles Sparrow, Q.C.*, and *Gavin Lightman* for the defendants.

*E. A. Machin* for the third parties.

**H** CROSS, J., having referred to the facts, to the agreements of July 4, 1963, and Mar. 24, 1965, to the lease of June 24, 1966, to the pleadings and the third party notice, and to R.S.C., Ord. 16, r. 1, continued: The first question which I have to decide is whether this case falls within R.S.C., Ord. 16, r. 1 (1) (b), (1). The original subject matter of this action is, plainly, the construction and effect of the agreement of July 4, 1963, between the plaintiffs and the defendants. Is the relief claimed by the defendants against the third parties, namely, specific performance of the agreement between them of Mar. 24, 1965, (a) connected with or related to the agreement of July 4, 1963, and (b) is that relief substantially

**I** the same as the relief claimed by the plaintiffs, that is, specific performance of the earlier agreement?

I find it difficult to say that the relief claimed by the defendants against the

\* Viz., an order under R.S.C., Ord. 16, r. 6, for which see footnote \*, p. 289, ante.

† *Benecke v. Frost*, (1876), 1 Q.B.D. 419; *Swansea Shipping Co., Ltd. v. Duncan*, (1876), 1 Q.B.D. 644; *Schneider v. Batt & Co.*, (1881), 8 Q.B.D. 701; *Baxter v. France* (No. 2), [1895] 1 Q.B. 591; *Barclays Bank v. Tom*, [1922] All E.R. Rep. 279; [1923] 1 K.B. 221.

(1) For R.S.C., Ord. 16, r. 1 (1) (b), see footnote \*, p. 288, ante.



third parties is not connected with or related to the relief claimed by the plaintiffs against the defendants, because it is a precondition of the success of the claim of the defendants against the third parties that the plaintiffs' claim against them should succeed. I think that this conclusion is supported by the judgment of PENNYCUICK, J., in *Standard Securities, Ltd. v. Hubbard* (2). In that case by an agreement dated Jan. 24, 1957 ("the 1957 agreement"), the third party, Telesurance, Ltd., agreed to sell 35 and 37, Fitzroy Street, St. Pancras, London, to the defendants, Lafayette Ronald Hubbard and Sidney John Parkhouse. By a subsequent agreement dated May 29, 1963 ("the 1963 agreement"), the defendants agreed to sell the same property to Rathbone Holdings, Ltd., the agreement providing that the sale and purchase should be completed on May 29, 1966, time being of the essence of the contract. On Feb. 7, 1964, Rathbone Holdings, Ltd. assigned all its rights and interests under the 1963 agreement to the plaintiffs, Standard Securities, Ltd. The 1963 agreement not having been completed by the stipulated date, the plaintiffs issued a writ on July 4, 1966, claiming specific performance. The 1957 agreement remained uncompleted and on Sept. 21, 1966, the defendant Hubbard issued a third party notice, pursuant to R.S.C., Ord. 16, r. 1 (1), addressed to the third party claiming specific performance of the 1957 agreement. PENNYCUICK, J., said (3):

"The question then is, are the claims for relief or remedy, claimed against the third party, related to or connected with the agreement dated May 29, 1963? The relief or remedy claimed against the third party is specific performance of the agreement dated Jan. 24, 1957, for the sale of the same premises, that agreement being still uncompleted. Now is that relief or remedy connected with the agreement of May 29, 1963? It seems to me that on any ordinary use of language it is so related and connected. In the first place, the defendants will be able to perform the agreement of May 29, 1963, only if they are first able to obtain the relief or remedy which they seek against the third party, viz., performance of the agreement dated Jan. 24, 1957. In the second place, in the ordinary course of conveyancing the two agreements for sale will be completed by a single instrument, in which the three parties concerned will join and the execution of that instrument will be one of the matters which will be secured by the order for specific performance in the present action. It is, of course, possible to complete the two agreements by separate conveyances, but that would be contrary to conveyancing practice; it would also involve payment of double stamp duty. In those circumstances, I find it impossible to say that the relief or remedy against the third party does not relate to or is not connected with the subject-matter of the present action."

It is true that in that case the plaintiff was himself interested in the relief claimed by the defendant against the third party, because unless the defendant was entitled to specific performance against the third party he could not get specific performance against the defendant. Here, on the other hand, the plaintiffs are not in the least interested in the rights of the defendants against the third parties. The exact parallel to that case would be if the third parties here were suing the defendants for specific performance of the agreement of Mar. 24, 1965, and the defendants were seeking to bring in the plaintiffs as third parties to obtain specific performance of the earlier agreement of July 4, 1963. But it would, to my mind, be very odd if a claim for specific performance of the earlier agreement would be related to or connected with the question of the enforceability of the later agreement while a claim for specific performance of the later agreement was not related to or connected with the question of the enforceability of the earlier agreement.

Assuming that be so, however, can it be said that the relief claimed by the

(2) [1967] 2 All E.R. 622; [1967] Ch. 1056.

(3) [1967] 2 All E.R. at p. 624; [1967] Ch. at p. 1060.

A defendants against the third parties is substantially the same as the relief claimed by the plaintiffs against the defendants? It cannot be enough that the same sort of relief, for example, specific performance, is being claimed in both cases. Something more than that must be required.

B *Re Burford, Burford v. Clifford* (4) which was a decision of the Court of Appeal, indicates to my mind that what is envisaged by this rule is a case where substantially the same facts will have to be gone over in order to ascertain both liabilities and where the success or failure of the plaintiff against the defendant will be substantially decisive of the claim by the defendant against the third party. I think that emerges from passages in the judgment of LORD HANWORTH, M.R. (5), and LAWRENCE, L.J. (6) and ROMER, L.J. (7). If that be the right way to look at it, it does not appear to me that the relief claimed by the C defendants against the third parties is substantially the same as the relief claimed by the plaintiffs against the defendants. It is true that they are both claims for specific performance of agreements for leases; it is also true that the premises comprised in the later agreement are part of the premises comprised in the former agreement: and it is also true, as I have held, that the two claims are connected, because it is a precondition of the defendants' success in their D claim against the third parties that the plaintiffs' claim against them succeeds. The third parties, however, had nothing to do with the making of the earlier agreement, or the plaintiffs with the making of the later agreement; and the success of the plaintiffs against the defendants will not necessarily entail the consequence that the defendants succeed against the third parties.

E It may, perhaps, be said that this conclusion runs counter to something else that PENNYCUICK, J. said in a later passage in his judgment in *Standard Securities, Ltd. v. Hubbard* (8). After holding that the relief claimed by the third parties was connected with the original subject matter of the action, he went on to say:

F "It has not been suggested that the relief or remedy sought by the third party proceedings is not substantially the same in any relevant sense as the relief or remedy claimed by the plaintiff against the defendants. In each case the party concerned is claiming specific performance of a contract for the sale of this property."

G In that connexion, there are three matters to be borne in mind. In the first place, the report of the case gives a very inadequate account of the facts. Secondly, that particular point was not argued. Thirdly, *Re Burford* (4) was not cited. So, without suggesting that the actual decision in that case was wrong, I feel entitled to hold that in this case the relief claimed against the third party was not substantially the same as the relief claimed against the defendants.

H Turning now to R.S.C., Ord. 16, r. 1 (1) (c), the defendants did not in fact ask in their notice as an alternative that the question of the enforceability of the earlier agreement should be determined not only as between themselves and the plaintiffs but also as between themselves and the third parties. The third parties have said, however, that they will undertake not to challenge in any proceedings brought against them by the defendants for specific performance of the later agreement any decision given in the existing action as to the enforceability of the earlier agreement as between the plaintiffs and the defendants, even I though they were not parties and were not brought in as parties to the original action.

Finally, looking at this case from the broader standpoint of the exercise of discretion, I think that even if, contrary to my opinion, it falls within the wording of R.S.C., Ord. 16, r. 1 (1) (b) it would not be right to allow the question of the enforceability of the later agreement to be tried in the same

(4) [1932] 2 Ch. 122.

(5) [1932] 2 Ch. at p. 138.

(6) [1932] 2 Ch. at pp. 140, 141.

(7) [1932] 2 Ch. at pp. 142, 143.

(8) [1967] 2 All E.R. at p. 624; [1967] Ch. at p. 1060.

action as the question of the enforceability of the earlier agreement. To do so would be a hardship to the plaintiffs and the third parties, since it might add considerably to the costs and the time spent and there would not, as far as I can see, be any compensating advantage. The third parties know nothing of the circumstances in which the earlier agreement was entered into and if they give the undertaking to which I have referred, that is all that the defendants can reasonably require. It is true that any separate action brought by the defendants against the third parties for specific performance of the later agreement could not be consolidated with the existing action because the plaintiffs would be different. The third parties, stated, however, through counsel, that they would be prepared to agree that the second action should be listed immediately after the first and be brought on before the same judge if the defendants should so desire.

*Third party notice set aside.*

Solicitors: *Lawrence Jones & Co.* agents for *Maughan & Hall*, Newcastle-upon-Tyne, (for the plaintiffs); *Ashurst Morris, Crisp & Co.* (for the defendants); *Charles Caplin & Co.* (for the third parties).

[Reported by JACQUELINE METCALFE, Barrister-at-law.]

## R. v. WALLETT.

[COURT OF APPEAL, CRIMINAL DIVISION (Lord Parker, C.J., Winn, L.J., and Ashworth, J.), March 11, 1968.]

*Criminal Law—Intention—Proof—Subjective test—Inference from evidence—Summing-up containing passages reminiscent of objective test—Conviction of murder—Substitution of conviction of manslaughter—Criminal Justice Act 1967 (c. 80), s. 8.*

The applicant, aged sixteen, was charged with murder of a girl of about the same age. Her death resulted from pressure of the applicant's left arm on her throat as he approached her with sexual intent. The summing-up at the trial contained passages which correctly put to the jury the subjective question of intent in accordance with s. 8\* of the Criminal Justice Act 1967, but other passages tended to re-state the objective test in *Director of Public Prosecutions v. Smith*†. The final direction in particular put to the jury the question of intent on the part of the applicant to kill or to do grievous bodily harm "knowing quite well" that he "was doing something which any ordinary person like himself would know" would do the girl serious bodily harm. On application for leave to appeal against conviction of murder,

**Held:** the conviction could not be allowed to stand, and there would be substituted a conviction of manslaughter on the basis that the applicant must have appreciated that some risk of harm to the girl was involved in what he did but without imputing to him intent to do her grievous bodily harm (see p. 299, letters F and G, post).

Appeal allowed.

[**Editorial Note.** Section 8 of the Criminal Justice Act 1967, which came into operation on Oct. 1, 1967, follows a draft suggested by the Law Commission in 1967, in their report on Imputed Criminal Intent, made after examination of the legal position consequent on the decision in *Director of Public Prosecutions v. Smith* ([1960] 3 All E.R. 161). In considering the present decision regard should be had not only to the exclusion by s. 8 (a) of what has been called the objective test of criminal intent, but also, and perhaps particularly, to the final words of para. (b) "drawing such inferences from the evidence as appear proper

\* Section 8 is set out at p. 297, letter I, post.

† [1960] 3 All E.R. 161.



A in the circumstances". The question remains open, therefore, what inferences are proper to be drawn; and of this the present decision affords an illustration.

As to the proof or disproof, of mens rea, see 10 HALSBURY'S LAWS (3rd Edn.) 282, 283, paras. 522, 524; and for cases on the subject, see 14 DIGEST (Repl.) 32, 33, 40-47, 500-503, 4819-4852.

B As to the crime of manslaughter, see 10 HALSBURY'S LAWS (3rd Edn.) 715, para. 1371; and as to the jurisdiction to convict of manslaughter on indictment for murder, see *ibid.*, 726, para. 1391, and see also now s. 6 (2) of the Criminal Law Act 1967, operative as from Jan. 1, 1968, in respect of arraignments on or after that day (s. 12 (1)).]

Case referred to:

C *Director of Public Prosecutions v. Smith*, [1960] 3 All E.R. 161; [1961] A.C. 290; [1960] 3 W.L.R. 546; 124 J.P. 473; 44 Cr. App. Rep. 261; Digest (Cont. Vol. A) 428, 1245a.

### Application for leave to appeal.

D This was an application by David Wallett by notice dated Nov. 23, 1967, for leave to appeal against his conviction on a charge of murder. The appellant was convicted at his trial on Oct. 27, 1967, at the Hallamshire Autumn Assize held at Sheffield before THESIGER, J., and a jury, and he was sentenced to be detained during Her Majesty's pleasure in such place and for such period as the Secretary of State might direct. The facts are set out in the judgment of the court.

*P. M. Taylor, Q.C.*, and *M. Walker* for the applicant.

*C. R. Dean, Q.C.*, and *R. A. R. Stroyan* for the Crown.

E WINN, L.J., delivered the following judgment of the court: The applicant was convicted on Oct. 27, 1967, at Sheffield Assizes of murder and sentenced to be detained during Her Majesty's pleasure, as directed by the Secretary of State. He is only sixteen years of age, and the girl whom he admittedly killed, that fact not being in dispute at the trial, was about the same age. They met at a dance, and after becoming friendly they went ultimately into a field, where, F they having been seen lying side by side, the girl's body was later found.

It is unnecessary to go into the sad and rather shocking details of the incident, but it is necessary to say this much about it. The girl died not because she had been manually strangled by deliberate pressure by one or two hands on her throat, but because, on the medical evidence, she had received a constricting force on the front of her throat for a minimum period of twenty-five seconds G which as the result of the pressure applied on the spine and the nervous system had caused her heart to stop and indeed caused a haemorrhage which revealed itself by blood coming from her mouth. The other necessary factual details to be mentioned are that the girl was at the time of the incident in the field menstruating; she was wearing a sanitary towel, and when her body was found that sanitary towel was detached from and separated from her body. The H back crutch of her panties and the front crutch of another garment were both damaged, and there was evidence that considerable force must have been applied to produce the damage which those garments had suffered.

The trial took place on Oct. 27, 1967. On Oct. 1 the Criminal Justice Act 1967 had become law. Section 8 of that Act provides that:

I "A court or jury, in determining whether a person has committed an offence, (a) shall not be bound in law to infer that he intended or foresaw a result of his actions by reason only of its being a natural and probable consequence of those actions; but (b) shall decide whether he did intend or foresee that result by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances."

It is quite clear that the learned trial judge had the provisions of that section in mind, since his summing-up did not follow the pattern which would have been revealed had he been directing the jury as to the law pronounced by their

lordships' house in the case of *Director of Public Prosecutions v. Smith* (1). He did not speak of presumptions; he did not speak of the only test being what is sometimes called the objective test; but regrettably, as the court thinks, there were more than a few traces of that former law still revealed in what the learned judge did say to the jury on the one essential issue for their decision, namely, whether the prosecution had made the jury feel sure that the applicant actually himself intended to cause death or grievous bodily harm to this girl.

It is really not necessary to go through all the passages or refer to all the passages in which the judge referred to the decision which the jury must make as to intent for that purpose. In some passages the judge put the points quite impeccably, and no doubt as to their meaning could have been left in the jury's mind. For example he said:

"It is for you to make up your minds what is the true conclusion as to his intent to be drawn from the evidence. It is your responsibility, not mine."

That is directly in accordance with the provisions of the section to which I have referred.

Previously the learned judge had stressed actual intent; and there are other passages. On those I shall not dwell beyond saying that the first of the references would seem on the wording rather to be reminiscent of and to reproduce the law altered by the Act of 1967 than the law since that Act was passed, for the learned judge said:

"The [applicant] is guilty of murder if he did on purpose what he, as an ordinary young fellow, stupid though he may be, dull he may be at scholastic things, but as an ordinary young fellow of sixteen must have known was likely to do really serious bodily harm."

A little later he came very much nearer to the 1967 law and to the subjective test which Parliament has now prescribed, because he was directing that the jury should give consideration to a number of matters such as conduct before, conduct afterwards, statements before, statements afterwards, demeanour in the witness box, all of which were logically relevant to the issue whether the applicant himself, judging him as the jury saw him, summing him up as the jury must sum him up from the point of view of stupidity, backwardness, inability to appreciate what others of his age would appreciate, in the jury's judgment intend to do serious bodily harm. For example the judge said: "If you feel sure that a man meant to do something that he must have known" and so on, that is murder; the emphasis in that passage is the correct emphasis.

Unfortunately, however, the point was not fully understood by the jury. How that came about it is impossible to know, but the fact is that after listening to the summing-up, which for the most part concentrated on this question of intent, the jury retired for thirty-eight minutes, and then they came back and said: "Could we have a directive on what constitutes murder and what constitutes manslaughter?" The learned judge proceeded to endeavour to help them with that difficulty, which was of course the essential difficulty, the essential problem in this case. I do not propose to read in extenso, but, having referred to the hypothetical case of running someone down or shaking someone off a motor car, the judge said:

"Provided the jury find [that an accused is] certain to realise [that he] is bound to do really serious bodily harm by that conduct",

then that constitutes the proof of intent. He proceeded to go from that to the more specifically relevant question of what the jury had to say to themselves in the instant case. He used these expressions "I leave out part in order that the meaning may be clearer—

(1) [1960] 3 All E.R. 161; [1961] A.C. 290.

A "The position is if you did find [the applicant] intended either to kill . . . or, as the prosecution suggest, really to do serious bodily harm."

If the learned judge had paused there, that would have been a very helpful direction at the crucial point of time just before the jury were to retire again and continue their deliberations, but having said that much he added:

B "Knowing quite well at the time that he was doing something [which] any ordinary person like himself would know was doing her really serious bodily harm."

The question is: do those words of surplus usage blur, confuse or render inept the earlier correct direction, so as to make this court feel that it would be unsatisfactory and unsafe to allow this verdict of guilty of murder to stand? As I have made, I trust, clear, the learned judge in those last words, which are the last words that he spoke to the jury, was still at least leaving within their mental contemplation the idea that one applied the test of what an ordinary person of sane mind would foresee or know was likely to be the result of an action, when approaching, for final decision, the vital question: what did this particular man at the time in fact intend? The jury went out again for another fifty-seven

D minutes, almost an hour, and when they came back they were still not in agreement, so the question arose of the acceptance of a majority verdict. Rightly enough the learned judge was not prepared to take a majority verdict at that time, so he sent them away again over the midday adjournment, having provided for them to be refreshed, and told them that he would take their verdict on his return to the court after that adjournment. When it was taken, it was a verdict of guilty of murder by eleven votes to one, a majority verdict. That, of course, is a factor which this court can properly have in mind when deciding what the result of this appeal should be.

The court has come to the conclusion that it would not be satisfactory or safe to allow this verdict to stand. On the other hand, it was never disputed at the trial by counsel for the defence, nor by counsel for the applicant before this court, who has been helpful and frank as always, that a proper verdict would be a verdict of manslaughter. It would not be of the type of manslaughter which the learned judge defined to the jury, when dealing with the topic of manslaughter—it is unnecessary to say anything about that definition—but manslaughter of the comparatively straightforward kind, which this obviously was, of applying pressure without intending to do grievous bodily harm, but in circumstances in which it should have been appreciated by an ordinary person, and by the applicant, that some risk of harm was involved in what he did, and that that was the cause of death through his left arm being laid across and pressed on the girl's throat, as he was approaching her with sexual intent.

G *Leave to appeal granted. Conviction of murder quashed. Conviction of manslaughter substituted (2).*

H Solicitors: *Rider, Heaton, Meredith & Mills*, agents for *Frank Allen & Co.*, Doncaster (for the applicant); *Director of Public Prosecutions*.

[Reported by NAEEM BUTT, Barrister-at-Law.]

I

(2) Sentence to detention for life in such place and on such conditions as the Secretary of State should direct was imposed; see Murder (Abolition of Death Penalty) Act 1965 s. 1 (5) substituting a new sub-s. (1) in s. 53 of the Children and Young Persons Act, 1933.



SECRETARY OF STATE FOR DEFENCE *v.* WARN.

[HOUSE OF LORDS (Lord Reid, Lord Morris of Borth-y-Gest, Lord Hodson, Lord Upjohn and Lord Wilberforce), April 4, May 2, 1968.]

*Court-Martial—Civil offence—Consent of Director of Public Prosecutions required for institution of proceedings—Gross indecency between males one of whom under twenty-one years of age—“Proceedings”—Consent of Director of Public Prosecutions not obtained—Whether naval court-martial a nullity—Sexual Offences Act, 1956 (3 & 4 Eliz. 2 c. 69), s. 13—Naval Discipline Act, 1957 (5 & 6 Eliz. 2 c. 53), s. 42—Sexual Offences Act 1967 (c. 60), s. 8, s. 10 (2).*

*Court-Martial—Civil offence—Time limit—Sexual offences between males—Limitation of time under s. 7 of Act of 1967 applicable to proceedings under Naval Discipline Act, 1957 (5 & 6 Eliz. 2 c. 53), s. 42—Sexual Offences Act 1967 (c. 60), s. 7 (2).*

By s. 8\* of the Sexual Offences Act 1967, which received the royal assent and came into force on July 27, 1967, no “proceedings” were to be instituted, except by or with the consent of the Director of Public Prosecutions, against any man for the offence of gross indecency with another man, if either of the men at the time of the commission of the offence was under the age of twenty-one. By letter dated July 31, 1967, a naval court-martial was convened for the trial of the respondent and another man on a charge under s. 42† of the Naval Discipline Act, 1957, and s. 13‡ of the Sexual Offences Act, 1956, of committing on July 15, 1967, an act of gross indecency with another man. The consent of the Director of Public Prosecutions was not obtained. The respondent was twenty-five years of age and the other man concerned was eighteen. On appeal from an order quashing the conviction of the respondent,

**Held:** the conviction had been rightly quashed because—

(i) s. 8 of the Sexual Offences Act 1967 applied to proceedings by court-martial (see p. 301, letter I, and p. 302, letter H, post), and

(ii) the proceedings under s. 42 of the Naval Discipline Act, 1957, were for the offence of gross indecency, viz., for the acts in respect of which the offence was charged, not for the commission of the civil offence as a matter distinct from those acts (see p. 303, letter C, post), and

(iii) the requirement of consent enacted by s. 8 of the Act of 1967 was for the protection of an accused person under the age of twenty-one, and the fact that it was procedural in nature did not prevent it being mandatory and did not entitle the court-martial to proceed when it was not observed (see p. 303, letter E, post).

*R. v. Jennings* ([1956] 3 All E.R. 429) not applied.

Per CURIAM: s. 7 (2) of the Act of 1967, which limits the time within which proceedings may be taken to twelve months from the offence, applies notwithstanding the longer period of three years provided by s. 52 of the Naval Discipline Act, 1957 (see p. 303, letter H, and p. 304, letter A, post).

Decision of the COURTS-MARTIAL APPEAL COURT (sub nom. *R. v. Warn*, ([1968] 1 All E.R. 339) affirmed.

[As to the liability of a person subject to naval discipline for civil offences, see 33 HALSBURY'S LAWS (3rd Edn.) 947, para. 1586; and for the comparable liability of persons subject to military or air force law, see *ibid.*, 1026, para. 1711, text and note (r).

For the Sexual Offences Act, 1956, s. 13, see 36 HALSBURY'S STATUTES (2nd Edn.) 223.

\* Section 8, so far as material, is set out at p. 301, letter I, post.

† Section 42 (1), so far as material, is set out at p. 302, letter C, post.

‡ Section 13 is set out at p. 302, letter B, post.

**A** For the Naval Discipline Act, 1957, s. 42, s. 52, see 37 HALSBURY'S STATUTES (2nd Edn.) 970, 979.]

Cases referred to:

*Cox v. Army Council*, [1962] 1 All E.R. 880; [1963] A.C. 48; [1962] 2 W.L.R. 950; 46 Cr. App. Rep. 258; 39 Digest (Repl.) 411, 294.

**B** *R. v. Jennings*, [1956] 3 All E.R. 429; [1956] 1 W.L.R. 1497; 40 Cr. App. Rep. 147; 39 Digest (Repl.) 425, 358.

### Appeal.

This was an appeal by leave from a judgment of the Courts-Martial Appeal Court (WINN, L.J., FENTON ATKINSON and BROWNE, JJ.) given on Nov. 20, 1967, and reported [1968] 1 All E.R. 339, allowing an appeal by the respondent, Peter John Warn, a naval rating, in respect of his conviction by a naval court-martial on Aug. 15, 1967, on two charges that on July 15, 1967, he committed an act of gross indecency with one Mullin, a man. The charges were laid under s. 42 of the Naval Discipline Act, 1957 and s. 13 of the Sexual Offences Act, 1956. Mullin was eighteen years old at the time of the alleged offence and the respondent was twenty-five. The proceedings were instituted without the consent of the Director of Public Prosecutions, which, however, was required by s. 8 of the Sexual Offences Act 1967 (which came into force on July 27, 1967) since Mullin was under the age of twenty-one years.

*The Solicitor-General (Sir Arthur Irvine, Q.C.)* and *A. F. Waley* for the Crown.

*J. B. R. Hazan* and *A. C. L. Lewisohn* for the respondent.

Their lordships took time for consideration.

**E** May 2. The following opinions were delivered.

**LORD REID:** My Lords, for the reasons given by my noble and learned friend, LORD HODSON, I would dismiss this appeal.

**LORD MORRIS OF BORTH-Y-GEST:** My Lords, I am in agreement with the opinion of my noble and learned friend, LORD HODSON, and, for the reasons he gives, I would dismiss this appeal.

**LORD HODSON:** My Lords, this is an appeal from the Courts-Martial Appeal Court (1) which quashed a conviction by Naval Court-Martial sitting at the Naval Barracks at Portsmouth on Aug. 15, 1967. The respondent (2) was convicted on two charges of gross indecency with another male and sentenced to be dismissed from Her Majesty's service, to be kept in detention for the term of six calendar months and to suffer the consequential penalties involved. The other male person concerned, who was serving with the respondent, was under the age of twenty-one years. The question involved in the appeal is whether the leave of the Director of Public Prosecutions is necessary to institute proceedings for gross indecency contrary to s. 42 of the Naval Discipline Act, 1957, and s. 13 of the Sexual Offences Act, 1956, at the trial by court-martial when one of the men was at the time of the commission of the offences under the age of twenty-one. The court-martial was convened by circumstantial letter dated July 31, 1967, and was held on Aug. 15, 1967. On July 27, 1967, the Sexual Offences Act 1967 had come into force. Section 8 of this Act provides:

**I** "No proceedings shall be instituted except by or with the consent of the Director of Public Prosecutions against any man for the offence of . . . gross indecency with another man, . . . where either of those men was at the time of its commission under the age of twenty-one . . ."

No consent of the Director of Public Prosecutions was ever obtained.

There is no apparent reason to restrict the meaning of the word "proceedings" to proceedings taken in the civil courts of this country. The word "proceedings" is applicable to courts-martial, as is shown by the Naval Discipline

(1) [1968] 1 All E.R. 339.

(2) I.e., the respondent to the appeal, Peter John Warn.

Act, 1957; see s. 48 and the succeeding sections of that Act which deal expressly with courts-martial and with "Proceedings of courts-martial". This is the title which embraces s. 58 to s. 66 (inclusive) of the Act of 1937, a group of sections which deals with the procedure and practice of courts-martial. The charges, as has been stated, were laid against the respondent under s. 42 of the Naval Discipline Act, 1957, and s. 13 of the Sexual Offences Act, 1956. The latter section (s. 13 of the Act of 1956) provides:

"It is an offence for a man to commit an act of gross indecency with another man, whether in public or private, or to be a party to the commission by a man of an act of gross indecency with another man, or to procure the commission by a man of an act of gross indecency with another man."

Section 42 (1) of the Naval Discipline Act, 1957, so far as material provides:

"Every person subject to this Act who is guilty of any civil offence (that is to say any act or omission which is punishable by the law of England or would be so punishable if committed in England) shall be liable on conviction under this Act . . . (c) (i) to such punishment (being a punishment authorised by this Act) as could be imposed on the offender on conviction before a civil court of the like offence committed in England, or (ii) to dismissal with disgrace from Her Majesty's Service or any less punishment authorised by this Act."

When one turns to the Sexual Offences Act 1967 itself, there are clear indications that court-martial proceedings were contemplated thereby. Section 1 of the Act of 1967 amends the law relating to homosexual acts in private declaring that there shall be no offence provided that the parties consent thereto and have attained the age of twenty-one years. Section 1 (5) provides, so far as material:

"Subsection (1) of this section shall not prevent an act from being an offence (other than a civil offence) under any provision of . . . the Naval Discipline Act, 1957."

This reference presumes the liability to dismissal with disgrace from Her Majesty's Service or any less punishment authorised by the Naval Discipline Act, 1957, in the case of every person who is guilty of any disgraceful conduct of an indecent kind.

There is an express reference to a court-martial in s. 10 (2) of the Sexual Offences Act 1967, which deals with past offences. This subsection provides:

"Except as provided by the next following subsection, this Act shall not have effect in relation to any act which is, or apart from this Act would be, an offence where the defendant to an indictment for that offence has been committed for trial before the passing of this Act or, as the case may be, a court-martial for the trial of that offence has been ordered or convened before the passing of this Act."

These statutory references are sufficient to negative such a narrow construction of s. 8 as to exclude proceedings by court-martial from the scope of s. 8 of the Sexual Offences Act 1967. If proceedings did not include trial by court-martial, it is difficult to see the purpose of any reference to courts-martial in the Act of 1967.

Accepting the difficulty presented by the statutory provisions to which I have referred, the main argument presented by the Solicitor-General was to the following effect. Section 42 of the Act of 1957 being an offence-creating section, one has to examine with care the wording of that section so as to ascertain what its subject-matter truly is. The offence against naval discipline is the offence of "committing a civil offence" not the civil offence itself. If this is the correct construction then the offence against naval discipline is not caught by the language of s. 8 of the Act of 1967, which accordingly has no application. This argument is not supported by reference to other sections of the Naval Discipline Act, 1957, where the word "offence" is plainly used to denote the act in respect



A of which the person is charged as an offence in itself apart from naval discipline. See, for example, s. 48 (1) of the Act of 1957 which deals with the trial and punishment by court-martial of any offence under Part 1 of the Act of 1957; see also s. 129 (1) which debars civil courts from retrying persons acquitted or convicted of an offence for the same offence.

B Applying the language of s. 8 of the Sexual Offences Act 1967, it is for the offence of gross indecency that the proceedings can only be taken with the consent of the Director when either of the men concerned is under twenty-one and it was for that offence that the court-martial proceedings were taken. The words of LORD RADCLIFFE in *Cox v. Army Council* (3) (also a court-martial case) are of assistance. He said: "The occurrence that is said to constitute the offence is always the actual occurrence itself . . ." These words are, I think, of general application and are certainly applicable here, for I can see no justification for distinguishing an offence from the commission of the offence in any of the sections to which attention has been drawn.

I should mention an argument which was not pressed strongly although not, I think, abandoned by the Solicitor-General. It was said that s. 8 of the Act of 1967 is a procedural section and consequently, in spite of the fact that the procedure provided by that section was not carried out, the court-martial was entitled to act. This proposition depends on the authority of the case of *R. v. Jennings* (4), a decision of the Courts-Martial Appeal Court, which has found its place as an authority for the proposition stated above in manuals of service law (5). It was on the authority of that decision that the judge advocate in this case advised the court-martial to overrule the objection made on behalf of the respondent and to proceed with the trial. In my opinion, the proposition is too widely stated. Procedural sections are usually mandatory and there is nothing which points to the contrary in this case. Procedural provisions are, as here, often inserted for the protection of accused persons. There may, for example, be doubt as to the age of one of the men concerned, and it is wrong to brush the condition precedent on one side on the bare ground that it is procedural in its nature. I think that it is right to express the opinion, therefore, that *R. v. Jennings* (4), in so far as it rests on the ground stated above, ought not to be supported. It is right to say, however, that the decision itself may be supported on other grounds, for the provision of notice as required by the Road Traffic Act, 1930, s. 21 could not be complied with in Germany where the offence was committed and the considerations which arose in the case of *Cox v. Army Council* (6) are relevant. Difficult situations arise where English law is translated so to speak for the purpose of fitting into occurrences which take place outside the jurisdiction. These considerations do not arise here and I have only mentioned *R. v. Jennings* (4) in order, if possible, to avoid misunderstanding in the future.

It is, I think, necessary to add, although it is a question that does not affect your lordships' decision, that it appears clear for the reasons which have already been given as to the general application of the Sexual Offences Act 1967, that s. 7 (2) of that Act (7), which appoints a time limit of twelve months from the date of the offence beyond which no proceedings may be taken, applies notwithstanding the

(3) [1962] 1 All E.R. 880 at p. 884; [1963] A.C. 48 at p. 71.

(4) [1956] 3 All E.R. 429.

I (5) See MANUAL OF MILITARY LAW, Part 1 (11th Edn. 1965), p. 356, note (c); and MANUAL OF AIR FORCE LAW (4th Edn. 1964), Vol. 1, p. 376, note 9.

(6) [1962] 1 All E.R. 880; [1963] A.C. 48.

(7) Section 7 of the Sexual Offences Act 1967 provides: "(1) No proceedings for an offence to which this section applies shall be commenced after the expiration of twelve months from the date on which that offence was committed. (2) This section applies to—(a) any offence under s. 13 of the Act of 1956 (gross indecency between men); (b) any offence under s. 32 of that Act (soliciting and importuning by men for immoral purposes) where the immoral purpose is the commission of a homosexual act; (c) any offence of buggery by a man with another man not amounting to an assault on that other man and not being an offence by a man with a boy under the age of sixteen."

longer period of three years provided by s. 52 of the Naval Discipline Act, 1957. A  
For these reasons I would dismiss the appeal.

**LORD UPJOHN:** My Lords, I agree with the opinion already expressed by my noble and learned friend, LORD HODSON, and for the reasons that he gives would dismiss the appeal.

**LORD WILBERFORCE:** My Lords, for the reasons given by my noble and learned friend, LORD HODSON, I would dismiss this appeal. B

*Appeal dismissed.*

Solicitors: *Treasury Solicitor; V. J. Lissack* (for the respondent).

[*Reported by S. A. HATTEEA, ESQ., Barrister-at-Law.*] C

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NOTE. D

CONWAY v. RIMMER AND ANOTHER.

[HOUSE OF LORDS (Lord Reid, Lord Morris of Borth-y-Gest, Lord Hodson, Lord Pearce and Lord Upjohn), May 2, 1968.] E

*Discovery—Production of documents—Privilege—Crown privilege—Documents produced for the inspection of the court—Documents to be made available in the litigation.*

**Further consideration.**

Consequent on the decision reported at [1968] 1 All E.R. 874 the documents ordered to be produced were produced to the House of Lords for inspection. F

**LORD REID:** My Lords, I have examined the five documents with which this case is concerned. I can find nothing in any of them the disclosure of which would, in my view, be in any way prejudicial to the proper administration of the Cheshire Constabulary or to the general public interest. I am therefore of the opinion that they must be made available in this litigation. G

*Paragraph 3 of the order of Mr. Registrar CUNLIFFE, dated Nov. 24, 1966, restored (1).*

[*Reported by S. A. HATTEEA, ESQ., Barrister-at-Law.*] H

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(1) This was an order that the five documents should be produced for inspection to the plaintiff. I

**BANDAR PROPERTY HOLDINGS, LTD.  
v. J. S. DARWEN (SUCCESSORS), LTD.**

[QUEEN'S BENCH DIVISION (Roskill, J.), February 6, 1968.]

*Landlord and Tenant—Lease—Covenant—Insurance—Repayment by lessee of amount of fire insurance premiums paid by lessor—Lessor to insure with reputable insurers—Whether implied term against lessor imposing unnecessarily heavy burden on lessees in respect of premium.*

By the terms of a twenty-year underlease, the lessors agreed to keep the demised premises insured at "some insurance office or offices of repute, or at Lloyds", and the lessees agreed to repay to the lessors the amount of the premiums involved in such insurance. The lessors, through a firm of Lloyds' brokers, placed the cover with two companies for a total premium for twelve months of £1,134 14s. 2d. Two months later the lessees obtained through another firm of Lloyds' brokers a quotation for identical cover at Lloyds at a premium of £946 6s. 6d.

**Held:** a term that the lessors should place the insurance so as not to impose an unnecessarily heavy burden on the lessees would not be implied, and accordingly the lessors were entitled to recover the whole of the amount paid by them by way of premium to the two companies for the insurance arranged by the first Lloyds' brokers (see p. 309, letter A, post).

*Leather Cloth Co. v. Brassey* ((1862), 3 Giff. 474) considered.

[As to covenants in leases to insure, see 23 HALSBURY'S LAWS (3rd Edn.) 617-620, para. 1315-1319; and for cases on the subject, see 31 DIGEST (Repl.) 400-406, 5295-5353.]

Case referred to:

*Leather Cloth Co. v. Brassey*, (1862), 3 Giff. 474; 6 L.T. 63; 66 E.R. 496; 30 Digest (Repl.) 519, 1594.

**Action.**

This was an action brought by the plaintiffs, Bandar Property Holdings, Ltd., entitled to the reversion on an underlease of Red Star Wharf, Bethnal Green, for the recovery from the defendants, J. S. Darwen (Successors), Ltd., the underlessees, money alleged to be due to the plaintiffs by way of reimbursement of insurance premiums paid by the plaintiffs as underlessors, such liability being alleged to arise under a covenant for repayment in the underlease.

*E. J. Prince* for the plaintiffs, the lessors.

*R. J. Southan* for the defendants, the lessees.

**ROSKILL, J.:** By an underlease dated Feb. 9, 1965, the lessors there mentioned, a company called Industrial and Commercial Properties, Ltd., leased to the lessees, a company called S. Guiterman & Co., Ltd., certain property known as Red Star Wharf in Red Star Wharf Road, Bethnal Green, for a period of twenty years beginning on June 24, 1964, at an annual rental of £10,500. The lessors' reversion on the underlease has devolved on the present plaintiffs, Bandar Property Holdings, Ltd., and the lessees' title to the underlease has devolved on the present defendants, J. S. Darwen (Successors), Ltd. The matter comes before the court for the determination of a very short question—namely, the extent of the lessees' liability to indemnify the lessors in respect of certain insurance premiums paid by the lessors in accordance with certain provisions in that underlease.

I can, I think, go straight to the relevant clauses in the underlease. The first is cl. 2 (1) (b), which provides that the lessee will

"repay to the lessor such sum as the lessor shall from time to time pay or be called on to pay by way of premium or premiums for insuring the demised premises in accordance with the provisions of cl. 3 (1) hereof and against



such other risks in respect of the demised premises as the lessor may from time to time require and payment of such sums shall be made on the quarter day for payment of rent next following the date on which each such premium becomes payable by the lessor and the proportion of the current premium to the next renewal date shall be paid on the quarter day next following the date hereof."

The next relevant provision is in cl. 2 (6), which, so far as is relevant, contains the following provision:

"The lessee will at the lessee's own cost put and from time to time and at all times during the said term keep in good and substantial repair and condition and cleanse maintain and amend the whole of the demised premises including but without prejudice to the generality of the foregoing the fixtures and fittings therein."

Then follows reference to certain other things that have got to be kept in good repair. The covenant ends thus:

"(excepting such damage by fire or in peacetime by aircraft or articles dropped therefrom the reinstatement whereof is covered by the insurance referred to in cl. 3 (1) hereof)."

I turn next to cl. 3 (1), which reads thus:

"The lessor hereby covenants with the lessee as follows: (1) that the lessor will at all times during the said term (unless such insurance shall be vitiated by any act neglect default or omission of the lessee) insure and keep insured the demised premises against loss or damage by fire and in peacetime by aircraft and articles dropped therefrom in some insurance office or offices of repute or at Lloyds in the full reinstatement cost thereof including insurance to cover architects' surveyors' and legal fees and two years' loss of rent the provisions of the policy to be such as the insurers shall require and will whenever reasonably required produce to the lessee a certificate from the insurers stating for what sums the demised premises are insured and to what date the premium has been paid and in case of destruction or damage by fire or in peacetime by aircraft or articles dropped therefrom the lessor will as soon as practicable cause all money received in respect of such insurance (other than in respect of rent and fees) to be forthwith laid out in reinstating the demised premises."

What happened was this. On Mar. 25, 1966, a well known firm of Lloyd's brokers, Messrs. Halford, Henry and Montefiore placed the cover as to fifty per cent. with the Yorkshire Insurance Co., Ltd., and as to fifty per cent. with the Sun Insurance Office, Ltd., for £200,000 on building, £20,000 on architects' and surveyors' fees, that being ten per cent. of the sum insured on the building, and £21,000 for two years' rent, the total sum insured being £241,000. The cover there arranged by those Lloyds' brokers was expressed in the cover note to be for twelve months from 4 p.m. on Dec. 31, 1965. The premium appears on the second page of that cover note. The total premium was £1,134 14s. 2d. That, in passing I would mention, was the sum claimed by the lessors in this action against the lessees. It seems that the lessors shortly afterwards changed their insurance brokers; but nothing turns on that. On May 26, 1966, that is some two months after the cover effected through Messrs. Halford, Henry & Montefiore, the lessees consulted other Lloyds' brokers and obtained a quotation for what would appear to have been an identical, or virtually identical, cover at Lloyds at a premium of £946 6s. 6d., instead of the premium to which I have just referred, of £1,134 14s. 2d. The difference between the two is £188 7s. 8d.

The lessees for some time declined to pay any part of the premium for the cover arranged through Messrs. Halford, Henry & Montefiore; but ultimately liability was accepted except for the sum now nominally in dispute in this action which is that difference; for the lessees now contend that it is unjust and wrong on the true

**A** construction of the underlease that they should be called on to pay to the lessors the whole amount which the former as lessors have disbursed over the relevant period for insurance premiums, when an identical cover could have been obtained at Lloyds for nearly £200 less.

The question which I have to decide is whether, on the true construction of the covenants which I have read, the lessors are right in their contention that the whole amount is recoverable, or the lessees are right in their contention that an implication of a restrictive nature has to be made into the relevant covenants which, in effect, obliges the lessees to pay no more to the lessors in respect of insurance premiums than the sum for which the lessors could have obtained the requisite cover at Lloyds. I said a moment ago that the sum of £188 7s. 8d. was the sum nominally involved. The underlease, as I have already stated was for a period of twenty years; and therefore the sum in fact involved under the underlease is twenty times the figure which I have just mentioned. There is, however, a more substantial sum of money at stake, inasmuch as I was told by counsel that the total period involved is about forty years and not twenty years, a further and consecutive underlease having been executed. In reality, there is a substantial sum involved in this dispute between the parties, which I have been told is a friendly dispute, both parties wanting the true position determined by the court in view of the fact that the current lease and the later lease have nearly forty years to run.

As I have already indicated, the defence is that the lessors are not entitled to the larger sum which they claim, and the ground on which the lessees rely is pleaded, with admirable succinctness, if I may say so, in para. 6 of the defence, in these terms:

"The [lessees] admit that the [lessors] have arranged insurance for the said premises at a premium of £1,134 14s. 2d. but will contend that on the true construction of the said underlease there is to be implied a duty on the party of the lessor to act reasonably in placing such insurance so as not to impose an unnecessarily heavy burden on the [lessees]."

**F** The question for determination is, on the true construction of cl. 3 (1) has any restrictive implication of that nature to be made? If it has, then the lessees are right; if it has not, then the lessors are right.

The principles on which the courts have proceeded for at least the last seventy-five years in determining whether or not terms which have not been expressed in contracts are to be implied therein, have been stated again and again in cases of the highest authority. I do not propose to refer to those cases, all of which are well-known. It is axiomatic that a court will not imply a term which has not been expressed merely because, had the parties thought of the possibility of expressing that term it would have been reasonable for them to have done so. Before a term which has not been expressed can be implied it has got to be shown not only that it would be reasonable to make that implication, but that it is necessary in order to make the contract work that such a term should be implied. It has sometimes been expressed as "necessary for the business efficacy of the contract"; and it is against that well-known and established principle that I approach the determination of the crucial question in this case.

**I** As a matter of language, at least, there is no restriction on the lessors' freedom of choice; indeed, the covenant in cl. 3 (1) provides in terms that they shall insure and keep insured the premises "in some insurance office or offices of repute or at Lloyds in the full reinstatement cost". At first sight, at least, those words "in some insurance office or offices of repute or at Lloyds" would seem to give to the lessors a wholly unfettered option which means of effecting the insurance they adopt. Shall they go to one insurance office? Shall they go to more than one insurance office? Or shall they go to Lloyds? Moreover, the parties have not seen fit expressly to fetter that option which the covenant gives to the lessors. It has been stressed—and it is, of course, right—that the lessees have to pay; and it is

urged on me that, because the lessees have to pay, it is quite unreasonable to read this covenant as free from all restrictions in favour of the lessees. It is said that this covenant, by necessary implication, obliges the lessors to avoid imposing what the learned pleader has expressed as an "unnecessarily heavy burden on the lessee". It was not suggested that the whole test here was financial; it was not suggested that the lessor was bound of necessity to obtain the cheapest rate. It was suggested, however, that he had to look at all the circumstances and determine which course he was going to pursue in the light of that which would avoid an "unnecessarily heavy burden upon the lessee", and therefore could be argued to be the most reasonable for him to adopt.

I said a moment ago that the question: "what is reasonable?" is not the test. It has to be necessary to make the contract work as well as reasonable before the court will make any implication of the kind contended for on behalf of the lessees. Reliance was placed by counsel for the lessees on a decision of SIR JOHN STUART, V.-C., in *Leather Cloth Co. v. Bressey* (1). The facts of this case were unusual and intensely complicated, and the report is of some length. What appears to have happened, taking the matter as briefly as I can, was this. The plaintiffs, the Leather Cloth Co., were seeking to restrain a man named Bressey before SIR JOHN STUART, V.-C., from pursuing an action brought by Bressey on a covenant to which the plaintiffs, the Leather Cloth Co., were a party, under which Bressey claimed that the Leather Cloth Co. were liable to repay to Bressey certain sums disbursed by Bressey in respect of fire insurance premiums. Bressey had acquired his title by way of an underlease made in 1855, the headlease having been granted some five years earlier, in 1850. The Leather Cloth Co. came into the picture in 1857 when they, by an assignment from Bressey and others, acquired the benefit of the underlease which was entered into in 1855. Both the head lease and the underlease contained certain covenants requiring the head lessee in the one case, and the lessor in the other, to effect certain insurances and to keep those insurances in being. A man named Pratt failed for some time to effect the insurances which were necessary to comply with the provisions of the leases; but subsequently it seems that he disbursed a sum of money of no less than £528 in respect of an insurance which did not comply with his or the lessee's contractual obligation, and then sought through Bressey to recover that amount from the Leather Cloth Co.

SIR JOHN STUART, V.-C., restraining Bressey from pursuing his action at common law, said in a passage relied on by counsel for the lessees (2):

"But it is said that, according to the terms of the contract in that part of the lease in which the plaintiffs bind themselves to pay the expense of insurance, the words are large and general, and are words which import an obligation upon the plaintiffs to repay any sums which may be paid by the defendant. Pratt, in respect of insurance, whether unnecessarily paid or not; and it is sought to read these words as an absolute covenant, and without reference to other parts of the deed in which insurance is referred to. That is a mode of construction which it is impossible for the court to adopt. The instrument must be looked at as a whole, and it seems to me entirely contrary to the true construction of the words to say that this part of it imposes upon the plaintiffs the obligation to pay any sum that Pratt might choose to pay for insurance, although that insurance might be useless with regard to another covenant in the original deed, which proscribes another mode in which insurance must be effected."

It must be remembered that the words which SIR JOHN STUART, V.-C., used had reference to the particular facts of a particular case, and to a particular covenant. It is true that he did say that the obligation on the Leather Cloth Co. was not an unfettered and unrestricted obligation.

Counsel for the lessees has sought to apply those words to the covenant in the

(1) (1862), 3 Giff. 474.

(2) (1862), 3 Giff. at pp. 493, 494.



A present case; but with respect, I do not get any help from that decision. The question which I have to decide turns on the construction of this covenant in this particular underlease; and, for the reasons which I have endeavoured to give, and applying very well established legal principles, I can see no justification for making the implication sought, since no implication is necessary and the bargain between the parties works perfectly sensibly without making any implication.

B In the result, therefore, the defence fails, and there must be judgment for the lessors.

*Judgment accordingly (3).*

Solicitors: *Fremont & Co.* (for the lessors): *Forsythe, Kerman & Phillips* (for the lessees).

[*Reported by MARY COLTON, Barrister-at-Law.*]

## ZIMMER ORTHOPAEDIC, LTD. v. ZIMMER MANUFACTURING CO.

[CHANCERY DIVISION (Cross, J.), February 27, March 25, 1968.]

*Practice—Want of prosecution—Dismissal of action—Delay—Inordinate delay without excuse—Plaintiffs in default in not proceeding with action—Counterclaim by defendants—Defendants took no step to secure that counterclaim should be heard—No statutory time bar applicable—Defendants put on terms of abandoning counterclaim if they were to obtain order dismissing plaintiffs' action—R.S.C., Ord. 25, r. 1 (4).*

The plaintiffs began an action against the defendants, an American company, in January, 1961, claiming injunctions to restrain alleged infringement of the plaintiffs' trade mark and alleged passing-off, and other relief. A statement of claim was delivered in November, 1961, the defence and counterclaim was delivered in March, 1962. The plaintiffs were a company formed after the defendants' goods had been sold in England by (as the defendants alleged) an agent of the defendants, and by their counterclaim the defendants alleged, in effect, that the plaintiffs' trade mark was registered improperly or held on trust for the defendants. Pleadings were amended in 1962, and a reply and defence to counterclaim was delivered in April, 1963, in which month the plaintiffs also requested further particulars of the defendants' counterclaim. No summons for directions was taken out. On Jan. 1, 1964, a new R.S.C., Ord. 24, r. 2 (1) came into force, requiring litigants to make discovery by exchanging lists of documents within fourteen days after pleadings were closed. No list of documents was served by either party. In January, 1968, the defendants applied for an order that the action be dismissed, and on Jan. 30, 1968, the plaintiffs applied for an order that the counterclaim be dismissed. There had been negotiations for a settlement, but it was conceded that there had been inordinate delay for which the plaintiffs advanced no excuse; and the defendants had done nothing to secure that the counterclaim should be heard as soon as possible.

**Held:** in the circumstances, having regard to the existence of the counterclaim, to the nature of the issues and to the factors that each party had, in the view of the other, been acting unlawfully for twelve years and that no statutory time bar was applicable, the defendants would be granted an order dismissing the plaintiffs' action only on terms of submitting to a similar order dismissing their counterclaim (see p. 312, letter I, post).

*Allen v. Sir Alfred McAlpine & Sons, Ltd.* ([1968] 1 All E.R. 543) considered.

[As to the dismissal of actions for want of prosecution, see 30 HALSBURY'S LAWS (3rd Edn.) 410, 411, para. 771; and for cases concerning the taking out

(3) Having regard to payment having been made into court on leave to defend being granted, and to an agreed set-off, the order made was for payment of £784 14s. 2d. out of court to the plaintiff lessors.

of summons for directions and its purpose, see *DIGEST (PRACTICE)* (Repl.) 604, 605, 2256-2262, and for a case on the imposition of terms on an application for leave to discontinue an action see *ibid.*, 572, 2058.]

Case referred to:

*Allen v. Sir Alfred McAlpine & Sons, Ltd.*, [1968] 1 All E.R. 543; [1968] 2 W.L.R. 366.

### Procedure Summonses.

These were applications by the defendants, Zimmer Manufacturing Co., an American company, by a summons dated Jan. 11, 1968, under R.S.C., Ord. 25, r. 1 (4) for an order that the plaintiffs' statement of claim in the action should be dismissed for failure to take out the summons for directions, and a cross-summons, issued on Jan. 30, 1968, by the plaintiffs, Zimmer Orthopaedic, Ltd., for a like order that the defendants' counterclaim be dismissed on the ground that they had taken no step in the counterclaim since 1962. The case noted below\* was cited in argument in addition to the one referred to in the judgment.

*S. Gratwick* for the defendants.

*W. Aldous* for the plaintiffs.

*Cur. adv. vult.*

Mar. 25. **CROSS, J.**, read the following judgment: By their writ in this action issued on Jan. 10, 1961, and amended on Oct. 2, 1962, the plaintiffs, Zimmer Orthopaedic, Ltd., an English company, claim against the defendants, Zimmer Manufacturing Company, an American company, first, injunctions to restrain the defendants from infringing their trade mark No. 674,834, registered in November, 1948, in respect of orthopaedic goods and from advertising, offering for sale or selling under the trade mark or under the name "Zimmer" orthopaedic goods not of the plaintiffs' manufacture; secondly, damages or an account of profits; and, thirdly, delivery up of all infringing material or all material calculated to lead to passing-off. The statement of claim was delivered on Nov. 14, 1961, and amended on Oct. 8, 1962, a defence and counterclaim were delivered on Mar. 21, 1962, and amended on Dec. 12, 1962, and a reply and defence to counterclaim were delivered on Apr. 27, 1963.

The pleadings are somewhat complicated. Stated in its barest essentials, the position which they disclose is this. The defendants were founded as long ago as 1927 by one Justin O. Zimmer, from whom they take their name, and for some years at least before 1940 one Franklin Isaac Saemann acted as their agent or distributor over here for the sale of orthopaedic appliances made by them and imported into this country under the name "Zimmer". In 1947 Saemann formed the plaintiffs, Zimmer Orthopaedic, Ltd., and on Nov. 24, 1948, the plaintiffs obtained registration of the trade mark "Zimmer" in respect of orthopaedic appliances.

There is an acute conflict between the parties as to the relations which obtained between the defendants and Saemann between 1940 and 1947. The plaintiffs contend that during that period Saemann obtained from the defendants the exclusive right to sell orthopaedic goods in this country on his own account under the name "Zimmer", that he was entitled to cause the plaintiffs to be registered as proprietors of the trade mark "Zimmer", and that the defendants, by selling orthopaedic goods under that name in this country, are guilty of infringement of trade mark and passing-off. The defendants, on the other hand, say that Saemann never acquired any right to trade on his own account under the name "Zimmer", and that the plaintiffs' trade mark was either registered improperly or alternatively held by the plaintiffs as trustees for the defendants. The counterclaim claims relief to give effect to their contentions. The resolution of the dispute will turn in part on the construction of an agreement made on Aug. 31, 1946, between the defendants and Saemann, but I understand that there may be oral evidence as well.

\* *Fitzpatrick v. Batger & Co., Ltd.*, [1967] 2 All E.R. 657.

**A** I now resume the history of this action. On Apr. 27, 1963, the plaintiffs delivered a request for some further and better particulars of the amended defence and counterclaim which the defendants did not supply. Order 30, r. 1 (1) of the Rules of the Supreme Court then in force provided that a plaintiff should within seven days of the close of pleadings take out a summons for directions; but no summons for directions has ever been taken out by the plaintiffs in this action. On Jan. 1, 1964, new rules of the Supreme Court came into force in place of the existing rules without any transitional provisions applicable to pending actions. Order 24, r. 2 (1), now provides that the parties to an action between whom pleadings are closed must make discovery by exchanging lists of documents and accordingly each party must, within fourteen days after the pleadings in the action are deemed to be closed as between him and any other party, make and serve on that party a list of the documents which are or may have been in his possession, custody or power relating to any matter in question between them in the action. Order 25, which replaces the old Ord. 30, extends this time in which the plaintiffs must take out a summons for directions to one month from the close of the pleadings. In this action, neither party has served a list of documents on the other.

**D** On Jan. 11, 1968, the defendants took out a summons under Ord. 25, r. 1 (4), asking for an order that the statement of claim be struck out and the action dismissed on the ground that the plaintiffs had failed to take out a summons for directions and on Jan. 30, 1968, the plaintiffs took out a summons for an order that the counterclaim be dismissed on the ground that the defendants had taken no step in the counterclaim since its delivery with the defence on Dec. 12, 1962.

**E** Both summonses are before me. I was told that in the summer of 1967 there were negotiations for a settlement which led to nothing, but, apart from this, so far as I know, the parties did not communicate with each other in any way from Apr. 27, 1963, when the plaintiffs delivered their request for particulars, until the defendants issued their summons on Jan. 11, 1968, nearly five years later.

**F** In the cases reported as *Allen v. Sir Alfred McAlpine & Sons, Ltd.* (1) the Court of Appeal has recently given some guidance to judges of first instance as to the principles on which the discretion to dismiss an action for want of prosecution should be exercised. In those cases, it was in fact the plaintiffs' solicitors and not the plaintiffs themselves who were to blame for the delays which had occurred, whilst in this case, so far as I know, it was the plaintiffs themselves who allowed the action to go to sleep. But what was said by the Court of Appeal is just as applicable to a case where a party himself is to blame as to a case where the fault lies with his solicitor. The essence of the matter, as I understand it, is this. It is for the plaintiff and his legal advisers to get on with the action and to see that it is brought to trial with reasonable despatch. The defendant is normally under no duty to stimulate him into action, and the plaintiff cannot complain that he gave him no warning before applying to have the action dismissed for want of prosecution. But the court will not take the drastic step of dismissing the action unless (a) the delay has been inordinate, (b) there was no excuse for it, and (c) the defendant is likely to be seriously prejudiced by it if the action is allowed to go on.

**I** In this case it is conceded that the delay has been inordinate and the plaintiffs have put forward no excuse for it. They submit, however, that the position of the defendants is altogether different in this case from that of the defendants in the cases with which the Court of Appeal was concerned. This action certainly has some unusual features which distinguish it from the ordinary run of actions. In the first place, the events in dispute occurred between 1940 and 1947, that is to say, from twenty to thirteen years before the writ was issued. In the second place, the dispute between the parties is not simply whether, as a result of those events, the defendants were entitled to go on selling the goods in



question here after 1947 under the name "Zimmer". The question also arises whether the plaintiffs themselves ever became entitled to use the name "Zimmer" for their own account, hence the counterclaim, which is a true cross-action, alleging that, so far from the defendants being in the wrong, it is the plaintiffs who are at fault. Thirdly, having regard to the fact that each side allowed the other to go on acting, as each says that the other did, unlawfully for at least a dozen years makes it possible that the result of the proceedings may be that both the action and the counterclaim will fail and the parties will be left in the position that each can go on trading as it has been trading, however inconvenient that may be to the other.

These peculiar features of this action have to my mind a considerable bearing on the exercise of the discretion whether to dismiss the action. First, even if the action had come on when, but for the plaintiffs' negligence, it would have come on, say in 1964, there might even then have been great difficulty in arriving at the truth so far as it depended on oral as opposed to documentary evidence. It is to my mind doubtful whether the difficulty will be any greater if the action is tried in 1969 than it would have been if it had been tried in 1964, and so it is doubtful whether the defendants will suffer by the action not being dismissed. Secondly, the position of a defendant who is simply defending a claim made against him is, to my mind, very different from that of a defendant who has a cross-claim against the plaintiff arising out of the same events as are to be investigated in the action. If such a defendant really wants his view of the legal position to be established and does not regard his counterclaim simply as a factor which may give the plaintiff pause in deciding whether to press on with the action, then I think that he ought to take active steps to ensure that the case is brought on.

This leads me to consider the cross-summons for dismissal of the counterclaim. Counsel for the plaintiffs relied to some extent in this connexion on the fact that after the new rules came into operation on Jan. 1, 1964, the defendants themselves came to be in default because they did not serve on the plaintiffs a list of relevant documents. I cannot regard that argument as of any weight. The plaintiffs were equally at fault in this respect and—both defaults were—in the circumstances, rather technical since both sides might quite excusably have overlooked the change in the rules. This does not in any way absolve the plaintiffs from their primary obligations to get on with the action by issuing a summons for directions; but, although the plaintiffs are in default and the defendants have not done or failed to do anything which disentitles them to ask to have the action dismissed, the fact that the defendants did nothing to secure that the counterclaim should be heard as soon as possible disentitles them in my judgment from asking for the action to be dismissed and the counterclaim to be left on foot. I am confirmed in this view by the reflection that there is no period of limitation applicable to proceedings of this sort, apart from the period in respect of which damages can be recovered. So that if I dismissed this action and the defendants decided to go on with the counterclaim, the plaintiffs could, so far as I can see, start a fresh action for infringement and passing-off and ask for it to be consolidated with the defendants' action.

All these considerations lead me to think that the defendants in this case are only entitled to an order dismissing the plaintiffs' action for want of prosecution, if they submit to a similar order dismissing the counterclaim. If they wish to press the counterclaim, then they must allow the plaintiffs to proceed with the action, provided, of course, that they now at long last bestir themselves.

*Order that defendants not entitled to have action dismissed unless they have their counterclaim dismissed.*

Solicitors: *Bird & Bird* (for the defendants); *Woodham Smith, Borradaile & Martin* (for the plaintiffs).

[Reported by JACQUELINE METCALFE, Barrister-at-Law.]

**A** METROPOLITAN PROPERTIES CO., LTD.  
v. NOBLE AND OTHERS.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Ashworth and Blain, J.J.), March 19, 20, 1968.]

**B** *Rent Restriction—Rent—Determination of fair rent—Cost of services—Management charge in respect of services—Selective employment tax in respect of staff—Rentals of residential staff's flats—Cost of central heating—Whether such management charge and S.E.T. allowable in calculating cost of services—Whether amount allowable in respect of rent of staff flats and of cost of central heating may be reduced below figure of actual cost, if smaller amount appropriate—Whether rent assessment committee bound to inspect staff flats—Rent Act 1965 (c. 95), s. 27, Sch. 3, para. 12.*

**C** A rent assessment committee determined the fair rent of four flats in a block, for which services were provided by residential staff. For this purpose the committee calculated the cost of the services. In computing this cost the committee did not allow a management charge of ten per cent., claimed by the landlords, on the total cost of providing services, which cost amounted, according to the landlords, to £20,243 annually\*. The committee also disallowed in their calculation the amount of selective employment tax in respect of the staff providing the services. In computing the amount allowable in respect of rental cost of residential staff flats (the house-keeper's and the engineer's flats) the committee did not allow the actual amount of rent claimed by the landlord (£1,775 per annum) but a smaller amount which they thought appropriate (£1,275 per annum). The committee considered that the central heating provided by the landlords for the tenants' flats was inefficient and that the charge was too high for the service given; they allowed only fifty per cent. of the charge claimed by the landlords. On appeal,

**D** **Held:** (i) the committee were wrong in law in holding that nothing should be allowed by way of management charge in respect of services and that selective employment tax was not chargeable to the tenants; accordingly the cases would be remitted to the committee for determination in the light of the following opinions of the court that—

**E** (a) something by way of management charge was allowable in law in respect of services, though it could be allowed either by percentage or by lump sum (see p. 317, letter I, p. 318, letters B and D, and p. 319, letter A, post).

**G** *Metropolitan Properties Co. (F.G.C.), Ltd. v. Lannon* ([1968] 1 All E.R. 354) applied.

(b) selective employment tax should be included in the cost of providing services (see p. 318, letter I, and p. 319, letter A, post).

**H** (ii) in calculating what, in respect of the cost of the residential staff's flats, should be allowed in the cost of services to be included in assessing the fair rent of tenants, the committee were entitled to allow only such rentals for the residential staff flats as they considered appropriate, though less than the landlords' assessed actual cost of the staff flats; moreover the committee were not bound for this purpose first to inspect the staff flats (see p. 316, letters E and F, post).

**I** (iii) the committee were entitled to make a deduction from the actual cost of the central heating in view of inefficiency of the heating provided and on the basis that the charge was too high (see p. 316, letter H, post).

Appeal allowed in part.

[As to determinations by rent assessment committees, see SUPPLEMENT to 23 HALSBURY'S LAWS (3rd Edn.) para. 1571b, 5; and for a case on the subject, see 31 DIGEST (Repl.) 676, 7702.

\* The items are stated at p. 316, letter I, post.

For the Rent Act 1965, s. 27, s. 28 and Sch. 3, para. 12, see 45 HALSBURY'S STATUTES (2nd Edn.) 843, 844, 866.] **A**

Cases referred to:

*Crofton Investment Trust, Ltd. v. Greater London Rent Assessment Committee*, [1967] 2 All E.R. 1103; [1967] 3 W.L.R. 256.

*Metropolitan Properties Co. (F.G.C.), Ltd. v. Lannon*, [1968] 1 All E.R. 354. **B**

### Appeals.

These were four appeals by the landlords, Metropolitan Properties Co., Ltd. on points of law from the determination by the rent assessment committee on Oct. 11, 1967, of the fair rents for four flats, Nos. 6E, 6G, 8M and 14A, Hyde Park Mansions, Marylebone Road, N.W.1.

The grounds of appeal stated in the notice of appeal in respect of flat No. 6E were that the committee, in assessing the element of rent attributable to services, erred in point of law in that (a) there was no evidence to support their reduction of the cost of central heating by fifty per cent.; (b) they failed to include the cost of selective employment tax in the cost of portage services; (c) they made an arbitrary assessment of the cost of flats provided for the head porter, the resident engineer and the housekeepers instead of assessing a fair rent in respect of each flat and did so without inspecting the flats\*, except that of the head porter; and (d) they refused to include a charge for management in the cost of services to the landlords. **C**

*E. A. Bramall* for the landlords.

*P. A. W. Merriton* for the tenants.

*A. E. Holdsworth* as amicus curiae. **D**

**LORD PARKER, C.J.:** These are four appeals on points of law from a decision of a rent assessment committee given on Oct. 11, 1967, in respect of four flats, Nos. 6E, 6G, 8M and 14A, Hyde Park Mansions, Marylebone Road, N.W.1. **E**

Before dealing with the facts of this case, it is convenient to remind oneself of the legislation and the principles involved. Under the Rent Act 1965, the determination of the fair rent is dealt with in s. 27 (1) which provides: **F**

"In determining for the purposes of this Act what rent is or would be a fair rent under a regulated tenancy of a dwelling-house regard shall be had, subject to the following provisions of this section, to all the circumstances (other than personal circumstances), and in particular to the age, character and locality of the dwelling-house and to its state of repair." **G**

Subsections (2) and (3) do not matter for the purposes of this appeal; but s. 28 (1) provides:

"The amount to be registered as the rent of any dwelling-house shall include any sums payable by the tenant to the landlord for the use of furniture or for services, whether or not those sums are separate from the sums payable for the occupation of the dwelling-house or are payable under separate agreements." **H**

Accordingly, pausing there, there is no statutory obligation on the tribunal to determine the element in the fair rent which is properly included for the use of furniture or services. Having said that, however, it is quite clear that it will be an important ingredient in the fair rent, and is something which the assessment committee should consider. In *Metropolitan Properties Co. (F.G.C.), Ltd. v. Lannon* (1), WIDGERY, J., in giving what in effect was the judgment of the court, referred to this. He said: **I**

"Accordingly, I would put it as a very strong recommendation to rent assessment committees, if no higher, that, when the rent is concerned with

\* There were five of these flats.

(1) [1968] 1 All E.R. 354 at p. 364.



- A** the provision of services, they should endeavour always to give in brief form a statement of the principle on which they have acted. If the landlord, as he usually does, calls evidence of the cost of providing the services, the committee need not adopt that approach, but they must listen to the evidence, and, if they choose not to adopt that approach, it is of the greatest possible value in considering the correctness of their decision if they say
- B** why they have not adopted that approach . . .”

I mention that at this stage because the rent assessment committee with which we are concerned, although making their decision before that case of *Lannon* (2) was reported, have very properly done the very thing which WIDGERY, J., was advocating.

- C** Lastly on this matter I would refer to Sch. 3, para. 12 to the Act of 1965, which provides:

“The committee shall make such inquiry, if any, as they think fit and consider any information supplied or representation made to them in pursuance of para. 10 or para. 11 of this schedule and—(a) if it appears to them that the rent registered or confirmed by the rent officer is a fair rent, they shall confirm that rent; (b) if it does not appear to them that that rent is a fair rent, they shall determine a fair rent for the dwelling-house.”

- D** Accordingly, it is for the committee to listen to the evidence, to give such weight to it as they think fit, to make such inquiry as they think fit, and finally, as was stated in the case of *Crofton Investment Trust, Ltd. v. Greater London Rent Assessment Committee* (3), they were entitled to arrive at a conclusion on their own knowledge and experience. It is unnecessary to refer to that case in any detail; it applied to the procedure of rent assessment committees what LORD GODDARD, C.J., had said (4) earlier in respect of furnished rent tribunals.

- E** With those preliminary observations, one comes to the facts of this case. Quite generally, the rent assessment committee's approach was in this case to look first at the cost of services. They had before them expert evidence on behalf of the landlords and on behalf of the tenants in regard to the cost of these services. They also had before them a schedule prepared by the landlords purporting to be the actual costs of individual items in those services. That matter was considered in the first instance by the tribunal, and they arrived at definite figures as representing the proper costs of the services in respect of each flat. They then went on to consider fair rent, in the light of those figures for services which they had arrived at. Taking into consideration comparables, and all the circumstances of the case and scarcity value, they came to certain figures which were expressed in this form: flat 6E £570 including £168 for services; flat 6G £650 including £195 for services; flat 8M £690 including £210 for services; and finally flat 14A £390 including £126 for services.

- G** The appeals in the present case, which are appeals by the landlords against those determinations to which I have referred, relate to the way in which the assessment committee dealt with the costs of services. Four points are taken and it is convenient in the first instance to deal with the two minor ones raised by the landlords. The first of these minor points concerns the way in which the tribunal dealt with the flats which were occupied by certain members of the resident staff. The schedule that the landlords had prepared provided in respect of a Mr. and Mrs. Robinson, Mr. Robinson being the head porter, a total cost of £1,176 15s. In commenting on that, the tribunal said:

“Though this figure includes the wages, national health and pensions contributions and S.E.T. for the head porter and his wife, an estimated rental of the flat occupied by them (which is not in Hyde Park Mansions) at £650

(2) [1968] 1 All E.R. 354.

(3) [1967] 2 All E.R. 1103.

(4) In *R. v. Brighton and Area Rent Tribunal, Ex p. Marine Parade Estate (1936), Ltd.*, [1950] 2 K.B. 410 at pp. 420, 421.

per annum, rates, gas and electricity, the committee consider that the rental for an appropriate flat for a head porter should be £325."

They accordingly made the appropriate deduction from the figure put forward by the landlords in their schedules. That deduction forms part of the grounds of appeal, but counsel for the landlords quite rightly has in effect discarded this item because it certainly looks as worded as if the tribunal were saying it was unnecessary for the head porter to have a flat worth £650; that the appropriate rental for a head porter's flat would be £325; and as the committee in fact inspected the flat occupied by Mr. and Mrs. Robinson and saw that it was, as it undoubtedly was, a very big one, and also bearing in mind that the tribunal are entitled to exercise their own knowledge and experience, he does not challenge that they were entitled to say that the appropriate rental for a head porter's flat was £325.

There was, however, another item dealing with flats of resident staff in the landlords' schedule, and that was No. 9, housekeeper's and engineer's flats, £2,441 9s. 8d. The committee dealt with that in this way. They said:

"This total is made up of a rent as fixed by the landlord for each of the five flats concerned together with rates, electricity and gas. The rents totalled £1,775 but the committee consider that appropriate rentals should not exceed £1,275",

and accordingly they deducted £500.

The way counsel for the landlords puts his point on this matter is: that the tribunal clearly did not accept the witness for the landlords, which, he says, they are of course entitled to do, but, he says, if they are going to fix appropriate rents for these flats by reference to their own knowledge and experience, then they ought to have inspected them and they never did. The answer, as it seems to me, is that they were not the flats which were the subject of the appeal; they were only flats which came into the calculation of the cost of services; there was no obligation on the committee physically to inspect them, and without going through the voluminous evidence in this case, it is quite clear that they had from that evidence a very considerable amount of knowledge of these facts. I am quite unable to say that they were wrong in law in arriving at a figure for the appropriate rentals of the housekeeper's and engineer's flats, saying that they should not exceed a total of £1,275.

The second minor item concerned the cost of central heating. In regard to that, the committee say that they accept the figures put forward by the landlords as the actual cost of the central heating; but they say:

"The committee, however, considered the charge for central heating high in relation to the service provided, and accordingly propose to deduct fifty per cent."

Again, without going through the evidence at the hearing, it is clear to my mind that there was evidence before the committee that whatever the cost of providing this central heating, which incidentally varied from flat to flat, because there were different forms of heating, oil, coke and gas, but whatever the cost, it provided a very inefficient amount of heat for these flats; in some flats there were only two radiators, one of which was in the kitchen, and as it seems to me the committee, assisted by the valuer member and with their knowledge and experience, were fully entitled to make that deduction.

The first of the important points concerned the management charge in respect of the services provided. The landlords' schedule set out a number of items, wages, insurance, staircase lighting, porters' expenses, uniforms, window-cleaning, fire extinguishing, Mr. and Mrs. Robinson, to whom I have already referred, and the housekeeper's and engineer's flats, and the total of those items in the landlords' schedule was some £20,243. The landlords in their schedule then added ten per cent. management charge, that is in respect of the supply

**A** of those services, some £2,024. The committee, when they came to deal with that, said this: "The committee do not regard a management charge on items 1-9 [that is, in the schedule] as properly chargeable to the tenants"—pausing there, as it seems to me, it is saying quite clearly that any management charge, let alone the ten per cent., or ten per cent., on items 1-9, was not properly chargeable to the tenants.

**B** This question of management charges in respect of services arose in the earlier case to which I have referred of *Lannon* (5). WIDGERY, J., in dealing with this point, said this (6):

**C** "Finally, it is said that [the committee] failed to take into account a material consideration, namely, management charges. To understand this point, one must again go back to Mr. Weaver's original schedule of the cost of services [that, as here, was the landlords' schedule] which included among other items 'ten per cent. for management of services, and administration £4,627'. It will be remembered that the committee, when dealing with this point, had dismissed management charges in a somewhat summary way, including them with such things as fire extinguisher rental and saying: '... we do not accept that any of these are services supplied to or for the benefit of the tenants...' If that meant that the committee were saying to themselves—'We direct ourselves as a matter of law that management charges are an inadmissible factor when assessing the cost of services'—I would have thought that they were clearly wrong, because there is plenty of authority for the proposition that management costs, and indeed in appropriate circumstances management profit, may properly be admitted."

**E** Counsel for the landlords says that having regard to the passage that I have read, where the committee say that the management charge on services is not properly chargeable, they have misdirected themselves in law. The matter, however, does not end there, because having used those words, they add this: "But they have allowed a management charge in their estimation of a fair rent." At the end of their decision before giving the figures, they say:

**F** "In arriving at a fair rent the committee have taken into account all the matters referred to above and in particular the situation, character and age of the building. They have also had regard to the cost of repairs as given in evidence, and to the normal cost of management."

**G** It has been urged on this court that while they have not accepted ten per cent. of items 1-9 in the schedule as a management charge in respect of services, yet this shows that they have added something, and what that something is, is clearly for the committee; they have added something in the fair rent. In my judgment that really is, on the wording of this decision, an impossible contention, if only for this reason, that the figures in the fair rent include the figures for services from which a management charge in regard to services had been deleted, therefore if there is any management charge in respect of services, it must be in the figure of basic rent, that is fair rent less services, and if there is any element of management charge in the basic rent, it is clearly and could only be in respect of the building as opposed to the services. That, as I understand, is what the tribunal meant when they said: "They have also had regard to the cost of repairs", this is to the building, "and to the normal cost of management."

**I** Accordingly, as it seems to me, the tribunal have misdirected themselves in holding that they should not properly allow anything by way of management charge in respect of services.

What is said on behalf of the tenants is this, as I understand it. They are saying: be that as it may, assume, without conceding, that the committee have misdirected themselves, yet it cannot be said that in the final result the committee were wrong, because what they are arriving at is a fair rent; they



are not arriving at a cost of services. Secondly, the tenants say: anyhow, the committee were not bound to adopt the method of arriving at the cost of services which they did, namely by working on the admitted figures of cost in the landlords' schedule. It is said that they might have arrived at the same conclusion by considering the evidence of the expert witnesses. In my judgment, it is no answer to say that the committee might have arrived at the same final figure if they had adopted some other method; nobody could tell. What this court is concerned with is to see the method which they did adopt, and whether in adopting that method they went wrong in law. In my judgment they did so in regard to this management charge in respect of services. A  
B

Counsel for the landlords has invited this court not to send the case back to the committee, but by reference to a schedule which he has prepared to add on to the rent of each of these tenants the appropriate figure in respect of management charges. I think that that is quite an impossible contention, if only for this reason: while the committee, I think, ought to have allowed something for management charge in respect of services, it does not follow that they were bound to allow ten per cent. or any percentage. It does not follow that they were bound to allow ten per cent. or any percentage on items 1-9 in the schedule. It would be open to them indeed to allow not a percentage at all, but a lump sum, if they thought it right by way of a management charge in respect of services. C  
D

Accordingly, the proper course is for the court in respect of this item to remit the case to the committee for determination in the light of the opinion of this court.

The last item concerns selective employment tax. The landlords' schedule of actual costs included a large item: wages for resident and non-resident staff of £14,249; that included not only, as one would expect, national insurance and pensions, but also S.E.T. The cost of Mr. and Mrs. Robinson's wages also included S.E.T., and the committee in deducting S.E.T. in all those cases, said this: E  
F

"The committee deducted S.E.T. as they were not satisfied that this tax is properly chargeable to the tenants. They distinguish national insurance and pensions since these enure to the benefit of the employees engaged in the provision of services."

It is conceded that the reason given, namely that it can be distinguished from national insurance and pensions since those enure to the benefit of the employees, is really not sustainable because what the tenants can properly be called on to pay cannot be affected by how far the employees providing the services themselves get a benefit. The sole question is whether S.E.T. is properly chargeable to the tenants. G

For my part I find it very difficult to see how it could be said to be properly deductible and not properly chargeable. It is an inescapable cost of providing the service. This is not a case where the landlords could conceivably recover under the Selective Employment Payments Act 1966 the tax paid with or without premium; it is something which the landlords have to pay in providing those services, just indeed as any shopkeeper has to pay it in respect of his shop assistants. It is, as it seems to me, something which is properly included in the cost of providing services. It may be that it does not amount in the result to more than a few pounds in respect of the rent of each of these flats, but the case in my judgment must be remitted anyhow on management charges, and I would remit this point also to the committee to consider. H  
I

Finally, I should say this, that there is apparently an arithmetical error in the calculations of the cost of services properly allocated to flat 14A, and when the case is remitted to the committee they should correct that error.

A ASHWORTH, J.: I agree.

BLAIN, J.: I also agree.

*Case remitted.*

Solicitors: *Grangewood, Allen & Co.* (for the landlords); *Douglas-Mann & Co.* (for the tenants); *Solicitor, Ministry of Housing and Local Government.*

B [Reported by NAEEM BUTT, ESQ., *Barrister-at-Law.*]

R. v. METROPOLITAN POLICE COMMISSIONER,  
*Ex parte* BLACKBURN (No. 2).

C [COURT OF APPEAL, CIVIL DIVISION (Lord Denning, M.R., Salmon and Edmund Davies, L.J.J.), February 26, 1968.]

*Contempt of Court—Publications concerning legal proceedings—Criticism of administration of justice—Court of Appeal—Judgment regarding non-enforcement of gaming laws criticised—Error of fact in matter published—Right of fair comment on matters of public importance.*

D Criticism, however vigorous, of a judgment or a decision of a court will not constitute contempt of court, if it is made in good faith and is reasonable, even though it contains error; but it is desirable that criticism should be accurate and fair, bearing in mind that the judiciary cannot enter into public controversy and thus cannot reply to criticism (see p. 320, letter G, and p. 321, letters A and F, post).

E Dictum of LORD RUSSELL OF KILLOWEN, C.J., in *R. v. Gray* ([1900-03] All E.R. Rep. 59 at p. 62) applied.

[Editorial Note. While the decision in the present case shows that the courts are open to criticism by reasonable comment on, or protest at, a judicial act as being contrary to law or to the public good, yet the liberty of the press in this matter is no greater and no less than the liberty of every subject of the Queen. Personal scurrilous abuse of a judge as a judge, for example, is and has always been contempt of court (compare per LORD RUSSELL OF KILLOWEN, C.J., in *R. v. Gray* ([1900-03] All E.R. Rep. at p. 62, letters E, F); so also are publications of matter that are calculated to interfere with the administration of justice.

As to contempt of court by criticism of the administration of justice or by attack on judges, see 8 HALSBURY'S LAWS (3rd Edn.) 7, paras. 8, 9; and for cases, see 16 DIGEST (Repl.) 22-24, 159-179.]

G Case referred to:

*R. v. Gray*, [1900-03] All E.R. Rep. 59; [1900] 2 Q.B. 36; 69 L.J.Q.B. 502; 82 L.T. 534; 64 J.P. 484; 16 Digest (Repl.) 23, 176.

**Motion.**

H This was a motion by the applicant, Albert Raymond Blackburn, by notice dated Feb. 21, 1968, to the Court of Appeal for an order that the Right Honourable Quintin Hogg, P.C., Q.C., M.P., was guilty of contempt of court in that he published in the issue of "Punch" dated Feb. 14, 1968, an article which brought or sought to bring the Court of Appeal into ridicule or contempt or to lower its authority. The facts are set out in the judgment of LORD DENNING, M.R.

I The case noted below\* was cited during the argument in addition to the one referred to in the judgment of EDMUND DAVIES, L.J.

The applicant appeared in person.

*Sir Peter Rawlinson, Q.C.*, and *J. P. Harris* for the respondent.

LORD DENNING, M.R.: Some few days ago (1) we had before us an application by Mr. Albert Raymond Blackburn, seeking an order of mandamus against the Commissioner of Police of the Metropolis. After that case was

\* *Ambard v. A.-G. of Trinidad and Tobago*, [1936] 1 All E.R. 704; [1936] A.C. 322. (1) [1968] 1 All E.R. 763.

reported, the respondent, Mr. Quintin Hogg, wrote an article in "Punch" A dated Feb. 14, 1968, under the heading "Political Parley". Mr. Blackburn today moves the court saying that Mr. Quintin Hogg, by this article, has been guilty of contempt.

Let me read the salient passages in the article. It starts:

"The recent judgment of the Court of Appeal is a strange example of the blindness which sometimes descends on the best of judges. The legislation B of 1960 and thereafter has been rendered virtually unworkable by the unrealistic, contradictory and, in the leading case, erroneous, decisions of the courts, including the Court of Appeal. So what do they do? Apologise for the expense and trouble they have put the police to? Not a bit of it. Lambaste the police for not enforcing the law which they themselves had rendered unworkable and which is now the subject of a Bill, the manifest C purpose of which is to alter it. Pronounce an impending dies irae on a series of parties not before them, whose crime it has been to take advantage of the weaknesses in the decisions of their own court. Criticise the lawyers, who have advised their clients. Blame Parliament for passing Acts which they have interpreted so strangely. Everyone, it seems, is out of step, except the courts... The House of Lords overruled the Court of Appeal D ... it is to be hoped that the courts will remember the golden rule for judges in the matter of obiter dicta. Silence is always an option."

That article is certainly critical of this court. In so far as it referred to the Court of Appeal, it is admittedly erroneous. This court did not in the gaming cases give any decision which was erroneous, nor one which was overruled by the House of Lords. Is the article, however, a contempt of court? E

This is the first case, so far as I know, where this court has been called on to consider an allegation of contempt against itself. It is a jurisdiction which undoubtedly belongs to us, but which we will most sparingly exercise: more particularly as we ourselves have an interest in the matter. Let me say at once that we will never use this jurisdiction as a means to uphold our own dignity. That must rest on surer foundations. Nor will we use it to suppress those who F speak against us. We do not fear criticism, nor do we resent it. For there is something far more important at stake. It is no less than freedom of speech itself. It is the right of every man, in Parliament or out of it, in the Press or over the broadcast, to make fair comment, even outspoken comment, on matters of public interest. Those who comment can deal faithfully with all that is done in a court of justice. They can say that we are mistaken, and our decisions G erroneous, whether they are subject to appeal or not. All we would ask is that those who criticise us will remember that, from the nature of our office, we cannot reply to their criticisms. We cannot enter into public controversy. Still less into political controversy. We must rely on our conduct itself to be its own vindication. Exposed as we are to the winds of criticism, nothing which H is said by this person or that, nothing which is written by this pen or that, will deter us from doing what we believe is right: nor, I would add, from saying what the occasion requires, provided that it is pertinent to the matter in hand. Silence is not an option when things are ill done.

So it comes to this. Mr. Quintin Hogg has criticised the court, but in so doing he is exercising his undoubted right. The article contains an error, no doubt, but errors do not make it a contempt of court. We must uphold his right to I the uttermost.

I hold this not to be a contempt of court, and would dismiss the application.

**SALMON, L.J.:** The authority and reputation of our courts are not so frail that their judgments need to be shielded from criticism, even from the criticism of Mr. Quintin Hogg. Their judgments, which can, I think, safely be left to take care of themselves, are often of considerable public importance. It is the inalienable right of everyone to comment fairly on any matter of public



A importance. This right is one of the pillars of individual liberty—freedom of speech, which our courts have always unfailingly upheld. It follows that no criticism of a judgment, however vigorous, can amount to contempt of court, providing it keeps within the limits of reasonable courtesy and good faith. The criticism here complained of, however rumbustious, however wide of the mark, whether expressed in good taste or in bad taste, seems to me to be well within those limits.

B LORD DENNING, M.R., pointed out on Mr. Blackburn's application for an order of mandamus that there had been decisions of the courts, one recently overruled in the House of Lords, which had introduced doubts into one corner of the field of the gaming law (2). Incidentally, those decisions were not decisions of the Court of Appeal, as Mr. Hogg stated, but that is of little consequence. C They, however, hardly excuse the inertia which allowed large gambling empires to be built up before they were delivered.

The purpose of the legislation of 1960 was plain: to do away with the legal taboos on gaming and at the same time to prevent its commercial exploitation. The provisions of the Act of 1960 were clear and effective to achieve the purpose of Parliament—which is more than can be said for some modern legislation. D They failed to do so and gambling empires flourished, not because of any fault in the provisions of the Act but for lack of sufficiently energetic action to enforce them.

No one could doubt Mr. Hogg's good faith. I, of course, entirely accept that he had no intention of holding this court up to contempt; nor did he do so. Mr. Blackburn complains that Mr. Hogg has not apologised. There was no reason why he should apologise, for he owes no apology, save, perhaps, to the readers of "Punch" for some of the inaccuracies and inconsistencies which his article contains. E I agree that this application should be dismissed.

EDMUND DAVIES, L.J.: The right to fair criticism is part of the birth-right of all subjects of Her Majesty. Though it has its boundaries, that right covers a wide expanse and its curtailment must be jealously guarded against. F It applies to the judgments of the courts as to all other topics of public importance. Doubtless it is desirable that critics should, first, be accurate and, secondly, be fair, and that they should particularly remember and be alive to that desirability if those whom they would attack have, in the ordinary course, no means of defending themselves.

In *R. v. Gray* (3), LORD RUSSELL OF KILLOWEN, C.J., said:

G "Judges and Courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no court could or would treat that as contempt of court."

Whether, despite his great learning and his distinction as a Queen's Counsel, Mr. Hogg paid proper respect to the standards of accuracy, fairness and good taste when he was composing his "Punch" article may, unhappily, be open to H doubt. But whether his article amounted to contempt involves different and graver considerations. For my part also, inaccurate though the article is now acknowledged to be in a material respect, I have no doubt that contempt has not been established, and I would accordingly refuse this application.

I My conclusions regarding the fairness and good taste of the article in question are immaterial, and I, therefore, refrain from revealing them. To that extent, and that extent only, I propose to observe what Mr. Hogg, in his article, described as "the golden rule" for judges in relation to obiter dicta, namely that "Silence is always an option".

*Application dismissed.*

Solicitors: *Bull & Bull* (for the respondent).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

(2) See [1968] 1 All E.R. 767.

(3) [1900] 2 Q.B. 36 at p. 40; [1900-03] All E.R. Rep. 59 at p. 62.

## GALLIE v. LEE AND ANOTHER.

A

[CHANCERY DIVISION (Stamp, J.), February 9, 13, 14, 15, 16, 19, 20, 21, 22, 23, March 29, 1968.]

*Mistake—Nature of document—Assignment on sale—Deed assigning leasehold term to L. executed by assignor in belief that it was a deed of gift to her nephew, P.—Assignor a widow aged seventy-eight who did not read the document—Signature obtained by fraud—Assignment and deed delivered to L., who mortgaged the property to a building society—Action by widow raising non est factum—Whether assignment void against L.—Whether building society could maintain estoppel against widow.*

B

In or about June, 1962, the plaintiff, who was a widow and seventy-eight years of age, executed a deed which purported to be an assignment on the sale by her of her leasehold interest in her house for £3,000 to L., and the deeds were delivered to L. She did not read the document. Her signature was obtained by fraud. She believed the deed to be a deed of gift to her nephew P., which L. represented to her that it was. She would not have executed an assignment on sale to L. The plaintiff was prepared to give an interest in her house to her nephew in order that he should be able to raise money on it. L., having obtained the assignment, mortgaged the house to a building society. In an action by the plaintiff against L. and the building society claiming that the assignment was void and delivery up of the deeds,

C

**Held:** the assignment was void and the building society would be ordered to deliver the deeds to the plaintiff, because—

D

(i) the assignment was a deed of a totally different description, of a different character or class and of a different nature, from what L. represented to the plaintiff that it was; accordingly the assignment was not, as between the plaintiff and L., the plaintiff's deed and did not confer title to the property on L. as against the plaintiff (see p. 327, letter E, and p. 329, letter C, post).

F

Dictum of WARRINGTON, J., in *Howatson v. Webb* ([1907] 1 Ch. at p. 549) not followed.

*National Provincial Bank, Ltd. v. Jackson* ((1886), 33 Ch.D. 1) considered.

(ii) the plaintiff was not estopped, although she had carelessly allowed herself to be misled as to the character of the assignment, from maintaining as against the building society that the assignment was not her deed, for she owed no duty to the building society, nor was her carelessness a proximate cause of the building society's lending money to L. (see p. 331, letter C, and p. 332, letters A and B, post).

G

*Carlisle and Cumberland Banking Co. v. Bragg* ([1911] 1 K.B. 489) applied.

[As to when a plea of non est factum is available, see 11 HALSBURY'S LAWS (3rd Edn.) 361, 362, para. 588; and for cases on non est factum, see 17 DIGEST (Repl.) 247, 248, 508-511.]

H

Cases referred to:

*Blay v. Pollard and Morris*, [1930] All E.R. Rep. 609; [1930] 1 K.B. 628; 99 L.J.K.B. 421; 143 L.T. 92; 35 Digest (Repl.) 123, 212.

*Brocklesbury v. Temperance Building Society*, [1895] A.C. 173; 64 L.J.Ch. 433; 72 L.T. 477; 59 J.P. 676; 35 Digest (Repl.) 431, 1235.

I

*Carlisle and Cumberland Banking Co. v. Bragg*, [1911] 1 K.B. 489; 80 L.J.K.B. 472; 104 L.T. 121; 17 Digest (Repl.) 248, 510.

*Cundy v. Lindsay*, [1874-80] All E.R. Rep. 1149; (1878), 3 App. Cas. 459; 47 L.J.Q.B. 481; 38 L.T. 573; 42 J.P. 483; 39 Digest (Repl.) 653, 1571.

*Foster v. Mackinnon*, (1869), L.R. 4 C.P. 704; 38 L.J.C.P. 310; 20 L.T. 887; 17 Digest (Repl.) 242, 457.

- A** *Howatson v. Webb*, [1907] 1 Ch. 537; 76 L.J.Ch. 346; 97 L.T. 730; *affd.*, C.A., [1908] 1 Ch. 1; 77 L.J.Ch. 32; 17 Digest (Repl.) 247, 509.
- Hunter v. Walters, Curling v. Walters, Darnell v. Hunter*, (1871), 7 Ch. App. 75; 41 L.J.Ch. 175; 25 L.T. 765; 35 Digest (Repl.) 76, 695.
- Jones (R. E.), Ltd. v. Waring and Gillow, Ltd.*, [1926] All E.R. Rep. 36; [1926] A.C. 670; 95 L.J.K.B. 913; 135 L.T. 548; 35 Digest (Repl.) 161, 492.
- B** *King v. Smith*, [1900] 2 Ch. 425; 69 L.J.Ch. 598; 82 L.T. 815; 40 Digest (Repl.) 320, 2632.
- Leighton's Conveyance, Re*, [1936] 1 All E.R. 667; *on appeal*, C.A., [1936] 3 All E.R. 1033; 38 Digest (Repl.) 900, 949.
- Lickbarrow v. Mason*, [1775-1802] All E.R. Rep. 1; (1787), 2 Term Rep. 63; 100 E.R. 35; *on appeal*, Ex. Ch., (1790), 1 Hy. Bl. 357; *on appeal*, H.L., (1793), 4 Bro. Parl. Cas. 57; 39 Digest (Repl.) 750, 2279.
- C** *Muskham Finance, Ltd. v. Howard*, [1963] 1 All E.R. 81; [1963] 1 Q.B. 904; [1963] 2 W.L.R. 87; Digest (Cont. Vol. A) 472, 510a
- National Provincial Bank of England v. Jackson*, (1886), 33 Ch.D. 1; 55 L.T. 458; 17 Digest (Repl.) 215, 136.
- Swan v. North British Australasian Co., Ltd.*, (1862), 7 H. & N. 603; *on appeal*, (1863), 2 H. & C. 175; 159 E.R. 73; 9 Digest (Repl.) 220, 1405.
- D** *Wilson & Meeson v. Pickering*, [1946] 1 All E.R. 394; [1946] K.B. 422; [1947] L.J.R. 18; 175 L.T. 65; 6 Digest (Repl.) 70, 612.

### Action.

In this action the plaintiff, Rose Maud Gallie, by her statement of claim, re-served as amended on Dec. 8, 1965, claimed against the defendants, William

- E** Robert Lee and Anglia Building Society (formerly Northampton Town and County Building Society), a declaration that a purported assignment on sale being an assignment dated June 15, 1962, by the plaintiff to the first defendant, Mr. Lee, of the residue of the term of 999 years granted in 1899 in a property, 12, Dunkeld Road, Ilford, for the sum of £3,000, was void, and delivery to the plaintiff of the title deeds.

- F** The house, 12 Dunkeld Road, had been subject to a mortgage which had been repaid by Sept. 8, 1961, the last payment being made by the plaintiff's nephew, Mr. Parkin. When the deeds were received from the mortgagee on redemption the plaintiff handed them to Mr. Parkin. It was common ground that the plaintiff intended by so doing to make a gift to Mr. Parkin to take effect immediately, though she had not made a legally effective gift. The plaintiff knew that her nephew needed money for his business. He carried on the business of repairing motor vehicles at a small garage. The plaintiff was acquainted with the first defendant, Mr. Lee, who had come to her house on occasions before the deed was executed; and she knew that he would be concerned with raising the money. One day Mr. Lee and Mr. Parkin came to the plaintiff's house. Mr. Parkin opened the front door with his key and they walked in.

- H** According to the plaintiff's evidence before an examiner Mr. Lee asked her to sign a paper, which he had in his hand, and she asked what it was for, and Mr. Lee said that it was to do with the gift of the house by deed to Mr. Parkin. On the evidence concerning this occasion HIS LORDSHIP (STAMP, J.) found as facts that the plaintiff did not read the document which she signed (*viz.*, the deed of June 15, 1962), that Mr. Lee represented it to be a deed of gift to Mr. Parkin, and that the plaintiff executed it in the belief that that was what it was. Further, that the plaintiff had no idea that the document took the form of a conveyance on sale from her to Mr. Lee, and that a sale or gift to him was something which she did not and would not for one moment have contemplated. In her evidence the plaintiff had said that she told Mr. Lee, when he asked her to sign, that she had broken her glasses and could not see. HIS LORDSHIP found that it was not necessary to decide whether Mr. Parkin knew the contents of the document signed on this occasion, which was the purported assignment dated June 15, 1962. If it were necessary, then HIS LORDSHIP held that by the time when the



mortgage to the building society was executed Mr. Parkin had become aware that Mr. Lee had, or claimed to have, the ownership of the property, and that Mr. Parkin was expecting to receive from Mr. Lee, by monthly instalments of £25, the £2,500 (which sum, according to Mr. Parkin's evidence was agreed between him and Mr. Lee as the price that Mr. Lee would pay for buying the house from Mr. Parkin) which, however, Mr. Lee did not intend to pay. Mr. Parkin, so HIS LORDSHIP found, was the victim of a confidence trick.

*Michael Albery, Q.C., and A. E. Holdsworth* for the plaintiff.

*J. E. S. Ricardo* for the first defendant.

*P. R. Oliver, Q.C., and H. F. J. Teague* for the second defendants, the building society.

**STAMP, J.:** About the month of June, 1962, the plaintiff, Mrs. Rose Maud Gallie, a widow then aged seventy-eight, executed an instrument which bears the date June 15, 1962. It was on the face of it an assignment on sale expressed to be made between the plaintiff, called "the vendor", of the first part and the first defendant, William Robert Lee, called "the purchaser" of the other part. The instrument recited that the property, 12, Dunkeld Road, Ilford, was vested in the plaintiff for the residue of a term of 999 years granted in 1899 at a ground rent of £5 14s. per annum; it recited an agreement for sale for the sum of £3,000 and by it, in pursuance of the agreement and in consideration of the sum of £3,000 expressed to be then paid by the purchaser to the vendor, the receipt whereof the vendor was expressed to acknowledge, the vendor as beneficial owner assigned unto the purchaser all the premises to which I have referred, to hold the same unto the purchase for all the residue of the term under which the premises were held, subject to the payment of the rent and performance of the covenants on the part of the lessee, contained in the lease.

In fact the plaintiff had not agreed to sell 12, Dunkeld Road, which was her home and at which she carried on the boarding house from which she derived her livelihood, nor had she received the sum of £3,000, nor any sum from Mr. Lee, nor from any other person. The instrument was false in every particular.

Following the execution of the document Mr. Lee sent or took it to his solicitors, Messrs. Lincoln & Lincoln (1). Mr. Lee was in financial difficulties, he had hanging over him a petition in bankruptcy, there were unsatisfied judgments against him and his bank account was in debit in that month of June in a sum of about £1,400. He was in arrear in respect of rent to one Royce the landlord of premises which were let to him at a rent of £50 per month. He had before ever the document of June 15 was executed made arrangements with Messrs. Lincoln & Lincoln for them to negotiate a mortgage of the premises. This they did and on or about Aug. 10, 1962, a sum of £2,000 was advanced on the security of a first mortgage of 12, Dunkeld Road, dated Aug. 10, 1962, and made between Mr. Lee of the one part and the second defendants (2) (then the Northampton Town and County Building Society) of the other part. In order that the mortgage could be obtained, Messrs. Lincoln & Lincoln (1) falsely put forward the instrument of June 15, 1962, as a genuine document giving effect to a genuine sale. In the document which he had to sign leading to the mortgage, Mr. Lee, with the connivance of one Hall, the conveyancing clerk then in the employ of Messrs. Lincoln & Lincoln, made a number of statements to the building society which were false and known by him to be false.

The advance of £2,000 less £19 10s. on account of costs was paid to Messrs. Lincoln & Lincoln. From it Messrs. Lincoln & Lincoln deducted two sums, namely, £92 17s. 6d. in respect of their own costs, charges and disbursements including an item described as professional charges in acting "on the purchase of the above property from Mrs. Gallie" and £205 17s. which they paid in connexion with a judgment obtained against Mr. Lee in certain other proceedings.

(1) This firm of solicitors ceased to exist in August, 1966, and has no connection with any other firm of similar name.

(2) The Anglia Building Society.

A The balance of £1.681 odd, together with another small sum, was paid into Mr. Lee's bank account then in debit in the sum of £1,310. In the result that account was on Aug. 17 in credit in the sum of £385. By the end of the month the account was again in debit in an amount of about £150, having been reduced by substantial payment to one Royce in respect of arrears of rent and other payments made for Mr. Lee's benefit. Mr. Lee's bank account was not disclosed on discovery, so I understand; and if it had been, much time would have been saved at the trial.

The mortgage is still outstanding and the plaintiff claims against both defendants a declaration that the assignment is void and for delivery of the title deeds of the property or their value £4,500, and damages for their detention and further or alternatively, against the defendant Mr. Lee for fraudulent misrepresentation.

C [HIS LORDSHIP then reviewed the evidence concerning the circumstances in which the assignment came to be executed and the deeds to be delivered to Mr. Lee. The plaintiff's evidence was taken before an examiner in 1966, and the witnesses at the trial before HIS LORDSHIP included her nephew, Mr. Parkin, the defendant Mr. Lee and a Mr. Hall, who had been conveyancing clerk at the time in the employ of the firm of solicitors who then, but not at the time of the trial, (3), were carrying on their profession under the firm name of Lincoln & Lincoln. In the course of reviewing the evidence HIS LORDSHIP made findings as set out at p. 323, letter I, ante. In regard to the witnesses HIS LORDSHIP found that Mr. Lee was fraudulent and that Mr. Hall made the transaction possible by preparing what he knew to be a false document and representing to the building society that it was a true one. HIS LORDSHIP found that it was Mr. Lee's purpose throughout to get hold of the plaintiff's house without paying for it and to raise money on it so as to pay his creditors. HIS LORDSHIP continued:] The plaintiff, Mrs. Gallie, claims that neither the first defendant, Mr. Lee, nor the second defendants, the building society, became entitled to the property at law, it being claimed that it is still vested in Mrs. Gallie because the assignment was not Mrs. Gallie's deed; the plea of non est factum. I have heard much argument and a considerable number of authorities has been cited on the question whether the plea of non est factum is available to Mrs. Gallie in this case. I will endeavour to state the principles which in my judgment are to be extracted from the authorities and which I ought to apply.

F In the first place it is, I think, clear that where a man executes a deed without knowing or enquiring as to its contents then, whatever remedy he may have against him who procured the execution of the deed, it cannot be said that his mind did not go with his act. The fraud of the person who obtains the instrument and uses it for a purpose different from that which the author intended does not affect the deed. A very good example of such a case is to be found in *King v. Smith* (4), where a man was accustomed to signing documents tendered to him by his solicitor without enquiring as to character; and see also, in more recent times, *Re Leighton's Conveyance* (5).

H Secondly, the rule is the same where a representation is made as to the character of a deed, and that representation is not untrue. Where a man, being told that the deed deals with his estate, is content to execute the deed, without reading it and it does deal with his estate, it cannot then be said that it is not his deed and it is as if he had made no enquiry and there had been no representation.

I "When a man knows that he is conveying or doing something with his estate, but does not ask what is the precise effect of the deed, because he is told it is a mere form, and has such confidence in his solicitor as to execute the deed in ignorance, then, in my opinion, a deed so executed, although it may be voidable upon the ground of fraud, is not a void deed."

(3) This firm ceased to exist in August 1966, and has no connection with any other firm of similar name.

(4) [1900] 2 Ch. 425.

(5) [1936] 1 All E.R. 667.

(See per MELLISH, L.J., in *Hunter v. Walters* (6).)

*Howatson v. Webb* (7), despite the first paragraph in the headnote, was in my judgment such a case. The facts as stated in the headnote were these:

"The defendant, who was formerly the managing clerk to one H., a solicitor, acted as his nominee in a building speculation relating to the E. property, of which H. was owner. Shortly after leaving H.'s employment he was requested by H. to execute certain deeds, and on asking what those deeds were he was told by H., in whom he had complete confidence, that they were deeds transferring the E. property. The defendant thereupon signed them. One of the deeds so signed was a mortgage between the defendant, as mortgagor, of the one part and W. of the other part, and contained the usual covenant by the mortgagor for payment of principal and interest. In an action by the transferee of the mortgage for payment of the principal debt and interest, the defendant pleaded that the deed was not his deed, but was signed by him in consequence of a misrepresentation by H. as to its contents."

WARRINGTON, J., whose judgment was affirmed and approved in the Court of Appeal (8), said this of the plea non est factum (9):

"What does the evidence in the present case show? I may go so far in the defendant's favour as to say that Webb, having regard to his knowledge of Hooper, when Hooper said that the deeds were 'deeds for transferring the Edmonton property', was justified in believing that they were deeds such as a nominee could be called upon to execute either in favour of a new nominee or for the purpose of putting an end to his own position of nominee, and certainly not a deed creating a mortgage to another person. But in my opinion that is not enough. He was told that they were deeds relating to the property to which they did in fact relate. His mind was therefore applied to the question of dealing with that property. The deeds did deal with that property. The misrepresentation was as to the contents of the deed, and not as to the character and class of the deed. He knew he was dealing with the class of deed with which in fact he was dealing, but did not ascertain its contents."

Counsel for the building society has submitted that *Howatson v. Webb* (7) was a case where there was a misrepresentation as to the identity of the transferee. Having given that case the best consideration I can, I conclude that that was not so. Webb in his evidence had said that before he signed the deeds in question he asked what they were and was told "they are just deeds transferring the property", and he added in his evidence that his impression was that Hooper said "They are just deeds transferring that property to me". As I understand WARRINGTON, J.'s findings of fact he refused to accept the latter part of Webb's evidence as proving the fact that Hooper used the words "to me". *Howatson v. Webb* (7) is not in my judgment authority for the proposition that, if a man executes a conveyance on the faith of a representation that the transferee is "A" when in fact he is "B", that is not such a misrepresentation as to the character or class of the document as to come within the plea non est factum. The mistake by Webb was in not ascertaining in what way the deed transferred the property; he did not enquire sufficiently as to the character of the deed.

This brings me to the third proposition namely that if a man executes a deed on the faith of misrepresentations as to the character and class of the deed, it is non est factum. The rule was stated by COTTON, L.J., in *National Provincial Bank of England v. Jackson* (10), as follows:

(6) (1871), 7 Ch. App. 75 at p. 88.

(8) [1908] 1 Ch. 1.

(7) [1907] 1 Ch. 537.

(9) [1907] 1 Ch. at p. 549.

(10) (1886), 33 Ch.D. 1 at p. 10.



A "Now the rule of law is that if a person who seals and delivers a deed is misled by the mis-statements or misrepresentations of the persons procuring the execution of the deeds, so that he does not know what is the instrument to which he puts his hand, the deed is not his deed at all, because he was neither minded nor intended to sign a document of that character or class, as, for instance, a release while intending to execute a lease. Such a deed is void."

B DONOVAN, L.J., quite recently in *Muskham Finance, Ltd. v. Howard* (11) stated the rule in similar terms with the warning that the plea of non est factum is to be kept within narrow limits; but I do not understand him as defining those limits in any narrower terms than those which I have stated.

C The rule has sometimes been put slightly differently but without, I think, altering its substance. For example, SLESSER, L.J., in *Blay v. Pollard and Morris* (12), referring to the defence of non est factum, said that that defence might be raised where the deed signed is of a nature different from what it is represented to be so that it is of an entirely different legal category.

D The question which I, therefore, have to pose and answer is whether the assignment which Mrs. Gallie signed was of a different character or class of a totally different description or of an entirely different legal category to that which it was represented to be.

E In this case Mrs. Gallie signed the assignment on the faith of a representation that it was a deed of gift of the property to Mr. Parkin whereas in truth it was a conveyance of the property to Mr. Lee expressed to be an assignment on sale. The assignment was in my judgment of a totally different description, of a nature different, of a different character and class from that which it was represented to be and from that which Mrs. Gallie intended to execute. In the absence of authority constraining me to take the contrary view, I cannot hold that a deed of a gift to A is, in a sense relevant to the question which falls to be decided—"was this the deed of Mrs. Gallie"—of the same character or class or of the same nature as a deed of gift to B?: and even less so is it of the same

F nature or character or class as a conveyance expressed to be on sale to B. There is a passage in *Howatson v. Webb* (13) in which WARRINGTON, J., referring to *National Provincial Bank of England v. Jackson* (14), said that it seemed to him that the Court of Appeal came to the conclusion that although a man might be misled as to the nature of the deed, yet if he knew it related to his property he could not succeed on a plea of non est factum. That passage in the judgment

G of WARRINGTON, J., is, for the reason which I indicated earlier in this judgment, not part of the ratio decidendi of his own decision; nor are the words of a judge in an extempore judgment to be read or construed as if they were contained in a statute; and having given the judgments of the Court of Appeal in *National Provincial Bank of England v. Jackson* (14) the best consideration that I can, I am unable to conclude that they are authority for the wide statement made by

H WARRINGTON, J. Applied literally one would conclude from that statement that if a solicitor said "this is a deed conveying your estate to A and B as trustees on trust for yourself and your wife in equal shares", whereas in fact it was a conveyance to the solicitor expressed to be for value, the plea of non est factum would not be available. I cannot accept the view that the Court of Appeal in *National Provincial Bank of England v. Jackson* (14) (one of whose

I members, namely, LINDLEY, L.J., thought that case very near the line) would have accepted that view. COTTON, L.J., who delivered the leading judgment, proceeded on the view that nothing was said in that case to mislead the defendants as to the nature of the instrument, that it was doubtful how far they had understood the nature of the deeds but that they knew that the deeds dealt in

(11) [1963] 1 All E.R. 81; [1963] 1 Q.B. 904.

(12) [1930] All E.R. Rep. 609 at p. 616; [1930] 1 K.B. 628 at p. 641.

(13) [1907] 1 Ch. at p. 549.

(14) (1886), 33 Ch.D. 1.

some way with the houses. I cannot draw from that case the conclusion that, if a man knows that a deed deals in some way with his property and in fact it does so; then it matters not that he has been misled as to the way in which it does so; whether by mortgage, conveyance on sale, deed of gift, lease or release or whether in favour of A, B, C or D. Neither in *National Provincial Bank of England v. Jackson* (15) nor in *Howatson v. Webb* (16) had there been any such misrepresentation. To hold that a man who executes a release which has been misrepresented to him as a lease is not bound because he was neither minded nor intended to sign a document of that character or class, but that a man who executes a voluntary conveyance to his solicitor which has been represented as a lease for seven years at a rack-rent to a third party is bound to the conveyance because those deeds relate to his property, and therefore are of the same character or class, would in my judgment be anomalous and would confine the doctrine of non est factum more narrowly than the cases warrant. The identity of the parties to a deed is in my judgment one of the factors which must be taken into account in ascertaining its character or description and will be more or less significant for that purpose according to the other features of the deed. Where the deed intended to be executed is a deed of gift to A, then in my judgment its essential character is that of a gift to A. If on the other hand the deed is understood to be a conveyance to A and B merely as trustees, it may be that a conveyance on trust to A and C as trustees to hold on the trusts contemplated is not of a different character or class.

In coming to the conclusion which I have reached on this part of the case I derive some comfort from the cases under the law of contract such as *Cundy v. Lindsay* (17), where the identity of a contracting party being vital to the contract a misrepresentation as to identity has been held to result in there being no contract.

Counsel for Mr. Lee submitted that Mrs. Gallie was most anxious to get rid of her house, that it made no difference to her whether it was transferred to Mr. Parkin and then sold by him to Mr. Lee or whether the transaction was dressed up as a sale by Mrs. Gallie to Mr. Lee. It was, he submitted, a sensible arrangement to make. Whether the adjective "sensible" was intended to embrace the insertion in the assignment of a fictitious consideration and an untrue receipt, or merely to be descriptive of a device designed to procure the loan from the building society notwithstanding s. 42 of the Bankruptcy Act, 1914, is not clear to me. I say no more about that submission.

It was submitted on behalf of the building society that Mrs. Gallie knew that the instrument which she was signing was an instrument dealing with her property and that her intention was so to deal with it that a mortgage could be obtained on it, that she wanted Mr. Parkin to have the property so that he could get money on its security and that she knew Mr. Parkin and Mr. Lee were working together in the matter. I accept these submissions; but this is only part of the story and the factual analysis, so far as it is directed to showing that Mrs. Gallie's mind went with her pen, in my view confuses what she intended to do with her object in doing it. What she intended to do was to put the property into the hands of Mr. Parkin. True it is that her object was to enable Mr. Parkin to raise money on its security; but her object was to make the house available to Mr. Parkin not to Mr. Lee and to enable Mr. Parkin, not Mr. Lee, to raise money on it. If her object is relevant—I think it is not—then her object was to provide money for Mr. Parkin's business and that object was fairly defeated by the assignment to Mr. Lee. The submissions on this part of the case advanced on behalf of the defendants are dangerously like a submission that it made no difference to her whether her signature was obtained by a trick or whether, Mr. Parkin having obtained a deed of gift, was subsequently tricked by Mr. Lee. Moreover, although

(15) (1886), 33 Ch.D. 1.

(16) [1907] 1 Ch. 537.

(17) [1874-80] All E.R. Rep. 1149; (1878), 3 App. Cas. 459.

**A** it is no doubt true that had Mrs. Gallie made a voluntary disposition in favour of Mr. Parkin and had Mr. Parkin then sold to Mr. Lee the result from Mrs. Gallie's point of view would have been the same, I cannot assume that that would have happened. In the first place even Mr. Hall, though willing to prepare a document recording a fictitious sale of Mrs. Gallie's house, might have jibbed at preparing a deed of gift from Mrs. Gallie to Mr. Parkin without seeing that she was separately

**B** advised; and if he had been willing to prepare the deed of gift he was, I think, sufficiently alive to reality to have advised his client Mr. Lee not to purchase property depending on a gift known not to have been the subject of independent advice. Nor would the building society in those circumstances have advanced the money. The transaction would have been a different transaction and would probably have had different consequences.

**C** I hold that as between the plaintiff, Mrs. Gallie, and the first defendant, Mr. Lee, the deed which Mrs. Gallie signed was not her deed; and since one cannot give a better title to property than one has oneself that would, if there was no question of estoppel, be the end of the matter.

It is, however, submitted on behalf of the second defendants, the building society, who advanced money to Mr. Lee on the security of the property in the belief that Mr. Lee was the beneficial owner of it, that Mrs. Gallie cannot as

**D** between herself and the building society be heard to say that the assignment was not her deed. Reliance is placed on the fact that Mrs. Gallie gave the deeds to Mr. Parkin with a view to his raising money on their security but more particularly on the very fact that she put her hand to the assignment without reading it. It was, it is urged, precisely in order to enable money to be raised from a mortgagee

**E** that Mrs. Gallie did what she did and she therefore ought not now to be allowed to set up her own title against that of the building society, who did what she intended it should do. If this submission stood alone it would, I think, have to be rejected because it is less than the truth to say that Mrs. Gallie did what she did in order that money should be raised; she did what she did in order that Mr. Parkin should have the property so that he, not Mr. Lee, might raise money on it.

**F** The submission, however, goes wider than this, for it is contended that the owner of property who purports to execute a deed knowing that it transfers his property owes a duty to all persons who may be induced on the faith of the transfer to pay money for the property or advance money on its security, and that, if he goes through the motions of executing such a transfer, he is estopped as against a bona fide purchaser for value without notice of the circumstances from the plea

**G** that the transfer is not his deed.

The question whether such a principle ought to be applied—a question which did not arise because the court held that the case was not one of *non est factum*—is almost precisely that touched on by MELLISH, L.J., in *Hunter v. Walters* (18), when he remarked:

**H** “Now, in my opinion, it is still a doubtful question at law, on which I do not wish to give any decisive opinion, whether, if there be a false representation respecting the contents of a deed, a person who is an educated person, and who might, by very simple means, have satisfied himself as to what the contents of the deed really were, may not, by executing it negligently be estopped as between himself and a person who innocently acts upon the faith of the deed being valid, and who accepts an estate under it. I do not

**I** think that the case of *Swan v. North British Australasian Co.* (19)—a decision of which the learned Vice-Chancellor disapproves—is really a direct authority upon that question, because in that case a transfer of shares had been executed in blank; the person who executed it owned shares in two companies, and gave authority to the broker to fill them up with shares in one company, and the broker filled them up with shares in another company, which were afterwards transferred to an innocent person.”



In connexion with this plea of estoppel I have been presented with a wealth of authority. It was stated by ASHURST, J., in *Lickbarrow v. Mason* (20), that whenever one of two innocent parties must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it. Where, as here, the failure of Mrs. Gallie to be careful not to sign a document without ensuring that it was of the character which it was represented to be has led, whether directly or indirectly, to the building society advancing money on a security which, if Mrs. Gallie is right, is worthless to that society, I would not have been reluctant to apply the principle so broadly stated in *Lickbarrow v. Mason* (20). Nevertheless LORD GREENE, M.R., in *Wilson & Messon v. Pickering* (21), doubted whether there was any general proposition in the books which required so much qualification as the observation of ASHURST, J., in *Lickbarrow v. Mason* (20) to which I have referred; and on the authority of *Carlisle and Cumberland Banking Co. v. Bragg* (22), I have come to the conclusion that the question which I have to determine must be answered in favour of Mrs. Gallie.

The facts of that case are in my judgment correctly set out in the headnote which reads as follows (22):

"The defendant signed a document, which purported to be a continuing guarantee by him, up to a certain amount, of the payment by R. of any sum which might at any time thereafter be or become due from R. to the plaintiffs, a banking company, on the general balance of his banking account with them. In fact the defendant had been induced by the fraud of R. to sign the document, without reading it, and not knowing that it was a guarantee, but supposing it to be a document of a different character. Subsequently to the signature of the document by the defendant, R. forged the signature of an attesting witness to it, and handed it to the plaintiffs. The jury, in answer to a question put to them by the judge, found that the defendant was negligent in signing the document . . ."

The case was thus one of non est factum and was so treated by the Court of Appeal. Nevertheless, and notwithstanding the finding of the jury that the defendant was negligent in signing the document, the court held, affirming the decision of the judge in the court below

"that in an action on the supposed guarantee the defendant was not estopped from denying that he had contracted to guarantee the debt of R., inasmuch as he was under no duty to the plaintiffs in the matter, and the proximate cause of the plaintiffs' loss was the fraudulent action of R. and not the defendant's supposed negligence."

In the course of his judgment VAUGHAN WILLIAMS, L.J., said this (23):

"The jury were asked: 'Was the defendant induced to sign the guarantee by the fraud of Rigg?' They answered that he was. They then were asked: 'Did the defendant know that the document which he signed was a guarantee?' They answered in the negative. It seems to me that on those findings alone the defendant would be entitled to say in respect of this guarantee that it was not, in contemplation of law, signed by him. His signature was obtained by fraud, and it is manifest, on the evidence and the findings of the jury, that he was not intending to sign any such document. What he was intending to sign was some document with reference to insurance. It appears to me that under the circumstances of this case the mere fact that the jury have found that there was negligence on the part of the defendant does not raise such an estoppel as prevents the defendant from setting up the defence that he never signed the guarantee and that his signature to the document was obtained from him by fraud; that he did not know of its nature, or intend to sign a document of that description. If the document

(20) [1775-1802] All E.R. Rep. 1 at p. 3; (1787), 2 Term Rep. 63.

(21) [1946] 1 All E.R. 394 at p. 395; [1946] K.B. 422 at p. 425.

(22) [1911] 1 K.B. 489.

(23) [1911] 1 K.B. at pp. 493, 494.

- A** in question had been not a guarantee, but a bill of exchange, and the question had arisen what was the position of a holder for value without notice of the fraud, the matter might have been different, because the law merchant, and now the statute law, puts persons who in such circumstances take bills of exchange and such like instruments in the position that they have to prove that they gave value for the bill or other like instrument honestly, but, if
- B** they prove that, it does not matter that it was originally procured by fraud."

That, in my view, is a clear expression of opinion that, since the deed was non est factum, the fact that the defendant signed the deed negligently relying on what he was told and without reading it did not estop him from pleading it was not his deed. These passages, in my judgment, form part of the ratio decidendi

- C** of that decision which I must follow by holding that the fact that Mrs. Gallie carelessly allowed herself to be misled as to the character of the deed did not constitute a breach of duty to the building society. BUCKLEY, L.J., in that case held that the defendant did not owe a duty to the plaintiff which appears to me to be tantamount to holding that when a man signs a document, other than a document which happens to be a bill of exchange or other like instrument, he
- D** does not owe a duty to a person into whose hands the document may come. There is in other words no more a duty to the world or to a person into whose hands the document may come not to execute an instrument without ascertaining its character and class than there is a duty to a person into whose hands goods may come not to leave your goods where thieves may break in and steal.

- E** VAUGHAN WILLIAMS, L.J., continuing the passage that I have already quoted. said this (24):

- "The only other thing which I wish to say is on the question of negligence. I do not know whether the jury understood that there could be no material negligence unless there was a duty on the defendant towards the plaintiffs. Even if they did understand that, in my opinion, in the case of this instrument, the signature to which was obtained by fraud, and which was not a
- F** negotiable instrument, PICKFORD, J., was right in saying that the finding of negligence was immaterial. I wish to add for myself that in my judgment there is no evidence whatsoever to show that the proximate cause of the plaintiffs' advancing money on this document was the mere signature of it by the defendant. In my opinion, the proximate cause of the plaintiffs' making the advance was that Rigg fraudulently took the document to the bank, hav-
- G** ing fraudulently altered it by adding the forged signature of an attesting witness, and but for Rigg having done those things the plaintiffs would never have advanced the money at all."

BUCKLEY, L.J., also thought that the act of the defendant was not the act which involved the plaintiff in the loss. He said (25):

- "What involved the plaintiffs in loss was the act of Rigg a rogue, who obtained from the defendant his signature to an instrument which he never intended to sign, and, having thus defrauded the defendant, proceeded to do another act which was what caused the plaintiffs' loss. He took the document thus fraudulently obtained, and pretended to the plaintiffs that it was a genuine guarantee given by the defendant. In point of fact it was not."

- I** KENNEDY, L.J., came to the same conclusion (25) on the same two grounds.

The present case is of course not on all fours with *Carlisle and Cumberland Banking Co. v. Bragg* (26), and in particular because there the defendant was being sued on a document which it was held was not the defendant's deed, where as here Mrs. Gallie is seeking to recover her property from the building society who, partly by her carelessness, has been induced to advance money on the security of the property. The decision of the Court of Appeal in that case, however, appears

to me to be a clear one and I ought not, I think to do otherwise than apply it. If a man owes no duty to a party into whose hands a document that he does not read may come, then it seems to me to follow that Mrs. Gallie in executing the assignment in this case without ascertaining its character and class, owed no duty to the building society. Nor if the act of the defendant in *Carlisle and Cumberland Banking Co. v. Bragg* (27) was not the proximate cause of the loss to the building society could I hold that Mrs. Gallie's neglect of any duty she owed to the building society was the proximate cause of the building society lending the money to Mr. Lee. Here the proximate cause of the building society making the advance to Mr. Lee was that Mr. Lee fraudulently through his solicitors represented the assignment to be that which it was not.

*Carlisle and Cumberland Banking Co. v. Bragg* (27) has been the subject of criticism on the ground that it was, so it is said, based on a misunderstanding of the decision in *Foster v. Mackinnon* (28); see CHESHIRE AND FIFOOT ON THE LAW OF CONTRACT (6th Edn.) pp. 222 et seq., where in the course of an examination of those two cases it is suggested that it is illogical that knowingly to sign a blank deed does not have the same effect as knowingly to sign a blank negotiable instrument. In point of fact in neither of the two cases had the party signed a blank document and so authorised another party to complete it. In both cases the party signed the instrument without reading it or ascertaining its true character. In *Foster v. Mackinnon* (28) the instrument was a bill of exchange and the case was sent for a new trial on the question of whether the defendant had been negligent, and in *Carlisle and Cumberland Banking Co. v. Bragg* (27) the finding of negligence by the jury was held irrelevant or wrong. The difference between the two cases and the justification of any such illogicality as that found by the editors of CHESHIRE AND FIFOOT is perhaps explained in the earlier judgment of BYLES, J., in *Swan v. North British Australasian Co.* (29) (to which he was referred in argument in *Foster v. Mackinnon* (28)) where he said:

"The object of the law-merchant, as to bills and notes made or to become payable to bearer, is to secure their circulation as money; therefore honest acquisition confers title. To this despotic but necessary principle the ordinary rules of the common law are made to bend."

I am content to leave the matter there, for I must follow *Carlisle and Cumberland Banking Co. v. Bragg* (27) and not equate an assignment or conveyance of immovables with instruments to which the law merchant is applicable.

It was urged on behalf of the building society that this case fell within the principle of the decision of the House of Lords in *Brocklesbury v. Temperance Building Society* (30). What was there in question, however, was I think another kind of estoppel, and in reference to that case I simply echo the remark of LORD SUMNER in *R. E. Jones, Ltd. v. Waring and Gillow, Ltd.* (31) that that case is inapplicable since Mr. Lee was in no sense the agent for Mrs. Gallie and she never knowingly held him out as authorised to deal with her property to the slightest extent.

The plaintiff, Mrs. Gallie, is in my judgment entitled to succeed against both defendants.

*Declaration that the assignment was void, as against both defendants; inquiry as to damages against Mr. Lee; order for delivery of the deeds by the building society.*

Solicitors: *Hunt & Hunt* (for the plaintiff); *Gerald Black & Co.* (for the first defendant); *Sharpe, Pritchard & Co.*, agents for *Shoosmiths & Harrison*, Northampton (for the second defendants).

[Reported by JENIFER SANDELL, Barrister-at-Law.]

(27) [1911] 1 K.B. 489.

(28) (1869), L.R. 4 C.P. 704.

(29) (1863), 2 H. & C. 175 at pp. 184, 185.

(30) [1895] A.C. 173.

(31) [1926] All E.R. Rep. 36 at p. 47; [1926] A.C. 670 at p. 695.



A

## BELL v. INGHAM.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Ashworth and Milmo, J.J.), March 18, 1968.]

*Road Traffic—Driving licence—Endorsement—Common law misdemeanour—*

B

*Attempt to commit offence of taking and driving away motor vehicle without consent of owner or other lawful authority—No power to order endorsement of offender's driving licence—Road Traffic Act, 1960 (8 & 9 Eliz. 2 c. 16), s. 217—Road Traffic Act, 1962 (10 & 11 Eliz. 2 c. 59), s. 7—Magistrates' Courts Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 55), s. 19 (9).*

C

The appellant pleaded guilty to an information that he had attempted to take and drive away a motor vehicle without the consent of the owner thereof or other lawful authority contrary to the Road Traffic Act, 1960, s. 217 (1)\* and "against the peace of Our Sovereign Lady the Queen, Her Crown and Dignity". The justices fined him £10 and ordered that particulars of the conviction should be endorsed on any driving licence held by or issued to him. The appellant appealed against the order for endorsement.

D

**Held:** the common law misdemeanour of attempting to commit the offence enacted by s. 217 (1) of the Road Traffic Act, 1960, was not an offence specified in Part 2 of Sch. 1 to the Road Traffic Act, 1962, which specified the offence under s. 217 (1) but not the attempt, and as s. 7† of the Act of 1962 empowered or required endorsement of a licence only on conviction of an offence specified in Sch. 1, the justices had no jurisdiction to order endorsement in the present case, and thus the endorsement should be removed (see p. 335, letter H, p. 336, letter E, and p. 337, letter B, post).

E

Per CURIAM: endorsement on a driving licence is a penalty (see p. 336, letters D and E, and p. 337, letter B, post).

Observations on the construction of s. 19 (9)‡ of the Magistrates' Courts Act, 1952 (see p. 337, letter B, post).

F

Appeal allowed.

[As to the endorsement of driving licences, see 33 HALSBURY'S LAWS (3rd Edn.) 643, para. 1087; and for a case on endorsement, see DIGEST (Cont. Vol. B) 678, 413a.

As to the offence of attempting to commit a crime, see 10 HALSBURY'S LAWS (3rd Edn.) 306-308, para. 567.

G

For the Magistrates' Courts Act, 1952, s. 19, see 32 HALSBURY'S STATUTES (2nd Edn.) 438.

For the Road Traffic Act, 1960, s. 217, see 40 HALSBURY'S STATUTES (2nd Edn.) 898; and for the Road Traffic Act, 1962, s. 5, s. 7, Sch. 1, see 42 HALSBURY'S STATUTES (2nd Edn.) 891, 894, 923.]

Case referred to:

H

*R. v. Pearce*, [1952] 2 All E.R. 718; [1953] 1 Q.B. 30; 116 J.P. 575; 36 Cr. App. Rep. 149; 14 Digest (Repl.) 564, 5631.

### Case Stated.

This was a Case Stated by justices for the borough of Scarborough in respect of their adjudication as a magistrates' court sitting at Scarborough in the North Riding of the county of York. On May 10, 1967, an information was preferred by the respondent, James Nettleton Ingham, against the appellant, Leslie Thomas Bell, that the appellant on Apr. 22, 1967, at Scarborough, together with Peter Anthony Frankish, did attempt to take and drive away a certain motor vehicle, namely a motor van, without having either the consent of the owner thereof or other lawful authority, contrary to s. 217 of the Road Traffic

I

\* Section 217, so far as material, is set out at p. 334, letter I, to p. 335, letter A, post.

† Section 7, so far as material, is set out at p. 335, letter D, post.

‡ Section 19 (9), so far as material, is set out at p. 336, letter I, post.

Act, 1960, and against the peace of Our Sovereign Lady the Queen, Her Crown and Dignity. The justices heard the information on June 7, 1967, when the appellant entered a plea of guilty to the offence alleged against him. No evidence was received. In addition to imposing a fine of £10 on the appellant the justices ordered that particulars of the conviction be endorsed on any driving licence held by or issued to the appellant. It was in respect of the order for endorsement of any driving licence that the justices were requested to state a Case. The justices set out their reasons at length. In the course of them they stated, not only the matters appearing at p. 336, letters F to H, post, but also that endorsement of licence was not a punishment. A

The question stated for the opinion of the High Court was whether or not there was power to order endorsement of a driving licence and disqualification for holding or obtaining a driving licence on an offender being found guilty of an offence of attempting to take and drive away a motor vehicle without the consent of the owner or other lawful authority. B

*D. E. Hill-Smith* for the appellant.

*N. A. Medawar* for the respondent. C

**ASHWORTH, J.:** This is an appeal by way of Case Stated from a decision of justices sitting for the borough of Scarborough in the following circumstances: an information was preferred by the respondent against the appellant that he, the appellant, did attempt to take and drive away a certain motor vehicle, namely a motor van, without having either the consent of the owner thereof or other lawful authority; contrary to s. 217 of the Road Traffic Act, 1960, and against the peace of Our Sovereign Lady the Queen, Her Crown and Dignity. The reason why I mention those matters is, as will appear, that s. 217 of the Act of 1960 does not itself provide for the offence of attempting to take and drive away. D

When the information was heard, a plea of guilty was entered by the appellant: no evidence was received, but the facts were recited to the justices and are in a very short compass. Apparently on a Saturday evening a police officer in Scarborough saw the appellant and another youth getting into a motor van. The time was a quarter of an hour before midnight, and some six minutes later, as the result of information which he had received, the police officer stopped the appellant when he was leaving the area. The appellant was taken to the police office, and eventually admitted that he and his companion were going to drive round the coach park. He said: E

"I don't think we would have gone on to the main road. A man passed and Pete got out. I lifted the engine cover, but that was all. All I can say is that I've had some beer and maybe that caused it, but I wouldn't have taken it far." F

He was thereupon fined £10 and there was no quarrel with that financial penalty: but the justices also ordered that the particulars of the conviction should be endorsed on any driving licence held by or issued to the appellant, and it is in respect of that order for endorsement of the driving licence that the appellant comes before this court. G

The justices evidently considered the matter with considerable care, and have set out their reasons for coming to the view that they could order the endorsement to be placed on the licence at some length. For my part I would prefer at this stage, at any rate, to consider for a moment the relevant statutory provisions. Section 217 of the Road Traffic Act, 1960, provides (1) that: H

"A person who takes and drives away a motor vehicle without having either the consent of the owner thereof or other lawful authority or knowing that a motor vehicle has been so taken, drives it or allows himself to be I

- A** carried in or on it without such consent or authority shall (subject to the next following subsection) be liable (a) on conviction on indictment, to a fine not exceeding £100 ... (b) on summary conviction, to a fine not exceeding £50 ..."

There are also provisions for imprisonment. It will be noted that that section does not in terms provide for the offence of attempting to take and drive away without lawful authority, though it is also to be noted that in sub-s. (4) a police officer is given express authority to arrest without a warrant a person reasonably suspected by him of attempting to commit an offence under that section. Nonetheless, it is quite plain that there is such an offence as attempting to take and drive away without lawful authority, and indeed the matter came before the Court of Criminal Appeal, as it then was known in *R. v. Pearce* (2), where LORD GODDARD, C.J., giving judgment, said (3): "As the defendant attempted to commit the offence... he was guilty of a common law misdemeanour...", and that indeed was the offence of which the defendant was guilty. In 1962 the Road Traffic Act, 1962, provided in s. 7 for endorsement of licences and it states:

- D** "(1) Subject to sub-s. (2) of this section, where a person is convicted of an offence specified in Pt. 1 or Pt. 2 of Sch. 1 to this Act, the court shall order that particulars of the conviction, and, if the court orders him to be disqualified, particulars of the disqualification, shall be endorsed on any licence held by him ...

- E** "(2) If the court does not order the said person to be disqualified, the court need not order particulars of the conviction to be endorsed as aforesaid if for special reasons it thinks fit not to do so."

The offences referred to in s. 7 are those set out in Pt. 1 and Pt. 2 of Sch. 1 to the Act of 1962. Part 1 consists of six offences, and the heading is: "Offences involving obligatory disqualification". Part 2, which contains a much longer list of offences, is headed: "Offences involving discretionary disqualification."

- F** Item 24 in Pt. 2 of that schedule is in these words:

"An offence under s. 217 (1) of the principal Act (taking, etc., motor vehicle without authority)."

That, therefore, is the offence in question specified in Pt. 2 of Sch. 1 to the Act of 1962.

- G** Returning, therefore, to the wording of s. 7 of the Act of 1962, it is to be noted that the opening words refer to a person being convicted of an offence specified in Pt. 1 or Pt. 2 of Sch. 1, and one asks: was the offence of attempting to take and drive away a motor vehicle without authority so specified? To that, there can be only one answer, namely: no. In my judgment, on that short ground, though there are others, this action by the justices in endorsing the appellant's
- H** licence, purporting to act under s. 7 was misconceived.

It does not, however, stop there, because, as counsel for the appellant has pointed out, s. 5 is dealing with disqualification (4), and sub-s. (6) provides:

- I** "The foregoing provisions of this section shall apply in relation to a conviction of an offence committed by aiding, abetting, counselling or procuring, or inciting to the commission of an offence specified in Pt. 1 of Sch. 1 to this Act as if the offence was specified in Pt. 2 of that schedule."

(2) [1952] 2 All E.R. 718; [1953] 1 Q.B. 30.

(3) [1952] 2 All E.R. at p. 719; [1953] 1 Q.B. at p. 31.

(4) Section 5, so far as material, provides: "(1) Where a person is convicted of an offence specified in Pt. 1 of Sch. 1 to this Act the court shall order him to be disqualified ... (2) Where a person is convicted of an offence specified in Pt. 2 of Sch. 1 to this Act the court may order him to be disqualified for such period as the court thinks fit."



The effect of this subsection is that when a person is convicted of aiding and abetting one of the offences specified in Pt. 1 of Sch. 1, he is to be treated for the purposes of disqualification and endorsement as if he had committed an offence specified in Pt. 2. There is, however, no corresponding provision in respect of aiding and abetting an offence specified in Pt. 2, much less any provision dealing with an attempt. **A**

In addition, s. 6 of the Act of 1960 deals with a person driving or attempting to drive a motor vehicle on a road when unfit through drinks or drugs. This provision expressly includes a case of attempting to drive, and when that is related to Sch. 1, one finds that an offence under s. 6 (1) of the principal Act, driving under the influence of drink, is an offence involving obligatory disqualification, and so is attempting in that instance, but there is no room, in my judgment, for importing attempts into the specified offences in the way that it was done in this case. **B**

The justices said that nowadays an endorsement is not a penalty. For my part I am inclined to think counsel for the appellant is right, that whatever may have been the position before the recent legislation, the presence of an endorsement on a licence now is something that any motor driver would seek to avoid, and as it comes as the result of an offence by him, it is in my judgment truly described as part of the penalty. In my judgment, therefore, the justices were wrong in ordering that this appellant's licence should be endorsed, and I would allow this appeal, and order the endorsement to be removed. **C**

**MILMO, J.:** I agree. I would add only one word, about the construction that the justices in this case have placed on s. 19 (9) of the Magistrates' Courts Act, 1952, because I think it is quite clear that they have read something into that section that is not there, and have in consequence misdirected themselves. **D**

One observes from para. 3 of the Case Stated that the justices state this: **E**

"Such offence [that is the offence of attempting to take and drive away] is a hybrid offence in that it is triable on indictment or summarily at the prosecutor's election. An attempt to commit such an offence is an indictable misdemeanour at common law triable summarily with the accused's consent pursuant to s. 19 of and Sch. 1 to the Magistrates' Courts Act, 1952 [then follows the important passage] If it were not for s. 19 (9) of the Magistrates Courts Act, 1952, a person attempting to take and drive away a motor vehicle without the consent of the owner or other authority, tried summarily, would be liable to a greater penalty than would a person completing such offence." **F**

That may well be so, but the justices go on **G**

"This subsection enacts that the person attempting the offence shall not be liable to greater punishment than the person completing such offence on summary trial. Parliament intended that the punishments should equate." **H**

There is nothing whatever in the Act of 1952 to support that statement. Later on the justices state: **I**

"It seems strange that Parliament should be at pains to ensure that the penalties should equate but not the consequences."

When one looks at s. 19 (9), it provides that:

"Where a person is convicted under this section of attempting to commit an offence that is both an indictable offence and a summary offence, he shall not be liable to any greater penalty than he would be liable to on being summarily convicted of the completed offence."

A The justices have read into that section something which just is not there, because they are reading that section as meaning: he shall be liable to the same penalties as he would have been liable to had he been convicted summarily of the completed offence. In my judgment there is no justification for saying that it was the purpose of the legislature to equate the penalties; it was not, the purpose was to ensure that the attempt should not be punished by a greater penalty

B than the substantive offence. I agree that this appeal must be allowed.

**LORD PARKER, C.J.:** I agree with both judgments.

*Appeal allowed.*

Solicitors: *Herbert Smith & Co.*, agents for *Pearsons & Ward*, Scarborough (for the appellant); *Thorpe & Co.*, Scarborough (for the respondent).

[*Reported by ELLEN B. SOLOMONS, Barrister-at-Law.*]

## D SWEET v. PARSLEY.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Ashworth and Blain, JJ.), March 22, April 4, 23, May 13, 1968.]

*Drugs—Dangerous drugs—Cannabis—Tenant of house—No knowledge that cannabis being smoked on premises—Rooms in house sub-let and in fact used for smoking cannabis—Whether tenant concerned in the management of premises used for smoking of cannabis—Dangerous Drugs Act 1965 (c. 15), s. 5 (b).*

The appellant was tenant of a farmhouse in Oxfordshire. She herself let rooms in the farmhouse at £5 to £6 a month, each so-called sub-tenant having the use of a bedroom and a right in common with everyone else in the house to the use of the kitchen. The appellant retained a bedroom in the farmhouse for her own use, though when she was away she allowed others to use it. Early in 1967 she had to move into Oxford, and thereafter only visited the farmhouse occasionally to collect rent, etc. On June 16, 1967, the police searched the farmhouse and garden and found small quantities of drugs. The appellant was charged with being concerned in the management of premises which were used for the purpose of smoking cannabis or cannabis resin contrary to s. 5 (b)\* of the Dangerous Drugs Act 1965. It was not in dispute that the premises had been used for the purpose of smoking cannabis resin and that the appellant herself had no knowledge whatever that the house was being used for that purpose. On appeal against conviction,

**Held:** though the fact that the appellant was tenant of the farmhouse and thus responsible for its rent and maintenance did not of itself establish that she was concerned in the management of the premises, which was a question of fact depending on the exact circumstances of the case, yet in the present case the justices were fully entitled to hold that the appellant was concerned in the management of the premises (see p. 340, letter B, post).

*Yeandel v. Fisher* ([1965] 3 All E.R. 158) considered.  
Appeal dismissed.

[As to offences under the Dangerous Drugs Acts, see 26 HALSBURY'S LAWS (3rd Edn.) 215, para. 487; and as to offences concerning the smoking of cannabis, see SUPPLEMENT thereto.]

For the Dangerous Drugs Act 1965, s. 5, see 45 HALSBURY'S STATUTES (2nd Edn.) 895.]

\* Section 5, so far as material, is set out at p. 339, letter E, post.

Case referred to:

*Yeandel v. Fisher*, [1965] 3 All E.R. 158; [1966] 1 Q.B. 440; [1965] 3 W.L.R. 1002; 129 J.P. 546; Digest (Cont. Vol. B) 151, 57a.

### Case Stated.

This was a Case Stated by justices for the county of Oxford in respect of their adjudication as a magistrates' court sitting at Woodstock on Sept. 14, 1967.

On July 21, 1967, a charge was made by the respondent Edmund Raymond Parsley, a sergeant of the Oxfordshire Constabulary, against the appellant, Stephanie Lavinia Sweet, charging that she on June 16, 1967, was concerned in the management of certain premises situate at Fries Farm in the parish of Gosford and Watereaton in the county of Oxford which were used for the purpose of smoking cannabis or cannabis resin contrary to s. 5 (b) of the Dangerous Drugs Act 1965. The facts are summarised in the judgment of LORD PARKER, C.J.

Before the justices the appellant conceded, and the justices found, that the premises at Fries Farm were used for the purpose of smoking cannabis resin. It was contended on behalf of the appellant before the justices that the phrase "concerned in the management of the premises" could not properly be applied to a landlord letting rooms to tenants; that the Act was designed to impose a responsibility on those in charge of premises to which members of the public had access, e.g., a public house or dance hall; that it could not be the intention of the legislature to impose on a landlord the responsibility of seeing that drugs were not being smoked behind the doors of rooms let to tenants; and that in no sense could a landlord of such premises be termed "a manager". It was further contended on behalf of the appellant that the law drew a distinction between persons who were "on the spot" and concerned with the management of premises and an occupier who might be an absent occupier and not on the premises at all. It was contended on behalf of the appellant that to all intents and purposes she was not "on the spot" but could be more properly termed an absent occupier. The fact that she had a room at the premises was not significant as she did not occupy that room except very occasionally and she was in the same position as a landlord who visited premises periodically to collect rents who would be termed an absent occupier.

It was contended by the respondents before the justices that by accepting responsibility to her landlord to pay rent and to maintain the premises the appellant could be said to be "concerned in the management of the premises" and that on the facts proved in evidence before us she was so concerned in the management of premises as to have committed an offence within s. 5 (b) of the Dangerous Drugs Act 1965.

The justices were of opinion that the appellant was concerned in the management of the premises at Fries Farm which were used for the purpose of smoking cannabis resin and they accordingly convicted her and imposed a fine of £25 on her and ordered her to pay £12 18s. costs. The appellant appealed.

*Leo Clark* for the appellant.

*R. M. A. C. Talbot* for the respondent.

**LORD PARKER, C.J.:** On the evening of June 16, 1967, police constables went to this farm with a search warrant, and there they found what I would call odds and ends of various drugs. They found underneath a stone behind the boundary wall two bottles of tablets which turned out to be amphetamine sulphate; they found a polythene bag with tablets, a silver match box which showed traces of cannabis resin; in the garden they found a blue envelope containing what turned out to be L.S.D., and in the kitchen they found three home-made cigarette ends and an ash tray which again disclosed cannabis resin. Mr. Cook is the tenant of Fries Farm who on Oct. 1, 1966, sub-let the farmhouse to this appellant under an agreement for a term of nine months



- A** certain and so on for three months and three months at a rent of £28 per four weeks payable in advance. Accordingly, the appellant became sub-tenant of these premises. The appellant herself from 1963 to 1966 was an undergraduate at Oxford, and in October, 1966, she became a teacher at a school in Oxford where she taught Spanish, English and mathematics. When she became sub-tenant of these premises on Oct. 1, 1966, she had intended to go and live there
- B** with another girl and motor into Oxford every day, but she found that the rent was too much for her and so she decided to sub-let rooms in the farmhouse. In fact she let rooms out at £5 to £6 per month, each so-called tenant having the use of the bedroom and a right in common with everybody else in the house to use the kitchen, the appellant herself retaining her own bedroom in the farmhouse for her own use, though when she went away she allowed others to use it.
- C** On Jan. 1, 1967, her car broke down, she could not afford to have it repaired, and, therefore, she had to move into Oxford, and from then on she only visited the farmhouse occasionally, as she put it, to collect letters, to collect any rent, and to see that the place had not been burned down and that everything was all right. That was the position, and two things at the trial were really conceded: one was that the premises had been used for the purpose of smoking cannabis
- D** resin, but also it was conceded that the appellant herself had no knowledge whatever that the house was being used for that purpose. It was in those circumstances that she was charged with being concerned in the management of the premises.

Section 5 of the Dangerous Drugs Act 1965 provides that:

- E** “If a person (a) being the occupier of any premises, permits those premises to be used [inter alia] for the purpose of smoking cannabis or . . . (b) is concerned in the management of any premises used for any such purpose . . . he shall be guilty of an offence.”

In the case of *Yeandel v. Fisher* (1), this court had occasion to consider this section, and the court noted the difference between para. (a) and para. (b).

- F** If somebody is a mere occupier he can only be guilty of an offence if it is proved that he permitted, which as we all know involves some knowledge or constructive knowledge. By contrast, para. (b) in dealing with somebody concerned with the management of premises where cannabis is smoked contains an absolute liability; it does not depend on knowledge at all.

- G** In this appeal counsel for the appellant really puts the matter, as I understand it, in two ways. He says in the first place that this appellant was an occupier, she was in occupation of her bedroom, she was the sub-tenant, she was in occupation presumably of the garden, and herself would have a right in common with others to use the kitchen. He says that being an occupier she can only be liable under the section if she permits, and it is agreed she did not permit. In my judgment there is a fallacy in that argument, in that para. (a) and para. (b) in the subsection are not mutually exclusive. A person can be an occupier and
- H** may also be concerned in management.

The second way in which he puts it is this, that on the facts here it is impossible in law to say that this appellant was concerned in the management of the premises. It is to be observed that the contention put forward by the respondent before the justices was in this form, that by accepting responsibility to her landlord to

**I** pay rent and to maintain the premises, the appellant could be said to be concerned in the management of the premises. In my judgment that is too wide, and one can conceive many cases when a landlord has let either the whole of the premises or parts of the premises, where it could not properly be said that he was concerned in the management of the premises.

In my judgment there is no single test to be applied in order to decide whether someone is concerned with the management of premises; it is a question in all

cases of fact depending on the exact circumstances, and there is no test which alone is applicable. It is quite true in this case, as counsel for the appellant has pointed out, that this appellant would be unable properly to enter rooms that she had let, that she would be unable to refuse entry to guests of persons to whom she had let rooms, and that she may have been unable to expel, as it were, anybody who was doing anything wrong. At the same time, however, if one thinks of these premises with a number of rooms let off in this way for short periods, with the common use of the kitchen, in any ordinary sense of the word a person would say she was managing the properties; she was in a position to choose her tenants; she could put them under as long or as short a tenancy as she desired; and she could make it a term of any letting that smoking of cannabis was not to take place. It seems to me that on the facts of this case the justices were fully entitled to hold that she was concerned in the management of the premises. Accordingly, I would dismiss this appeal.

ASHWORTH, J.: I agree.

BLAIN, J.: I agree.

*Appeal dismissed. Leave to appeal refused.*

May 13. On renewal of the application for leave to appeal, which had been refused on Apr. 4, but had been renewed on Apr. 23 and then had been adjourned pending the decision of the appeal in *Warner v. Metropolitan Police Comr.* (2), and now again came before LORD PARKER, C.J., and BLAIN, J.:—

Rose Heilbron, Q.C., and I. Brownlie, for the applicant, referred to *Warner's* case (2) and submitted that comparison of the opinions of their lordships in the House of Lords in that case indicated the need for further consideration of the section under which the present applicant had been convicted.

LORD PARKER, C.J.: We have been in communication with ASHWORTH, J., since the decision of the appeal in *Warner's* case (2), and we think that the applicant should have leave to appeal. We have drafted certain points on which we are prepared to certify under s. 1 of the Administration of Justice Act, 1960, that points of law of general public importance are involved. These points are—(i) whether s. 5 (b) of the Dangerous Drugs Act 1965 creates an absolute offence; and (ii) what, if any, mental element is involved in the offence. Those are the points of law of general public importance. Having given leave to appeal on those, it seems right to add a third, so as to make certain that their lordships have jurisdiction over the whole of the case, viz.—(iii) whether, on the facts found, a reasonable bench of magistrates, properly directing their minds on the law, would have convicted the applicant.

*Leave to appeal granted accordingly.*

Solicitors: Peacock & Goddard, agents for Harry F. Galpin & Co., Oxford (for the appellant); Cunliffe & Mossman, agents for County Prosecuting Solicitor, Bristol (for the respondent).

[Reported by N. P. METCALFE, ESQ., Barrister-at-Law.]

## R. v. MARSDEN.

[COURT OF APPEAL, CRIMINAL DIVISION (Sachs, L.J., Cantley and Cusack, J.J.), March 25, 1968.]

*Criminal Law—Sentence—Hospital order—Hospital order may be made for admission to a hospital in any part of the country where a vacancy exists—Mental Health Act, 1959 (7 & 8 Eliz. 2 c. 72), s. 60.*

An order under s. 60\* of the Mental Health Act, 1959, may authorise the offender's admission to, and detention in, a hospital in any part of the country (see p. 342, letter F, post).

PER CURIAM: once such an order is made it is competent for the appropriate authorities to arrange later a transfer to a hospital in an area closer to the patient's family (see p. 342, letter G, post).

[As to hospital orders under the Mental Health Act, 1959, see 29 HALSBURY'S LAWS (3rd Edn.) 524, 525, para. 985.

For the Mental Health Act, 1959, s. 60, see 39 HALSBURY'S STATUTES (2nd Edn.) 1013.]

## Appeal.

This was an appeal by June Marsden against a sentence of borstal training imposed on her by the recorder (SIR JOSEPH MOLONY, Q.C.) at Bristol Quarter Sessions on Sept. 28, 1967, to which court she had been committed for sentence under s. 29 of the Magistrates' Courts Act, 1952, after pleading guilty at Bristol Magistrates' Court on Sept. 13, 1967, to stealing 2s. 6d. Leave to appeal against sentence was granted by JAMES, J., in order that the court might look at the sentence in the light of the facts of the offence and the antecedents of the offender.

C. F. Sara for the appellant.

J. H. R. Newey for the Ministry of Health and the Home Office.

SACHS, L.J., delivered the following judgment of the court: On Sept. 13, 1967, at Bristol magistrates' court the appellant, aged seventeen, pleaded guilty to a very petty larceny and was committed for sentence under s. 29 of the Magistrates' Courts Act, 1952, to Bristol quarter sessions. At those sessions on Sept. 28 she was sentenced to borstal training. Now by leave she appeals against the sentence and the real objective of the appeal, as stated by counsel on her behalf, is to obtain instead of an order for borstal training a hospital order under s. 60 of the Mental Health Act, 1959.

Leave to appeal was given in October, 1967, and it is as well to state that the lapse of time before the matter has come before this court has been entirely due to the very great care that has been taken to obtain various medical reports and to ensure that the best thing that can be done will be done for the appellant. She is someone who has had a sad past: as a result she was placed in the care of the local authority already at the age of ten months and she has, indeed, been in the charge of the Cardiff children's department for a great part of her life. Whilst she was under that care she absconded from the hostel, "slept rough", went to the house of a boy friend whose mother let her stay there and there committed the larceny of a very small sum of money which brought her again before the courts.

\* Section 60, so far as material, provides: "Where . . . (a) the court is satisfied, on the written or oral evidence of two medical practitioners (complying with the provisions of s. 62 of this Act),—(i) that the offender is suffering from . . . psychopathic disorder . . . ; and (ii) that the mental disorder is of a nature or degree which warrants the detention of the patient in a hospital for medical treatment . . . ; and (b) the court is of opinion having regard to all the circumstances including the nature of the offence and the character and antecedents of the offender, and to other available methods of dealing with him, that the most suitable method of disposing of the case is by means of an order under this section, the court may by order authorise his admission to and detention in such hospital as may be specified in the order . . ."



When the matter came before quarter sessions there were great difficulties as to the way in which the court should proceed. It had become very clear that the normal avenues a court would like to pursue were in this case closed. The parent's home was unsuitable. An offer from a certain quarter of a home turned out also to be an offer of a type which no court could reasonably accept. A probation hostel had been tried, had failed, and was thus no good. It was in those circumstances that the court had to come to a conclusion on what could be done, and borstal training was ordered because there was no other available way of dealing with the appellant at that stage.

The unfortunate fact, however, is, as appears from later reports, that by reason of the appellant's limited intelligence and personality she has no adequacy to cope with and would derive no benefit from borstal training, whilst on the other hand she is unfitted to lead an unsupervised life in the community at large. Moreover, later it became clear that there were questions both of subnormality and of a psychopathic disorder, and this court has accordingly made a great many efforts to obtain the best medical reports that could be procured on the subject. By the time when the matter came before the court on the last occasion it had become clear that the proper order would be one under s. 60 of the Mental Health Act, 1959, but the obstacle to the court's acting on that occasion arose out of certain passages in the report of a very experienced prison medical officer. According to that officer the only place to which it was permissible for the appellant to be sent would for some reason be one administered by the Welsh Regional Board: and it was also stated to this court that there was no vacancy in any of the institutions administered by that board. This information naturally caused considerable concern to the court, for if it had been accurate it would mean that the administration of justice would be liable to be impeded by the absence of a vacancy in an institution in a particular region, and it would not be open to this court to take advantage of the existence of vacancies in other institutions in other regions. Had that been so it would have been a matter of lamentable red tape.

This court, however, has now been informed by counsel, who came here to put forward all available information from both the Ministry of Health and the Home Office, that the apprehensions of the court were unfounded. It is perhaps of some importance that it should be known generally that there is neither any statutory rule or order, nor is there any administrative rule or order, nor according to counsel is there any administrative way of thinking which precludes somebody, in respect of whom a s. 60 order ought to be made, going to whatever vacancy may be existing at the time in any institution in any part of the country. Once that order has been made it is quite competent for the appropriate authorities later on to arrange a transfer to an institution in an area closer to the patient's family, etc. (1).

Having thus been able, with the aid of counsel to make the position crystal clear in the future, the question now comes back as to what is the appropriate order in this particular case. The court has before it two reports from qualified practitioners within the meaning of the Mental Health Act, 1959 (2). Both of them state that in their opinion the appellant is suffering from a psychopathic disorder within the meaning of the Mental Health Act, 1959 (3). Both of them state that that disorder is in the nature or degree which warrants her detention in a hospital for medical treatment, and both of them make it clear that now, as opposed to on the last occasion, there is a vacancy at the Mid-Wales Hospital, Talgarth, Breconshire. In those circumstances the court, which is much concerned for the welfare of the appellant and is of the opinion that it is unfortunately necessary that she be within such an institution for quite a considerable time, makes the order under s. 60 that she go to the particular hospital which

(1) See Mental Health Act, 1959, s. 63 (3), s. 41, and Sch. 3; 39 HALSBURY'S STATUTES (2nd Edn.) 1017, 997, 1087.

(2) As required under s. 60 of the Act of 1959, see footnote \*, p. 341, ante.

(3) Psychopathic disorder is defined in s. 4 (4) of the Act of 1959; 39 HALSBURY'S STATUTES (2nd Edn.) 967.

A has just been named, and expresses thanks to both counsel for their efforts which have brought about the state of affairs on which an appropriate order can be made.

*Appeal allowed. Sentence varied.*

Solicitors: *Kingsley Napley & Co.* (for the appellant); *Solicitor, Ministry of Health.*

[*Reported by N. P. METCALFE, ESQ., Barrister-at-Law.*]

### NOTE.

#### LITTLER v. LIVERPOOL CORPORATION.

[LIVERPOOL ASSIZES (Cumming-Bruce, J.), February 2, 1968.]

C Highway—Maintenance—Standard of repair—Flagstone defective—Small triangular gap at corner, making a possible tripping point one half-inch in depth—Defect not a reasonably foreseeable cause of danger in a pavement in public use—Unevenness in pavement insufficient to give rise to cause of action in negligence or for breach of statutory duty—Highways Act, 1959 (7 & 8 Eliz. 2 c. 25), s. 44 (1).

D [Editorial Note. Section 44 (1) of the Highways Act, 1959, imposes on a highway authority a duty to maintain a highway repairable at the public expense, and by s. 295 (1) "maintain" includes "repair". The words of earlier legislation either imposed duty to "repair and keep in repair" or to "maintain and repair"; see generally 19 HALSBURY'S LAWS (3rd Edn.) 115, 116, para. 173, and for cases on the standard of repair of highways repairable at the public expense, see 26 DIGEST (Repl.) 382-384, 913-927.

E For the Highways Act, 1959, s. 44, s. 295 (1), see 39 HALSBURY'S STATUTES (2nd Edn.) 461, 708.]

Cases referred to:

*Griffiths v. Liverpool Corpn.*, [1966] 2 All E.R. 1015; [1967] 1 Q.B. 374; [1966] 3 W.L.R. 467; 130 J.P. 376; Digest (Cont. Vol. B) 329, 1278a.

F *Grundy v. Liverpool Corpn.*, (Liverpool Assizes, June 27, 1966) unreported. *Meggs v. Liverpool Corpn.*, [1968] 1 All E.R. 1137.

#### Action.

By writ issued on Oct. 21, 1966, the plaintiff, Thomas Littler, an infant suing by his father and next friend, claimed from the Corporation of the City of Liverpool damages for personal injuries sustained by alleged breach of statutory duty and negligence. The plaintiff by his statement of claim delivered on Oct. 26, 1966, gave the following particulars of the alleged breach of statutory duty and negligence—(i) failure to maintain a highway (viz., Queens Road in the city of Liverpool) contrary to s. 44 of the Highways Act, 1959; (ii) failure to keep and maintain the highway in safe condition; (iii) failure to enclose or rope off or give any or adequate warning of the defective condition of the highway, and (iv) failure to take all reasonable precautions to avoid the accident. The plaintiff further pleaded in the alternative that the highway constituted a nuisance in its then condition and that the plaintiff suffered injury thereby. The defendants denied the alleged breach of statutory duty, negligence and nuisance. They pleaded further (among other alternative defences) that if the plaintiff suffered the alleged or any injuries, the same were caused solely or alternatively were contributed to by the plaintiff's own negligence in failing to keep a proper look-out. The trial judge (CUMMING-BRUCE, J.) intimated that the alleged breach of duty at common law did not add, having regard to the facts in the present case, to the alleged breach of statutory obligation. The following statement of fact is summarised from the judgment.

I The plaintiff, who was nineteen years of age, lived in Aubrey Street in the city of Liverpool. On the day of the accident he left home with two lemonade bottles, which were empty, to go to a shop at the corner of Queens Road and Tegid Street to get new bottles of lemonade. In the course of going there he

stumbled and fell; the glass in his hand smashed and he was injured. The plaintiff had the handicap of constitutional backwardness. At the time when he fell he was running. On the evidence the trial judge decided that he was running from the shop towards home. The plaintiff alleged that the reason for his fall was that he caught the toe of his shoe on a lip of pavement sticking up above the level of the pavement from which he was coming. Thus his evidence was that he tripped, not that he slipped. The pavement was made of York stone flags about eighty years old. There was some unevenness of the surface; there were some cracks, other than the defect which was the alleged cause of the accident. There was, however, nothing likely to cause anyone to trip or stumble other than the one defect which was the alleged cause of the accident. The relevant facts, as found by the trial judge with regard to the pavement and the plaintiff's fall were accordingly that the plaintiff fell because he tripped by catching his toe in a half-inch triangular depression, three inches long on its longest side, while he was running on the pavement. There was no material source for complaint about the rest of the pavement, save that there was some irregularity of surface as a result of the wear of the York stone, but such irregularity would not present any danger of slipping. The pavement was constantly and had long been constantly in use by men, women and children.

The evidence which the trial judge accepted about the imperfection or defect in the pavement was that a small part of a corner of a flagstone had flaked away. The resulting defect in level at this point was in the shape of a right-angled triangle with a hypotenuse three inches in length and of a depth of half-an-inch. The effect of the flaking away of the flagstone was that one's foot would meet a half-inch ledge if one were going from Aubrey Street to Tegid Street. If one were going the other way, one could catch one's toe in the little cavity. After representatives of the highway authority had examined the pavement instructions were given to fill up the little gap with asphalt and to cover adjacent flags, and this was duly done.

*H. L. Lachs* for the plaintiff.

*I. H. M. Jones* for the defendants.

CUMMING-BRUCE, J., having stated the nature of the action and reviewed the facts and evidence concerning the accident and the state of the pavement in question, continued: The statutory duty of the defendants is to maintain the highway. A person who has suffered damage by reason of non-repair of a highway has a cause of action against the highway authority for breach of the duty to maintain, but what standard is a highway authority under a duty to maintain? The right of the subject is a right of passage along the highway. If the state of the highway is such that a subject is impeded or obstructed in his passage and he suffers damage other than personal injury thereby, it may be that he can establish a *prima facie* case without showing that the highway was dangerous: but where the cause of action of the plaintiff is that the plaintiff suffered personal injury by reason of the failure to maintain the highway, the plaintiff must make out a case that the highway was not reasonably safe, that is, was dangerous to the relevant traffic. This has now been settled by the Court of Appeal in *Mcggs v. Liverpool Corpn.* (1). Earlier uncertainty about the law illustrated in certain passages of PAUL, J.'s judgment in *Grundy v. Liverpool Corpn.* (2) is now removed.

(1) [1968] 1 All E.R. 1137.

(2) (Liverpool Assizes, June 27, 1966) unreported. The plaintiff, Mrs. Grundy, who was seventy-eight years of age, sustained an accident on Feb. 22, 1963, at about 3.15 p.m. She was walking home, after shopping, along the pavement. She heard a loud knocking; she turned her head to see the cause, and at this moment caught her foot in an upstanding edge of a paving stone and fell. The paving stone was cracked, and had sunk in the centre. At the point where the plaintiff tripped there was a ledge at which she tripped. The ledge was measured the same day by the plaintiff's daughter who found it to be three-quarters of an inch: the plan referred to at the trial showed it to measure half-an-inch. The action was founded on the Highways Act, 1959, particularly s. 44. The plaintiff was awarded £750 general damages.



A What, then, is the test of "dangerous" in this context? Once more, it is no longer necessary to rely on the persuasiveness of judgments at first instance or on my own undisciplined opinion. The approach foreshadowed obiter in the speeches in the Court of Appeal in *Griffiths v. Liverpool Corpn.* (3) has now become part of the law by the decision in *Meggs' case*. It is implicit in the words of LORD DENNING, M.R., where he says (4):

B "I must say I cannot go with that argument. It seems to me, using ordinary knowledge of pavements, that everyone must take account of the fact that there may be unevenness here and there, there may be a ridge of half-an-inch or three-quarters of an inch occasionally, but that is not the sort of thing which makes it dangerous or not reasonably safe."

C That passage occurs in a case in which the facts were that the plaintiff tripped and hurt herself because certain flagstones were uneven so that one of them had sunk about three-quarters of an inch.

The test in relation to a length of pavement is reasonable foreseeability of danger. A length of pavement is only dangerous if, in the ordinary course of human affairs, danger may reasonably be anticipated from its continued use by the public who usually pass over it. It is a mistake to isolate and emphasise a particular difference in levels between flagstones unless that difference is such that a reasonable person who noticed and considered it would regard it as presenting a real source of danger. Uneven surfaces and differences in level between flagstones of about an inch may cause a pedestrian temporarily off balance to trip and stumble, but such characteristics have to be accepted. A highway is not to be criticised by the standards of a bowling green.

E In the present case the only significant defect in the pavement was the small triangular gap which at its deepest presented a trip of half-an-inch. This is the kind of imperfection which has to be accepted in a pavement used by children and adults. Its presence would not make a reasonable person who considered the length of old pavement in Queens Road between Aubrey Street and Tegid Street think injury would ensue unless it was repaired. I say this although after the accident had happened Mr. Latham (5) was sensible in having it filled up.

I would add this: the sooner that the importance of the decision in *Meggs' case* (6) is appreciated in Liverpool by the profession and, in particular, those sitting on legal aid committees the better. There was room for doubt as to the ingredients of a *prima facie* case before *Meggs' case* (6) was decided. The Court of Appeal has resolved that doubt and it is important that all concerned in litigation should realise that there is not a cause of action whenever someone trips over an uneven pavement or as a result of a fractional difference in levels between flagstones.

*Judgment for the defendants.*

H Solicitors: *Silverman, Livermore & Co.*, Liverpool (for the plaintiff); *T. Alker*, Town Clerk, Liverpool (for the defendants).

[Reported by K. B. EDWARDS, ESQ., *Barrister-at-Law*.]

I

(3) [1966] 2 All E.R. 1015; [1967] 1 Q.B. 374.

(4) *Meggs v. Liverpool Corpn.*, [1968] 1 All E.R. at p. 1139, letter I.

(5) Mr. Latham gave instructions on behalf of the highway authority, the defendants, that the small cavity should be filled in.

(6) [1968] 1 All E.R. 1137.

DEOKINANAN *v.* REGINAM.

[PRIVY COUNCIL (Viscount Dilhorne, Lord Hodson, Lord Upjohn), January 30, 31, February 1, 1968.]

*Privy Council—Guyana—Criminal law—Evidence—Confession—Inducement—Person in authority—Statement to friend put in same lock-up as appellant by police—Whether person in authority.*

It remains the law, after the decision in *Comrs. of Customs and Excise v. Harz* ([1967] 1 All E.R. 177), that for a confession to be rendered inadmissible in evidence by being induced by fear of prejudice or hope of advantage, the inducement must be by a person in authority (see p. 350, letter H, post); and the mere fact that, at the time when a confession is made, the person to whom it is made is a possible witness for the prosecution does not make him a person in authority (see p. 349, letter G, post).

*Comrs. of Customs and Excise v. Harz* ([1967] 1 All E.R. 177) considered.

The appellant with M. and two other persons had gone in a launch up river to buy timber, for which M. was given money. The appellant returned alone and said that the launch had met with an accident. He gave different stories to various people. Later the bodies of the three men were found in the river with wounds caused by a sharp cutting instrument and the stomachs of M. and another man were cut open. The boat was found sunk with the sea cork removed. The appellant was arrested. A few days later, B., whom the appellant regarded as his friend, was placed by the police in a lock-up in the hope that he would get information from the appellant, who was then brought to the lock-up. While in the lock-up the appellant asked B. to get money from Powis Island, to keep part himself and to give the rest to the appellant's father-in-law. B. asked how the money got missing and the bodies chopped up. The appellant, in the course of replying, said that in the launch he chopped M. in his neck, and that he and another man, D., decided to burst the belly of M. and another, and to sink their bodies with the boat anchor. The money was found subsequently at the exact spot which the appellant had described to B. At the trial of the appellant for murder of M., objection was taken to the admission of the statement made by the appellant to B. in the lock-up on the ground that it was induced by hope of advantage held out with the knowledge and consent of the police and was not voluntary. The objection was overruled. On appeal against conviction,

**Held:** on the evidence the appellant did not regard B. as a person in authority, but as a friend, and in accordance with the principle stated at letter B, above, the statement by the appellant to B. was not made to a person in authority, was voluntary and had been rightly admitted in evidence (see p. 349, letter I, and p. 350, letter I, post).

*R. v. Wilson, R. v. Marshall-Graham* ([1967] 1 All E.R. 797) considered. Appeal dismissed.

[As to who are persons in authority in relation to inducements to make confessions, see 10 HALSBUURY'S LAWS (3rd Edn.) 469, 470, para. 861; and for cases on the subject, see 14 DIGEST (Repl.) 468, 469, 4508-4522.]

Cases referred to:

*Comrs. of Customs and Excise v. Harz*, [1967] 1 All E.R. 177; [1967] 1 A.C. 760; [1967] 2 W.L.R. 297; Digest (Repl.) Supp.

*R. v. Gibbons*, (1823), 1 C. & P. 97; 14 Digest (Repl.) 487, 4658.

*R. v. Moore*, (1852), 3 Car. & Kir. 153; 2 Den. 522; 21 L.J.M.C. 199; 16 J.P. 744; 14 Digest (Repl.) 488, 4694.

*R. v. Row*, (1809), Russ. & Ry. 153; 14 Digest (Repl.) 487, 4656.

*R. v. Thompson*, [1891-94] All E.R. Rep. 376; [1893] 2 Q.B. 12; 62 L.J.M.C. 93; 69 L.T. 22; 57 J.P. 312; 14 Digest (Repl.) 468, 4521.

- A *R. v. Todd*, (1901), 13 Man. L.R. 364; 14 Digest (Repl.) 486, \*3208.  
*R. v. Wilson, R. v. Marshall-Graham*, [1967] 1 All E.R. 797; [1967] 2 Q.B. 406; [1967] 2 W.L.R. 1094; Digest (Repl.) Supp.

### Appeal.

B This was an appeal by special leave from the judgment of the Court of Appeal of Guyana (STOBY, C., and LUCKHOO, A.J.; CUMMINGS, J.A. (Ag.), dissenting) given on Dec. 20, 1966, dismissing an appeal by the appellant against his conviction on Nov. 23, 1965, at his trial before the Supreme Court of British Guyana, when he was convicted of the murder of one Motie Singh and sentenced to death. On Oct. 15 and Oct. 22, 1963, one Raghubar had given money to Motie Singh to buy timber for Raghubar's sawmill, which was at Crabwood Creek at the mouth of the river. The appellant, with Motie Singh and two other men, Heera and Dindial, had gone up river in a launch to buy the timber. On Oct. 24, 1963, the appellant returned alone to a camp and got a lift downstream. He reported to Raghubar at Crabwood Creek. He said that the launch had met with an accident and that he found himself in the water near Maam Island. He gave various accounts to different people. C He was taken to the police station. On Oct. 25, 1963, the appellant, being with two policemen and Raghubar near Maam Island, pointed to a place in the river and said "This is the spot". Nothing was found there. On Oct. 26, the body of Dindial was found floating in the river near Ann's Creek about twenty-five miles up river from Maam Island; and the bodies of Heera and Motie Singh were found floating in the river about five miles from Ann's Creek. All three had wounds caused by a sharp cutting instrument. Motie Singh had a severe wound E in his neck, and he and Heera had had their stomachs cut open. On Oct. 28 the launch was found, sunk near Powis Island. It was brought to the surface, There was no sign of collision. Cutlasses which had been on board were missing, and so were the anchor and chain. The sea cork had been taken out. The launch had been deliberately sunk. The appellant was arrested and taken to F prison.

Balchand (who said that in 1963 he was a great friend of the appellant) went to the prison to see the appellant on Nov. 6. Balchand's account of what happened was as follows—

G "Accused said to me, 'Bal man, ah glad you come, I want to see you very important'. I asked him what was it all about so important. He said that he wanted me to help him because he knew I had an engine and a boat. I asked him what I could do to help him. He said that he got the money in Powis Island, and he wanted me to go to the island.

"The prison officer was patrolling behind the accused and he changed the conversation. In the presence of the accused, the prison officer said that the time was up. I then left the prison."

H Balchand said that on this occasion he had told the appellant that he would try his best to help by going for the money; it was Balchand's intention, so he said, to tell the police any information which he got from the appellant. It was not contended for the appellant that what was said to Balchand on this occasion was inadmissible in evidence.

I On Nov. 12, 1963, Balchand went to Whim Police Station. After speaking to one Sergeant Barker, he was placed in the lock-up, though not charged with any offence. He was put there in the hope that he would get information from the appellant and communicate it to the police. At about 1 p.m. the appellant was placed in the cell with Balchand. They were alone together for about an hour. Balchand's account of what happened included a statement that the appellant had given him directions where to find the money on Powis Island and that he was to take one thousand dollars for himself and to give to the appellant's father-in-law the balance. Balchand's account continued:



"I asked him how the money got missing. He said whilst they were coming on the river, 'We slipped out the money and hide it in the launch'. I asked him how the bodies got chopped. He told me that Dindial caused the whole trouble. He said that while they were coming, Motie Singh and Heera wanted to go to the Dutch police station to report the loss of the money; that Heera and Dindial had an argument, and Dindial told Heera to stop the launch; that Heera said 'No man, abee a go report the matter at the Dutch police station'. The while arguing Dindial picked up a cutlass, gave Heera several chops. He said that Motie Singh went to assist Heera, and he (the accused) picked up his cutlass and chopped Motie Singh on his neck; and the two of them decide to burst the belly of the men, to tie them and sink them with the boat anchor.

"I told the accused that I would try and assist to get the money."

After leaving the lock-up Balchand went with police officers to Powis Island where the money was found hidden exactly as the appellant had said.

At the trial objection was taken on behalf of the appellant to the admission in evidence of the statements made by the appellant to Balchand at Whim Police Station on the ground that they were induced by a promise to help the accused held out by a witness with the knowledge and consent of a person in authority, viz., Sergeant Barker, and were not made voluntarily. The trial judge ruled that the evidence was admissible. His LORDSHIP (VISCOUNT DILHORNE) said that the question to be decided on the appeal to the Judicial Committee was whether the judge's ruling was right. The appeal is reported only on the question whether, if inducement was offered, it was offered by a person in authority.

*T. O. Kellock, Q.C.*, and *L. J. Blom-Cooper* for the appellant.

*J. G. Le Quesne, Q.C.*, and *S. G. Davies* for the Crown.

VISCOUNT DILHORNE, having stated the facts relevant to the appeal, having reviewed Balchand's account of the appellant's statements to him and the circumstances in which they were made, and having referred to three cases (1) on the law concerning the admissibility of confessions, continued: In the light of what has been said in the cases referred to, the question for decision in this case is whether the prosecution established at the trial that the appellant's confession was free and voluntary and that he was not induced to confess by any promise or hope of advantage held out to him by a person in authority.

The appellant did not give evidence at the trial. Balchand's evidence as to the conversation at Whim Police Station was not contradicted nor was it challenged in cross-examination. At their meeting on Nov. 6, 1963, Balchand told the appellant that he would try to help him by going for the money. That promise was not conditional on the appellant telling Balchand what had happened. Balchand went to the prison to see the appellant at the request of the appellant's brother. The appellant said that he was glad Balchand had come as he thought Balchand was a friend on whom he could rely to assist him. At Whim police station Balchand repeated the promise he had already given and he was told by the appellant what to do with the money when he had found it. As LUCKHOO, A.J., said, in his careful and thorough judgment, nothing had happened to make Balchand appear to the appellant in a different light to that in which he had appeared on Nov. 6. LUCKHOO, A.J., rightly said:

"The very first words spoken by the appellant, who was the first to speak, would indicate that the same atmosphere and relationship which obtained at 'the prison conversation' prevailed. His words were 'What you doing here, Bal, you got the money?' 'Bal' was still his trusted friend; the recovery of 'the money' was still his earnest desire."

(1) *Ibrahim v. Regem*, [1914-15] All E.R. Rep. 874 at p. 877, letter H; [1914] A.C. 599 at p. 609; *R. v. Thompson*, [1891-94] All E.R. Rep. 376 at p. 378, letter E, lines 5, 6, per CAVE, J.; [1893] 2 Q.B. 12 at p. 15; and *Comrs. of Customs and Excise v. Harz*, [1967] 1 All E.R. 177; [1967] A.C. 760.

A LUCKHOO, A.J., held that the two questions which Balchand asked "were not tied to or hinged on any promises. They were independent of any promise to assist . . ." He went on to say "If he" (the appellant) "did not care to satisfy Balchand's curiosity and tell of 'How the money got missing?' and 'How the bodies got chopped?' there was no compulsion. Balchand had never promised (nor was it suggested that he did so) to assist only if he was told".

B Their lordships entirely agree with these observations. On the evidence given by Balchand, the appellant cannot have thought that his confession was the price he had to pay for Balchand's help. In their lordships' opinion it was established that the confession was not induced by any promise or hope of advantage held out to the appellant and was free and voluntary.

C Further even if a promise by Balchand had induced the confession, Balchand was not and could not in their lordships' opinion have been regarded by the appellant as a person in authority. It has long been established that a confession must be induced by a person in authority to be inadmissible in evidence (see *R. v. Row* (2); *R. v. Gibbons* (3); *R. v. Moore* (4)). In *R. v. Wilson*, *R. v. Marshall-Graham* (5) LORD PARKER, C.J., said:

D "The first question that arises is whether Captain Birkbeck was a person in authority. There is no authority, so far as this court knows, which clearly defines who does and who does not come within that category. It is unnecessary to go through all the cases; it is clear, however in *R. v. Thompson* (6) that the chairman of a company whose money was said to have been embezzled by the prisoner was held to be a person in authority. It is also clear that in some cases it has been held that the prosecutor's wife is a person in authority, and in one case that the mother-in-law of a person whose house had been destroyed by arson was said to be a person in authority vis-a-vis a young girl employed by the owner of the house; in other words she was looked upon as a person in authority in relation to that girl. Counsel for the appellant Marshall-Graham in the course of the argument sought to put forward the principle that a person in authority is anyone who can reasonably be considered to be concerned or connected with the prosecution, whether as initiator, conductor or witness. The court find it unnecessary to accept or reject the definition, save to say that they think that the extension to a witness is going very much too far."

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G In the present case at the time of the confession Balchand was no more than a possible witness for the prosecution and their lordships agree that the mere fact that a person may be a witness for the prosecution does not make him a person in authority.

H STOBY, C., based his judgment in the Court of Appeal primarily on the ground, that Balchand was not and could not have appeared to the appellant to be a person in authority. CUMMINGS, J.A., in his dissenting judgment, said that Balchand must have appeared to the appellant from the part he played in the search to have been "close to the police" and "someone who perhaps in the mind of the accused could influence the course of investigation by virtue of his position". He thought that Balchand "could reasonably in the mind of the accused have been regarded as a person in authority".

I Their lordships do not agree. In their opinion the evidence shows clearly that the appellant did not so regard him. He thought that Balchand was his friend. If he had not thought that and had thought that Balchand was "close to the police", it is not likely that he would have asked Balchand to become in effect an accessory after the fact. He cannot have thought that Balchand when he met him in the lock-up at Whim was a person in authority.

(2) (1809), Russ. & Ry. 153.

(3) (1823), 1 C. & P. 97.

(4) (1852), 2 Den. 522.

(5) [1967] 1 All E.R. 797 at p. 801; [1967] 2 Q.B. 406 at p. 415.

(6) [1891-94] All E.R. Rep. 376; [1893] 2 Q.B. 12.

Counsel for the appellant argued that a person in authority meant a person who could fulfil the promise made and that as Balchand could have done what he promised, he was a person in authority. He contended that in the cases where confessions induced by promises made by persons in authority had been excluded, the promisor always had power to fulfil the promise. If this be the case, it does not follow that that is the meaning to be given to the words "person in authority". The fact that a person could have kept his promise may show the reality of the promise and that it was a real inducement, but it is not a definition of those words. Counsel for the appellant was unable to cite any case in support of his contention. In their lordships' opinion his contention cannot be sustained. Counsel also argued that it was to be inferred from the decision in *Comrs. of Customs and Excise v. Harz* (7) that it was no longer necessary and part of the law that to be inadmissible a confession has to be induced by a person in authority. He submitted that it is illogical that a confession should not be regarded as inadmissible if the inducement came from someone without authority and yet a confession brought about by the same inducement is inadmissible if induced by a person in authority. Although the inducement is the same in one case the confession is regarded as free and voluntary and in the other it is not. This question was not considered in *Comrs. of Customs and Excise v. Harz* (7) and it cannot be concluded that the decision in that case inferentially declared what has long been regarded as part of the law, was not the law.

In *R. v. Todd* (8) the accused was induced to confess by two detectives who were not peace officers, representing that they were members of an organised gang of criminals and that to gain admission to the gang he had to satisfy them that he had committed a crime of a serious nature. DUBUC, J., held that the promise was not made by a person in authority and consequently the confession was admissible. BAIN, J., who was of the same opinion (9) said:

"A person in authority means, generally speaking, anyone who has authority or control over the accused or over the proceedings or the prosecution against him. And the reason that it is a rule of law that confessions made as the result of inducements held out by persons in authority are inadmissible is clearly this, that the authority that the accused knows such persons to possess may well be supposed in the majority of instances both to animate his hopes of favour on the one hand and on the other to inspire him with awe,..."

The fact that an inducement is made by a person in authority may make it more likely to operate on the accused's mind and lead him to confess. If the ground on which confessions induced by promises held out by persons in authority are held to be inadmissible is that they may not be true, then it may be that there is a similar risk that in some circumstances the confession may not be true if induced by a promise held out by a person not in authority, for instance if such a person offers a bribe in return for a confession. There is, however, in their lordships' opinion, no doubt that the law as it is at present only excludes confessions induced by promises when those promises are made by persons in authority.

For the reasons stated, their lordships humbly advised Her Majesty that the appeal should be dismissed.

*Appeal dismissed.*

Solicitors: *Leman Harrison & Flegg* (for the appellant); *Charles Russell & Co.* (for the Crown).

[Reported by S. A. HATTEEA, Esq., Barrister-at-Law.]

(7) [1967] 1 All E.R. 177; [1967] 1 A.C. 760.

(8) (1901), 13 Man. L.R. 364.

(9) (1901), 13 Man. L.R. at p. 376.



A

R. v. LEICESTER LICENSING JUSTICES, *Ex parte* BISSON.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Ashworth and Milmo, J.J.),  
March 18, 1968.]

B

*Licensing—Licence—Renewal Off-licence Original licence for sale of beer only—Amendment of law to reduce forms of off-licence to two only—One form was for intoxicating liquor of all descriptions, the other was for sale of beer, cider and wine only—Renewal to be for licence of type nearest to the previously existing licence, viz., for sale of beer, cider and wine—Such licence similar to previously existing licence within s. 3 (3) (a) of Licensing Act 1964—Licensing Act 1964 (c. 26), s. 1 (3) (as amended by Finance Act 1967 (c. 54), s. 5 (1) (c), Sch. 7, para. 1 (b) (ii)), s. 3 (3) (a).*

C

B. had for over seven years held an off-licence limited to the sale of beer only. In February, 1968, he applied to the justices for its renewal. By that time the Finance Act 1967 had come into force and had reduced the types of off-licence to two, viz., an off-licence authorising the sale either of intoxicating liquor of all descriptions or of beer, cider and wine only (see s. 5 (1) (c)\* of and Sch. 7, para. 1 (b) (ii)† of the Act of 1967, amending s. 1 (3)‡ of the Licensing Act 1964). The justices granted renewal of the off-licence for beer only, but to include cider also since that was formerly within the licence by virtue of s. 149 (3)§ of the Customs and Excise Act, 1952. On application for mandamus that the justices should renew the off-licence in due form having regard to the Act of 1967,

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**Held:** the proper course on the application for the renewal was to grant such form of licence authorised by the Finance Act 1967 as was the nearest to the previously existing licence, viz., the form of off-licence for beer, cider and wine, which form was to be regarded as “similar” for the purposes of s. 3 (3) (a) of the Licensing Act 1964 to the previously existing off-licence; accordingly mandamus would issue (see p. 354, letter G, and p. 355, letters B and H, post).

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*Marwick v. Codlin* ((1874), L.R. 9 Q.B. 509) explained and distinguished.

Per **CURIAM**: it would be wrong to exact an undertaking on the renewal of a beer off-licence that the applicant would not sell, e.g., wine (see p. 354, letter A, post).

G

[As to renewal of justices' licences, see 22 HALSBURY'S LAWS (3rd Edn.) 549, para. 1088; and for cases on the subject, see 30 DIGEST (Repl.) 37, 38, 287, 288, 293, 298-299.

For the Licensing Act 1964 s. 1, s. 3, see 44 HALSBURY'S STATUTES (2nd Edn.) 483, 486.]

Case referred to:

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*Marwick v. Codlin*, (1874), L.R. 9 Q.B. 509; 43 L.J.M.C. 169; 30 L.T. 719; 38 J.P. 518; 30 Digest (Repl.) 37, 287.

### Motion for mandamus.

I

This was an application by way of motion on notice dated Feb. 19, 1968, by Edward Frank Bisson for an order of mandamus directed to the licensing justices for the city of Leicester to hear and determine an application for a grant by way of renewal of a justices' off-licence in due form to the applicant. The applicant had attended on Feb. 8, 1968, the annual licensing meeting for the city of Leicester

\* Section 5 (1), so far as material, is set out at p. 353, letter B, post.

† Schedule 7, para. 1, so far as material, is set out at p. 353, letter C, post.

‡ Section 1 (3), is set out at p. 352, letter F, post.

§ Section 149 (3), so far as material, provided: “A person holding any licence under this section in respect of beer . . . may without taking out any further licence sell by retail at his licensed premises the following liquors respectively, that is to say—(a) cider as well as beer . . .” Section 149 was repealed by the Finance Act 1967, s. 5 (1) (a), s. 45 (8) and Sch. 16, Pt. 1.

to ask for a grant by way of renewal of an off-licence in respect of 130, Catherine Street, Leicester, premises owned by Ind Coope, Ltd. In evidence before the justices the applicant stated that he had held a justices' off-licence limited to beer only for seven years past, and asked for the grant by way of renewal of licence in the form of a licence to authorise the sale of beer, cider and wine only in the form provided by s. 1 (3) (b) (ii) of the Licensing Act 1964 as amended by the Finance Act 1967. The grounds of the application for mandamus were that (1) the justices were wrong in holding that they had no jurisdiction to renew the said licence in the form provided for in Sch. 7, para. 1 (b) (ii) to the Finance Act 1967, which amended s. 1 (3) of the Licensing Act 1964; and (2) that the licence which the justices did purport to grant was not a lawful licence.

The authorities and case noted below\* were cited in argument in addition to the case referred to in the judgment.

*D. W. T. Price* for the applicant.

*S. J. Waldman* for the respondents.

**LORD PARKER, C.J.:** In order to understand the point involved in this case, it is necessary to refer to some of the legislation. The Licensing Act 1964 deals in s. 1 with justices' licences. That section provides:

"(1) In this Act and the Customs and Excise Act, 1952, 'justices' licence' means a licence under this Part of this Act authorising the holder to hold an excise licence for the sale by retail of intoxicating liquor (and also, in the case of a licence granted to a club for club premises, for its supply to or to the order of members otherwise than by way of sale). (2) In this Act... 'justices' off-licence' mean respectively—(a) a justices' licence authorising the holding of a retailer's on-licence (within the meaning of the said Act of 1952) that is to say, a licence authorising sale for consumption either on or off the premises for which the licence is granted; and (b) a justices' licence authorising the holding of a retailer's off-licence (within the meaning of that Act) that is to say, a licence authorising sale for consumption off those premises only. (3) A justices' licence shall be in such form as the Secretary of State may prescribe and may authorise the person to whom it is granted to hold as many excise licences as the justices' licence may specify."

Pausing there, it is clear, in my judgment, that a justices' licence, whether on-licence or off-licence, is a licence which authorises the holder to apply for and hold one or more excise licences as specified in the justices' licence. Excise licences were dealt with in the Customs and Excise Act, 1952, and, in particular, s. 149. It is unnecessary to read any part of that Act or that section; it is enough to say that thereunder numbers of excise licences were provided for, both in respect of on-licences and off-licences. There might be an excise licence for all descriptions of intoxicating liquor or for beer which, by reason of s. 149 (3) of the Act of 1952 included power to sell cider; an excise licence for cider only; for wine only; for spirits only; and for any combination of such intoxicating liquors.

Section 3 of the Licensing Act 1964 deals with the grant of justices' licences, and provides:

"(1) Licensing justices may grant a justices' licence to any such person, not disqualified under this or any other Act for holding a justices' licence, as they think fit and proper. (2) A justices' licence may be granted as a new licence or by way of renewal, transfer or, subject to s. 93 (4) of this Act, removal. (3) In this Act—(a) renewing a justices' licence means granting a justices' licence for any premises to the holder of a similar licence in force for those premises..."

\* OXFORD ENGLISH DICTIONARY, Vol. 9, Pt. 1, p. 59 "Similar"; PATERSON'S LICENSING ACTS (76th Edn., 1968), pp. 476, 777, 780, 1260, 1273; *R. v. Crewkerne Licensing Justices*, (1888), 4 Q.B.D. 85.

- A It may well be, though for my part I feel it unnecessary to decide the matter, that the renewal of a justices' licence could only take the form of renewing the licence that the licensee then held, limited as it was to a particular form of liquor. In other words, if a licensee held an off-licence for beer only, he could only get a renewal in the form of a licence for beer only, and not for beer plus some other form of intoxicating liquor. In 1967, however, by the Finance Act
- B 1967, retailers' excise licences were abolished; that was done by s. 5 of the Act of 1967, which provides:

"(1) As from Oct. 1, 1967, an excise licence shall not be required for the sale by retail of intoxicating liquor . . . the Licensing Act 1964 shall have effect subject to the provisions of Sch. 7 to this Act."

- C Schedule 7, para. 1 provides that:

"In s. 1 (3) [of the Act of 1964] for the words from 'and' onwards there shall be substituted the words 'and . . . (b) in the case of a justices' off-licence, may authorise the sale—(i) of intoxicating liquor of all descriptions; or (ii) of beer, cider and wine only'."

- D Reading that amendment, therefore, into the Act of 1964, one finds that sub-s. (3) now reads:

"A justices' licence shall be in such form as the Secretary of State may prescribe and . . . (b) in the case of a justices' off-licence, may authorise the sale—(i) of intoxicating liquor of all descriptions; or (ii) of beer, cider and wine only."

- E To return to the facts, the applicant had for a number of years held an off-licence limited to beer only in respect of premises at 130, Catherine Street, in the city of Leicester. On Feb. 8, 1958, that is to say after the amendment provided by the Finance Act 1967 had come into force, he applied for renewal of that off-licence. He claimed that since the effect of that amendment was that a licence for beer only could no longer be granted to him by way of renewal, he was entitled
- F to the nearer of the two types of licence provided for, namely that under the amended s. 1 (3) (b) (ii) of beer, cider and wine only. The justices, who went into this matter with the very greatest care, and have set out the matters which affected their minds in an affidavit to this court, came to the conclusion that what they ought to do was to renew the licence that he in fact had for beer only; but since under s. 149 (3) of the Customs and Excise Act, 1952, he would have been
- G authorised as part and parcel of that licence to sell cider, they added the words in brackets "or cider".

- Despite the fact that the justices went into this with such care, I have come to the conclusion that what they did here was really the one thing which they had no power to do; and indeed counsel for the respondents, appearing in this court, has not sought to uphold that decision. I say it was the one thing that they could not
- H do because by reason of the amendment, the licence granted has to be not only in a form prescribed by the Secretary of State, but also has to be either for intoxicating liquor of all descriptions, or for beer, cider and wine only. It appears that this amendment has given rise to considerable trouble all over the country before licensing justices when renewals of the old licences come up. We have been told that some justices grant a beer, cider and wine only licence in every case,
- I even when the existing licence is limited, say, to beer or to wine; other justices, we are told, attempt to get over the difficulty by exacting undertakings, for instance that if the original licence was for beer only, the applicant for renewal would get the full licence for beer, cider and wine if he undertook not to sell cider and wine; and others have taken the view that it is impossible to deal with these licences by way of renewal and that the proper course is for the existing licensee to apply for a new licence, in which case if the licensing justices decide to grant it, it will be in the form prescribed under the amendment, of beer, cider and wine only. Limiting the possibilities here, it seems to me that any question of exacting



an undertaking would be utterly wrong; if Parliament say that the form of the licence is to be for beer, cider and wine only, it would be doing exactly what the Act of 1964 says cannot be done, for the justices to exact undertakings limiting the sale to beer only. Accordingly, the only two alternatives, it seems to me, are for the justices on an application for renewal to grant the nearest to the existing licence, which in this case would not be for intoxicating liquor of all descriptions, but for beer, cider and wine only; or, to say that they cannot renew the licence in any form, and the existing licensee must apply for a new one. A  
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For my part I find it very difficult to think that by this amendment Parliament ever intended to deprive existing licensees of the privileges attached to their licences in regard to renewals. If a new licence has to be applied for, a different form of procedure has to be adopted in the way of inviting objections; and the justices at the end, even if there are no objections, have a discretion in the matter, and accordingly, on this view, Parliament's intention must have been to deprive people of the benefits attached to their existing licences, and to put them in jeopardy of getting nothing at all. It seems to me that the proper view here is that Parliament must have intended that in interpreting the Act of 1964, the provisions should be read in such a way as to enable the licensing justices not to deprive existing licensees of the benefits and privileges attached to their licences, but to do in effect the best possible in the circumstances. The difficulty of course arises by reason of the words in s. 3 (3) (a), that: C  
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"renewing a justices' licence means granting a justices' licence for any premises to the holder of a similar licence in force for those premises."

It can of course be said that to grant a licence as provided under the amendment for beer, cider and wine only would be to grant something different, not similar, to the licence already existing, namely for beer only. At the same time I am impressed by the view that the amending statute, the Finance Act 1967, by s. 5 (1) (c) has specifically provided that the Licensing Act 1964 shall have effect, subject to any amendment in the schedule. From that I deduce, in the absence of express words to the contrary, that the Licensing Act 1964 and in particular s. 3, dealing with renewals, shall take effect so as to enable justices to grant renewals. Looked at in that way, it seems to me that it would be perfectly right to give a wide meaning to the word "similar", a word which anyhow does not mean identical, and that it is possible to read that word "similar" as covering the grant of the nearest licence to the existing licence, namely in this case a licence for beer, cider and wine. Accordingly, I would hold that the proper course here for the justices was to grant such a licence. E  
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I would only add two points. One is that the justices were afraid that if they did that, they would be opening the door on the next renewal to the applicant saying that he wanted a full licence for all intoxicating liquor. The argument would be that if he is entitled by way of renewal on the first occasion to, as it were, add cider and wine, what is there to prevent him on the next occasion from adding "all other liquors" so that he has a licence for intoxicating liquors of all descriptions. For my part I think that there is no danger of that; an applicant for renewal could not go from one category to another category; he could not go from beer, cider and wine, which is one category, into the separate category of intoxicating liquor of all descriptions. Secondly, the justices felt somewhat constrained by the decision in 1874 of *Marwick v. Codlin* (1). It is unnecessary to go through the facts of that case, but SIR ALEXANDER COCKBURN, C.J., in dealing with the question whether a particular licence was a new licence or a renewal, said this (2): H  
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"This is either a new licence or a renewal of an old one. It is plainly not the latter. A renewal of a licence is a repetition of an old one, and cannot include anything not contained in the old one."

(1) (1874), L.R. 9 Q.B. 509.

(2) (1874), L.R. 9 Q.B. at p. 516.

A That case, however, was on completely different statutes; in particular the renewal of a licence was not confined in any way to anything "similar". It provided that the renewal of a licence means a licence granted at a general annual licensing meeting by way of renewal. It seems to me that, whatever the position may have been under those statutes, under the Act of 1964, now that it has been amended in the way which I have described, the word "similar" in

B s. 3 (3) of the Act of 1964 should be given a wide meaning in order to enable people to get renewals of their existing licences in the form nearest to the licence they now hold.

Accordingly, I would issue in this case an order of mandamus to the justices to hear and determine this matter according to law in the light of the opinion of this court.

C ASHWORTH, J.: I agree. After the Licensing Act 1964, it seems to me that a licensee holding an off-licence for beer only who sought to apply for renewal and obtain a licence which covered him for beer, cider and wine would be in considerable difficulty, and his position may be contrasted with that of the holder of an on-licence in a similar case, because s. 37 of the Act of 1964 contained

D express power to extend an existing on-licence to additional types of liquor. It seems to me that the absence of any corresponding provision in regard to the holders of off-licences tells largely against any view that on the alteration of a licence from one for beer only to one for beer, cider and wine in respect of an off-licence holder, it would not be "similar" at all. That was the situation in 1965, and there is this further to be said. At that time the language, so to speak, of

E licences and the forms of licences which justices could give to the particular holders of off-licences were very wide. There has been supplied to this court a list of no less than fifteen different types of off-licences which justices could grant. In such circumstances, it may be that the task of deciding whether the new licence sought by renewal was similar to the old was one which could be carried out having careful regard to that list. When, however, the Finance Act, 1967 was passed, that range was cut down, and cut down, as LORD PARKER,

F C.J., has said, to two possible types. In my judgment the effect of that cutting down was incidentally, and I think directly, to give much greater scope to the word "similar" where it appears in s. 3 (3) of the Act of 1964. Any other construction of these two statutes would indeed lead to the result that the holder of an off-licence which did not happen to be an off-licence either for liquor of all descriptions or for beer, cider and wine only, would be quite unable to obtain a

G renewal of that licence. It seems to me that when one looks at the new range of licences and asks the question whether the old licence was similar to either of those, the answer plainly is: yes, the range has been reduced, but the similarity becomes more pronounced. I agree with the order proposed by LORD PARKER, C.J.

H MILMO, J.: I agree with both the judgments that have just been given and there is nothing which I can usefully add.

*Order of mandamus granted.*

Solicitors: Godden, Holme & Co., agents for Owston & Co., Leicester (for the applicant); Treasury Solicitor.

[Reported by N. P. METCALFE, ESQ., Barrister-at-Law.]

## WARNER v. METROPOLITAN POLICE COMMISSIONER.

[HOUSE OF LORDS (Lord Reid, Lord Morris of Borth-y-Gest, Lord Guest, Lord Pearce and Lord Wilberforce), February 13, 14, 15, 19, 20, May 2, 1968.]

*Drugs—Dangerous drugs—“Possession”—Unauthorised possession—Alleged lack of knowledge of contents of parcel containing prohibited drugs—Mental element in statutory offence—Whether absolute offence—Drugs (Prevention of Misuse) Act 1964 (c. 64), s. 1 (1).*

Where the words of an enactment creating a statutory offence, being the offence of possession of a prohibited article or substance, do not expressly predicate or exclude mens rea as an element of the offence, it is wrong to impute to Parliament, even if the enactment is directed against a grave social evil, an intention to deprive an innocent accused of all right to show by way of defence that he had no knowledge, or reason to suspect, that the prohibited article or substance was in his possession or in a container that was in his possession (per LORD REID, LORD PEARCE and LORD WILBERFORCE; see p. 367, letters C and G, p. 388, letter F, p. 391, letter H, p. 394, letter G, post; cf., p. 376, letter I, to p. 377, letter A, and p. 384, letter B, post). “Possession” of an article may, however, be satisfied by knowledge of the existence of the thing itself in the control of the possessor, but without his knowledge of its qualities (see p. 369, letter H, p. 375, letter C, p. 376, letter B, p. 384, letter A, p. 385, letter F, p. 388, letter H, and p. 393, letter D, post).

The appellant, who was a floor-layer by occupation, sold scent as a sideline. On Nov. 18, 1966, he went to a café, where on inquiry whether anything had been left for him the proprietor told him that there was something for him under the counter. The appellant found two boxes there which, according to his evidence, he took without looking inside the smaller box, assuming that it also contained scent. A police officer stopped the appellant when driving his mini-van. In the smaller of two boxes were found twenty thousand tablets containing amphetamine sulphate, a prohibited drug specified in the schedule to the Drugs (Prevention of Misuse) Act 1964. The larger box contained scent. The appellant was charged with having in his possession drugs contrary to s. 1\* of the Act of 1964. The jury were directed that absence of knowledge on the part of the appellant of what the smaller box contained went only to mitigation. The appellant was found guilty. On appeal to the House of Lords on the question whether for the purposes of s. 1 a defendant was deemed to be in possession of a prohibited substance when to his knowledge he was in physical possession of the substance but was unaware of its true nature,

**Held:** (i) although there had been misdirection of the jury in the present case (or, per LORD MORRIS, the summing-up was inadequate on possession) and the appellant had thereby been deprived of putting before the jury a defence that should have been open to him, yet no reasonable jury would on the evidence have accepted the appellant’s story; accordingly the proviso† should be applied (see p. 369, letter I, p. 370, letter A, p. 375, letter F, p. 391, letter A, p. 395, letter A, post; cf., p. 381, letter G, and p. 385, letter I, post).

(ii) (per LORD REID, LORD PEARCE and LORD WILBERFORCE)‡ the strong inference that possession of a package by an accused was possession of its contents could be rebutted by raising real doubt either

(a) whether the accused (if a servant or bailee) had both no right to open

\* Section 1, so far as material, is set out at p. 370, letters E and F, post.

† I.e., the proviso to s. 4 (1) of the Criminal Appeal Act, 1907, as amended by s. 4 of the Criminal Appeal Act, 1966.

‡ The formulation of the proposition is that of LORD PEARCE; LORD MORRIS and LORD GUEST substantially dissent from (ii) above.



A the package and no reason to suspect that the contents of the package were illicit, or

(b) that (if the accused were the owner of the package) he had no knowledge of, or was genuinely mistaken as to, the actual contents or their illicit nature and received them innocently, and also that he had no reasonable opportunity since receiving the package to acquaint himself with its contents (see p. 389, letters A and B, p. 394, letter A, p. 369, letter I, and p. 368, letter B, post).

B Dictum of LORD PARKER, C.J., in *Lockyer v. Gibb* ([1966] 2 All E.R. at p. 655, letter F) approved, but dictum at p. 656, letter E, both approved and criticised.

*Beaver v. Reginam* ([1957] S.C.R. 531) considered and applied.

C *Chajutin v. Whitehead* ([1938] 1 All E.R. 159) considered.

Per LORD REID (LORD MORRIS OF BORTH-Y-GEST and LORD GUEST dissenting): the offence with which the appellant was charged was not an absolute offence, and it was necessary for the prosecution to prove facts from which it could probably be inferred that the appellant knew that he had a prohibited drug in his possession (see p. 368, letter A, and p. 367, letter F, post).

D Per LORD MORRIS OF BORTH-Y-GEST and LORD GUEST: the appellant being, on the evidence, in physical control of the package and its contents either (per LORD MORRIS) with his consent thereto knowing that it had contents, or (per LORD GUEST) with knowledge that the package was in his control, his possession of the tablets was established for the purposes of s. 1 of the Act of 1964, whether or not the appellant realised that he was in possession of a prohibited drug (see p. 375, letter I, p. 380, letter H, p. 381, letter C, and p. 385, letter F, post).

E Decision of the COURT OF APPEAL (sub nom. *R. v. Warner*, [1967] 3 All E.R. 93) affirmed but by the majority on a different ground.

F [Editorial Note. There should not be attributed to Parliament the view that an offence could be enacted as an absolute offence on the basis that it would be left to the discretion of the police not to prosecute, or that justice would be served by imposing only a nominal penalty, in cases where the act in question was in fact innocently done, see per LORD REID (p. 366, letter B, post).

G As to mens rea in statutory offences, see 10 HALSBURY'S LAWS (3rd Edn.) 273, 274, para. 508; and for cases on the subject, see 14 DIGEST (Repl.) 35-40, 48-95.

For the Drugs (Prevention of Misuse) Act 1964, s. 1, see 44 HALSBURY'S STATUTES (2nd Edn.) 734.]

Cases referred to:

H A.-G. v. *Lockwood*, (1842), 9 M. & W. 378; *affd.* sub nom. *Lockwood v. A.-G.*, (1842), 10 M. & W. 464; 152 E.R. 552; 39 Digest (Repl.) 270, 116.

*Bank of New South Wales v. Piper*, [1897] A.C. 383; 66 L.J.P.C. 73; 76 L.T. 572; 61 J.P. 660; 14 Digest (Repl.) 32, 40.

*Beaver v. Reginam*, [1957] S.C.R. 531; 33 Digest (Repl.) 557 \*353.

*Beswick v. Beswick*, [1967] 2 All E.R. 1197; [1968] A.C. 58; [1967] 3 W.L.R. 932; Digest (Repl.) Supp.

I *Blaker v. Tillstone*, [1894] 1 Q.B. 345; 63 L.J.M.C. 72; 70 L.T. 31; 58 J.P. 184; 14 Digest (Repl.) 37, 70.

*Brend v. Wood*, (1946), 175 L.T. 306; 110 J.P. 317; 17 Digest (Repl.) 460, 194.

*Bridges v. Hawkesworth*, [1843-60] All E.R. Rep. 122; (1851), 21 L.J.Q.B. 75; 18 L.T.O.S. 154; 3 Digest (Repl.) 68, 85.

*Cartwright v. Green*, (1803), 2 Leach 952; 32 E.R. 412; 15 Digest (Repl.) 1049, 10,330.

*Chajutin v. Whitehead*, [1938] 1 All E.R. 159; [1938] 1 K.B. 506; 107 L.J.K.B. 270; 158 L.T. 277; 102 J.P. 117; 14 Digest (Repl.) 139, 94.

- Cundy v. Le Cocq*, [1881-85] All E.R. Rep. 412; (1884), 13 Q.B.D. 207; 53 A  
L.J.M.C. 125; 51 L.T. 265; 48 J.P. 599; 30 Digest (Repl.) 96, 719.
- Davies v. Harvey*, (1874), L.R. 9 Q.B. 433; 43 L.J.M.C. 121; 30 L.T. 629;  
38 J.P. 661; 14 Digest (Repl.) 42, 100.
- Gaumont British Distributors, Ltd. v. Henry*, [1939] 2 All E.R. 808; [1939]  
2 K.B. 711; 108 L.J.K.B. 675; 160 L.T. 646; 103 J.P. 256; 13 Digest  
(Repl.) 139, 822. B
- Harding v. Price*, [1948] 1 All E.R. 283; [1948] 1 K.B. 695; [1948] L.J.R.  
1624; 112 J.P. 189; 45 Digest (Repl.) 48, 160.
- Hibbert v. McKiernan*, [1948] 1 All E.R. 860; [1948] 2 K.B. 142; [1948]  
L.J.R. 1521; 112 J.P. 287; 15 Digest (Repl.) 1086, 10,752.
- Hobbs v. Winchester Corpn.*, [1910] 2 K.B. 471; 79 L.J.K.B. 1123; 102 L.T.  
841; 74 J.P. 413; 14 Digest (Repl.) 37, 71. C
- Lim Chin Aik v. Reginam*, [1963] 1 All E.R. 223; [1963] A.C. 160; [1963] 2  
W.L.R. 42; Digest (Cont. Vol. A) 23, \*166a.
- Lockyer v. Gibb*, [1966] 2 All E.R. 653; [1967] 2 Q.B. 243; [1966] 3 W.L.R.  
84; 130 J.P. 306; Digest (Cont. Vol. B) 522, 243b.
- Merry v. Green*, (1841), 7 M. & W. 623; 10 L.J.M.C. 154; 151 E.R. 916;  
15 Digest (Repl.) 1048, 10,323. D
- Nichols v. Hall*, (1873), L.R. 8 C.P. 322; 42 L.J.M.C. 105; 28 L.T. 473; 37  
J.P. 424; 14 Digest (Repl.) 37, 66.
- Oliver v. Goodger*, [1944] 2 All E.R. 481; 109 J.P. 48; 25 Digest (Repl.) 148, 616.
- Pearks, Gunston and Tee, Ltd. v. Ward, Hennen v. Southern Counties Dairies Co.*,  
[1900-03] All E.R. Rep. 228; [1902] 2 K.B. 1; 71 L.J.K.B. 656; 87  
L.T. 51; 66 J.P. 774; 14 Digest (Repl.) 43, 115. E
- R. v. Ashwell*, (1885), 16 Q.B.D. 190; 55 L.J.M.C. 65; 53 L.T. 773; 50 J.P.  
181, 198; 15 Digest (Repl.) 1048, 10,325.
- R. v. Bishop*, (1880), L.R. 5 Q.B.D. 259; 49 L.J.M.C. 45; 42 L.T. 240; 44  
J.P. 330; 14 Digest (Repl.) 37, 77.
- R. v. Carpenter*, [1960] Crim. L.R. 633.
- R. v. Cohen*, (1858), 8 Cox, C.C. 41; 14 Digest (Repl.) 37, 74. F
- R. v. Gould*, [1968] 1 All E.R. 849; [1968] 2 W.L.R. 643.
- R. v. Hallam*, [1957] 1 All E.R. 665; [1957] 1 Q.B. 569; [1957] 2 W.L.R. 521;  
121 J.P. 254; Digest (Cont. Vol. A) 450, 12,403a.
- R. v. Hehir*, [1895] 2 I.R. 709; 29 I.L.T. 119; 15 Digest (Repl.) 1049, \*6418.
- R. v. Hudson*, [1943] 1 All E.R. 642; [1943] K.B. 458; 112 L.J.K.B. 332;  
169 L.T. 46; 107 J.P. 134; 15 Digest (Repl.) 1049, 10,329. G
- R. v. Jacobs*, (1908), 1 Cr. App. Rep. 215; 12 Cox, C.C. 151; 14 Digest (Repl.)  
533, 5180.
- R. v. Langa*, [1936] S.A.L.R. (C.P. Div.) 158.
- R. v. Leinster (Duke of)*, [1923] All E.R. Rep. 187; 17 Cr. App. Rep. 176;  
14 Digest (Repl.) 181, 1475.
- R. v. Prince*, [1874-80] All E.R. Rep. 881; (1875), L.R. 2 C.C.R. 154; 44  
L.J.M.C. 122; 32 L.T. 700; 39 J.P. 676; 14 Digest (Repl.) 52, 181. H
- R. v. St. Margaret's Trust, Ltd.*, [1958] 2 All E.R. 289; [1958] 1 W.L.R. 522;  
112 J.P. 312; Digest (Cont. Vol. A) 327, 95a.
- R. v. Sleep*, [1861-73] All E.R. Rep. 248; (1861), Le. & Ca. 44; 30 L.J.M.C.  
170; 4 L.T. 525; 25 J.P. 532; 14 Digest (Repl.) 32, 35.
- R. v. Tolson*, [1886-90] All E.R. Rep. 26; (1889), 23 Q.B.D. 168; 58 L.J.M.C.  
97; 60 L.T. 899; 54 J.P. 4, 20; 15 Digest (Repl.) 890, 8578. I
- R. v. Wheat, R. v. Stocks*, [1921] All E.R. Rep. 602; [1921] 2 K.B. 119; 90  
L.J.K.B. 583; 124 L.T. 830; 85 J.P. 203; 15 Digest (Repl.) 891, 8591.
- R. v. Wilmetts*, (1848), 11 L.T.O.S. 495; 3 Cox, C.C. 281; 15 Digest (Repl.) 863,  
8293.
- R. v. Woodrow*, (1846), 15 M. & W. 404; 16 L.J.M.C. 122; 105 J.P. 791;  
153 E.R. 907; 14 Digest (Repl.) 36, 57.

- A *Reynolds v. G. H. Austin & Sons, Ltd.*, [1951] 1 All E.R. 606; [1951] 2 K.B. 135; 115 J.P. 192; 14 Digest (Repl.) 39, 95.  
*Roper v. Taylor's Central Garages (Exeter), Ltd.*, (1951), 2 T.L.R. 284; 45 Digest (Repl.) 134, 494.  
*Sambasivam v. Public Prosecutor, Federation of Malaya*, [1950] A.C. 458; 15 Digest (Repl.) 784, \*4912.
- B *Sherras v. de Rutzen*, [1895-99] All E.R. Rep. 1167; [1895] 1 Q.B. 918; 64 L.J.M.C. 218; 72 L.T. 839; 59 J.P. 440; 14 Digest (Repl.) 39, 90.  
*South Staffordshire Water Co. v. Sharman*, [1895-99] All E.R. Rep. 259; [1896] 2 Q.B. 44; 65 L.J.Q.B. 460; 74 L.T. 761; 37 Digest (Repl.) 171, 38.  
*Thomas v. Regem*, (1937), 59 C.L.R. 279.  
*Towers & Co., Ltd. v. Gray*, [1961] 2 All E.R. 68; [1961] 2 Q.B. 351; [1961] 2 W.L.R. 553; 125 J.P. 391; 46 Digest (Repl.) 167, 1115.
- C *United States of America v. Dollfus Mieg et Compagnie S.A.*, [1952] 1 All E.R. 572; [1952] A.C. 582; 1 Digest (Repl.) 58, 433.  
*Webb v. Baker*, [1916] 2 K.B. 753; 86 L.J.K.B. 36; 115 L.T. 630; 80 J.P. 449; 25 Digest (Repl.) 119, 405.
- D *Woolmington v. Director of Public Prosecutions*, [1935] 1 All E.R. 1; [1935] A.C. 462; 104 L.J.K.B. 433; 153 L.T. 232; 14 Digest (Repl.) 493, 4768.  
*Yeandel v. Fisher*, [1965] 3 All E.R. 158; [1966] 1 Q.B. 440; [1965] 3 W.L.R. 1002; 129 J.P. 546; Digest (Cont. Vol. B) 151, 57a.

### Appeal.

- This was an appeal by leave from the judgment of the Court of Appeal, Criminal Division (DIPLOCK, L.J., BRABIN and WALLER, J.J.) dated June 30, 1967, and reported [1967] 3 All E.R. 93, dismissing the appeal by the appellant Reginald Charles Warner, against his conviction at Inner London Quarter Sessions before the chairman (R. E. SEATON, Esq.) and a jury on Feb. 3, 1967, on a charge that on Nov. 18, 1966, not being authorised he had in his possession twenty thousand tablets containing amphetamine sulphate tablets specified in the Schedule to the Drugs (Prevention of Misuse) Act 1964. The point of law certified for the determination of the House of Lords was whether for the purposes of s. 1 of the Drugs (Prevention of Misuse) Act 1964 the appellant was deemed to be in possession of a prohibited substance, i.e., amphetamine sulphate, when to his knowledge he was in physical possession of the substance but was unaware of its true nature.

- G *W. M. Howard, Q.C.*, and *J. G. Boal* for the appellant.  
*J. B. R. Hazan* and *A. C. L. Lewisohn* for the Crown.

Their lordships took time for consideration.

May 2. The following opinions were delivered.

- LORD REID: My Lords, the appellant was tried at Inner London Quarter Sessions on Feb. 3, 1967, on a charge that on Nov. 18, 1966, he had in his possession a substance specified in the Schedule to the Drugs (Prevention of Misuse) Act 1964 namely twenty thousand tablets containing amphetamine sulphate. When stopped by the police he had in his car inter alia two packages. His defence was that he believed both packages contained scent. In fact when they were opened in his presence one was found to contain scent and the other to contain these tablets. I shall not deal further with the facts at this point.
- I His defence may not have been credible. It may be that no reasonable jury would have believed it. But the learned chairman directed the jury that this was no defence. He said that those tablets were under the control of the appellant, that "possession" meant that he had control, and the statute says you must not have such drugs in your possession in any circumstances whatever—there is absolute prohibition in law unless you have lawful authority. The jury returned a verdict of guilty after three minutes and the appellant was sentenced to two years' imprisonment. The Court of Appeal (1) dismissed his appeal on the



authority of *Lockyer v. Gibb* (2), holding that this was an absolute offence for which mens rea was not necessary. A

I understand that this is the first case in which this House has had to consider whether a statutory offence is an absolute offence in the sense that the belief, intention, or state of mind of the accused is immaterial and irrelevant. It appears from the authorities that the law on this matter is in some confusion, there being at least two schools of thought. So I think it necessary to begin by making some observations of a general character. B

There is no doubt that for centuries mens rea has been an essential element in every common law crime or offence. Equally there is no doubt that Parliament, being sovereign, can create absolute offences if so minded; but we were referred to no instance where Parliament in giving statutory form to an old common law crime has or has been held to have excluded the necessity to prove mens rea. C There is a number of statutes going back for over a century where Parliament in creating a new offence has transferred the onus of proof so that, once the facts necessary to constitute the crime have been proved, the accused will be held to be guilty unless he can prove that he had no mens rea. We were not referred, however, to any except quite recent cases in which it was held that it was no defence to a charge of a serious and truly criminal statutory offence to D prove absence of mens rea.

On the other hand there is a long line of cases in which it has been held with regard to less serious offences that absence of mens rea was no defence. Typical examples are offences under public health, licensing and industrial legislation. If a person sets up as say a butcher, a publican, or a manufacturer and exposes unsound meat for sale, or sells drink to a drunk man or certain parts of his factory are unsafe, it is no defence that he could not by the exercise of reasonable care have known or discovered that the meat was unsound, or that the man was drunk or that his premises were unsafe. He must take the risk and when it is found that the statutory prohibition or requirement has been infringed he must pay the penalty. This may well seem unjust, but it is a comparatively minor injustice and there is good reason for it as affording some protection to his customers or servants or to the public at large. Although this man might be able to show that he did his best, a more skilful or diligent man in his position might have done better, and when we are dealing with minor penalties which do not involve the disgrace of criminality it may be in the public interest to have a hard and fast rule. Strictly speaking there ought perhaps to be a defence that the defect was truly latent so that no one could have discovered it; but the law has not developed in that way, and one can see the difficulty if such a defence were allowed in a summary prosecution. These are only quasi-criminal offences and it does not really offend the ordinary man's sense of justice that moral guilt is not of the essence of the offence. E F G

*R. v. Woodrow* (3) was an early case. A statute provided that "every . . . retailer of tobacco who shall receive or take into or have in his possession" any adulterated tobacco shall forfeit £200. The accused had fifty-four pounds of tobacco in his possession which had been adulterated by the manufacturer, but he did not know that. He had bought it as genuine tobacco believing it to be such and he had no reason to suspect that it was not: but he had to pay the penalty. ROLFE, B., pointed out (4) in the course of the argument that another section empowered the Commissioners of Excise to forbear to prosecute if satisfied that a penalty was incurred "without any intention of fraud or of offending against this Act". The commissioners, however, did prosecute. POLLOCK, C.B., said (5): H I

" . . . it is not necessary that he should know that the tobacco was

(2) [1966] 2 All E.R. 653; [1967] 2 Q.B. 243.

(4) (1846), 15 M. & W. at p. 413.

(3) (1846), 15 M. & W. 404.

(5) (1846), 15 M. & W. at p. 415.

A adulterated; for reasons probably very sound, and not applicable to this case only, but to many other branches of the law, persons who deal in an article are made responsible for its being of a certain quality.”

And later he said (6):

B “In reality, a prudent man who conducts this business, will take care to guard against the injury he complains of . . . If he examines the article he may reject it, and not keep it in his possession; or if he is incompetent to do that, he may take a guarantee that shall render the person with whom he is dealing responsible for all the consequences of a prosecution.”

I need not deal with other early cases because the whole question was dealt with by WRIGHT, J., in a judgment in *Sherras v. de Rutzen* (7) which has frequently  
C been approved—in particular by the Privy Council in *Lim Chin Aik v. Reginam* (8). WRIGHT, J., said (9):

D “The presumption is, that mens rea, an evil intention or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals, and both must be considered . . .”

Then he mentioned two cases and continued (9):

E “Apart from isolated and extreme cases of this kind, the principal classes of exceptions may perhaps be reduced to three. One is a class of acts which, in the language of LUSH, J., in *Davies v. Harvey* (10), are not criminal in any real sense, but are acts which in the public interest are prohibited under a penalty.”

Then he gave examples and continued (11):

F “Another class comprehends some, and perhaps all, public nuisances. . . . There may be cases where, although the proceedings may be criminal in form, they are really only a summary mode of enforcing a civil right . . .”

Down to that time there appears to have been no case of an absolute offence where the punishment could be imprisonment or the offence was truly of a criminal character.

G One of the “isolated and extreme cases” mentioned by WRIGHT, J., was *R. v. Prince* (12). The offence was taking an unmarried girl, being under the age of sixteen, out of the possession of her father. The accused did knowingly take a girl out of the possession of her father but the jury found that he believed that she was eighteen and that his belief was reasonable. That was held not to be a defence. BLACKBURN, J., with whom nine judges concurred dealt with the matter briefly. He said (13):

H “. . . we are of opinion that the intention of the legislature sufficiently appears to have been to punish the abductor, unless the girl, in fact, was of such an age as to make her consent an excuse . . .”

BRAMWELL, B., with whom seven judges concurred dealt with the point at greater length. He said (14):

I “The act forbidden is wrong in itself, if without lawful cause; I do not say illegal, but wrong . . . (15). The legislature has enacted that if anyone

(6) (1846), 15 M. & W. at p. 416.

(7) [1895-99] All E.R. Rep. 1167; [1895] 1 Q.B. 918.

(8) [1963] 1 All E.R. 223 at p. 228; [1963] A.C. 160 at p. 173.

(9) [1895-99] All E.R. Rep. at p. 169; [1895] 1 Q.B. at p. 921.

(10) (1874), L.R. 9 Q.B. 433.

(11) [1895-99] All E.R. Rep. at p. 1170; [1895] 1 Q.B. at p. 922.

(12) [1874-80] All E.R. Rep. 881; (1875), L.R. 2 C.C.R. 154.

(13) [1874-80] All E.R. Rep. at p. 886; (1875), L.R. 2 C.C.R. at p. 171.

(14) [1874-80] All E.R. Rep. at p. 884; (1875), L.R. 2 C.C.R. at p. 174.

(15) [1874-80] All E.R. Rep. at p. 884; (1875), L.R. 2 C.C.R. at p. 175.

does this wrong act he does it at the risk of the girl turning out to be under sixteen. This opinion gives full scope to the doctrine of mens rea. If the taker believed he had the father's consent, though wrongly, he would have no mens rea. So if he did not know she was in anyone's possession . . . In those cases he would not know he was doing the act forbidden by the statute . . . (16). The same principle applies in other cases . . . a man was held liable for assaulting a police officer in the execution of his duty, though he did not know he was a police officer. Why? Because the act was wrong in itself."

A

B

That case is no authority for construing a statute so that a member of the public who genuinely believes that he is doing something lawful and innocent can be found guilty of a criminal offence.

The other extreme case was bigamy, but there the law has been altered and mens rea is now of the essence of the offence. In a very recent case *R. v. Gould* (17) the Court of Appeal refused to follow *R. v. Wheat*, *R. v. Stocks* (18), and, in my view rightly, cited with approval a judgment (19) of DIXON, J., than whom there is no greater authority on questions of legal principle:

C

"The truth appears to be that a reluctance on the part of courts has repeatedly appeared to allow a prisoner to avail himself of a defence depending simply on his own state of knowledge and belief. The reluctance is due in great measure, if not entirely, to a mistrust of the tribunal of fact—the jury. Through a feeling that, if the law allows such a defence to be submitted to the jury, prisoners may too readily escape by deposing to conditions of mind and describing sources of information, matters upon which their evidence cannot be adequately tested and contradicted, judges have been misled into a failure steadily to adhere to principle. It is not difficult to understand such tendencies, but a lack of confidence in the ability of a tribunal correctly to estimate evidence of states of mind and the like can never be sufficient ground for excluding from inquiry the most fundamental element in a rational and humane criminal code."

D

E

Before coming to the more recent cases I must examine *Hobbs v. Winchester Corpn.* (20), because the judgment of KENNEDY, L.J., has been much relied on. It was held that a butcher sold unsound meat at his peril. KENNEDY, L.J., said (21):

F

"I think there is a clear balance of authority that in construing a modern statute this presumption as to mens rea does not exist. I think with great respect to my brother CHANNELL that he has applied to the construction of this modern statute a maxim which is recognised as applicable to offences at common law, and it may be, as STEPHEN, J., suggests in *Cundy v. Le Cocq* (22), also to offences under the earlier statutes which are to be treated on the same basis as offences under the common law."

G

I do not think that the distinction depends on the date of the statute; it depends on the nature of the offence. KENNEDY, L.J., said later (23):

H

"I think that the policy of the Act is this: that if a man chooses for profit to engage in a business which involves the offering for sale of that which may be deadly or injurious to health he must take that risk . . . He has chosen to engage in that which on the face of it may be a dangerous business and he must do so at his own risk."

I

The judge's words were very wide, but again they must be read in their context.

(16) [1874-80] All E.R. Rep. at p. 885; (1875), L.R. 2 C.C.R. at p. 176.

(17) [1968] 1 All E.R. 849.

(18) [1921] All E.R. Rep. 602; [1921] 2 K.B. 119.

(19) *Thomas v. Regem*, (1937), 59 C.L.R. 279; the passage quoted above is at p. 309.

(20) [1910] 2 K.B. 471.

(21) [1910] 2 K.B. at p. 483.

(22) [1881-85] All E.R. Rep. 412; (1884), 13 Q.B.D. 207.

(23) [1910] 2 K.B. at pp. 484, 485.



- A No instance is given of any truly criminal offence under any statute where absence of *mens rea* was not a defence; and that is not surprising because, when counsel for the Crown in this case was invited in the course of his able argument to cite any Act of or before that period which made a truly criminal offence an absolute offence though the accused had done what he reasonably believed was innocent and lawful, he was unable to cite any, with the possible exception
- B of a bankrupt obtaining credit without informing the creditor of his bankruptcy (*R. v. Duke of Leinster* (24)).

A valuable discussion of the matter is to be found in the judgment of WILLS, J., in *R. v. Tolson* (25), where he refers to numerous cases where similar language in two statutes has led to different results. He says (26):

- C “there is nothing in the mere form of words used in the enactment now under consideration to prevent the application of what is certainly the normal rule of construction in the case of a statute constituting an offence entailing severe and degrading punishment. If the words are not conclusive in themselves, the reasonableness or otherwise of the construction contended for has always been recognised as a matter fairly to be taken into account.”
- D Next I must refer to *Chajutin v. Whitehead* (27), where the appellant had been convicted of having in his possession an altered passport, was fined £40 and recommended for deportation, although it was found as a fact that he did not know that it had been altered and honestly believed on reasonable grounds that it had been issued to him in the ordinary course by the proper authority in Budapest. The offence was not against an Act of Parliament but against an
- E Order—The Aliens Order, 1920. I would have thought that the first question ought to have been whether the terms of the Act of Parliament were such as to authorise the Secretary of State to create an absolute offence but that point was not taken. If Parliament chooses to create an absolute offence it can do so, but I would be very hesitant to hold that a general authority to make regulations or orders entitles a Minister to do that. In the vast majority of cases he could
- F without hampering enforcement make it a defence for the accused to prove that he did not know and had no reasonable grounds for suspecting that the document had been altered—or whatever the offence might be. It is one thing to say that Parliament has been in the habit of making persons who engage in trades absolutely liable for certain offences. It seems to me to be quite another thing to say that Parliament has intended to authorise a Minister to deprive an ordinary
- G member of the public of such a defence whenever he may think that desirable. The next important case is *Harding v. Price* (28). There a trailer attached to a lorry had damaged a stationary vehicle when passing it and the driver was charged with failing to stop or report the accident. He was acquitted because it was held that he did not know there had been an accident. The words of the Act were clear and imperative—the driver of a motor vehicle shall stop, and
- H he shall report the accident. There was no question of this being in the class of serious crimes and a more alert driver would almost certainly have realised that there had been an accident; but LORD GODDARD, C.J., however, thought it proper to say (29):

- I “The general rule applicable to criminal cases is *actus non facit reum nisi mens sit rea*, and I venture to repeat what I said in *Brend v. Wood* (30): ‘It is of the utmost importance for the protection of the liberty of the subject that a court should always bear in mind that, unless a statute, either clearly or by necessary implication, rules out *mens rea* as a constituent

(24) [1923] All E.R. Rep. 187; 17 Cr. App. Rep. 176.

(25) [1886-90] All E.R. Rep. 26; (1889), 23 Q.B.D. 168.

(26) [1886-90] All E.R. Rep. at p. 30; (1889), 23 Q.B.D. at p. 175.

(27) [1938] 1 All E.R. 159; [1938] 1 K.B. 506.

(28) [1948] 1 All E.R. 283; [1948] 1 K.B. 695.

(29) [1948] 1 All E.R. at p. 284; [1948] 1 K.B. at p. 700.

(30) (1946), 175 L.T. 306 at p. 307.

part of a crime, the court should not find a man guilty of an offence against the criminal law unless he has a guilty mind.' In these days when offences are multiplied by various regulations and orders to an extent which makes it difficult for the most law-abiding subjects in some way or at some time to avoid offending against the law, it is more important than ever to adhere to this principle."

Then LORD GODDARD, however, went on to say that (31):

"... there is all the difference between prohibiting an act and imposing a duty to do something on the happening of a certain event. Unless a man knows that the event has happened, how can he carry out the duty imposed?"

I am bound to say that I find that distinction very unsatisfactory. Take the passport case *Chaputin v. Whitehead* (32). So far as the man knew or could know, he was doing something perfectly innocent which many people constantly do—carrying a proper and valid passport. A passage often quoted from the judgment of the Privy Council in *Bank of New South Wales v. Piper* (33) is that

"... the absence of mens rea really consists in an honest and reasonable belief entertained by the accused of the existence of facts which, if true, would make the act charged against him innocent."

I can see no real difference between the lorry driver who does not know there has been an accident and the carrier of the passport who does not know there is anything wrong with it. Neither has any mens rea as explained in the above quotation. Both in ignorance do something which is forbidden—the one carries an altered passport, the other drives on after an accident—but for some reason which escapes me every man who carries a passport acts at his peril, though the man who drives on does not. Both do forbidden acts but one is guilty and the other is not. We seem to be in a very technical region far removed from the principle stated by LORD GODDARD or from anything that any reasonable Parliament could possibly be supposed to have intended. I think that the explanation of this case must be that the court, disliking some of the older authorities but being unable to overrule them, seized on an insubstantial distinction to prevent any extension of the doctrine of absolute liability. I observe the same tendency in the next case *Reynolds v. G. H. Austin & Sons, Ltd.* (34). There it was a condition of a licence to carry a party of people that the journey "must be made without previous advertisement to the public"; but some of the passengers did make a previous advertisement without the knowledge of the coach owner. He was prosecuted, but held to be not guilty. It was argued that this was an absolute prohibition but LORD GODDARD, C.J., said (35):

"Unless compelled by the words of the statute so to hold no court shall give effect to a proposition which is so repugnant to all the principles of criminal law in this kingdom."

DEVLIN, J., in a long judgment dealt with the question of principle. He quoted from DEAN ROSCOE POUND (36) who said with regard to statutes creating absolute liability (37):

"Such statutes are not meant to punish the vicious will but to put pressure upon the thoughtless and inefficient to do their whole duty in the interest of public health or safety or morals."

Then he said (38):

(31) [1948] 1 All E.R. at p. 285; [1948] 1 K.B. at p. 701.

(32) [1938] 1 All E.R. 159; [1938] 1 K.B. 506.

(33) [1897] A.C. 383 at pp. 389, 390.

(34) [1951] 1 All E.R. 606; [1951] 2 K.B. 135.

(35) [1951] 1 All E.R. at p. 609; [1951] 2 K.B. at p. 144.

(36) THE SPIRIT OF THE COMMON LAW. See L.Q.R. Vol. 64, p. 176.

(37) [1951] 1 All E.R. at p. 611; [1951] 2 K.B. at p. 149.

(38) [1951] 1 All E.R. at p. 612; [1951] 2 K.B. at p. 149.

A "I am not willing to conclude that Parliament can intend what would seem to the ordinary man (as plainly it seemed to the justices in this case) to be the useless and unjust infliction of a penalty."

In *Sambasivam v. Public Prosecutor, Federation of Malaya* (39) the Privy Council had to deal with emergency regulations (40) "a drastic code designed to meet a state of grave disorder". The words were that "any person who carries . . . any firearm not being a firearm which he is duly licensed to carry . . . shall be guilty of an offence". LORD MACDERMOTT said (41):

B "It was conceded on behalf of the Crown—and rightly in their lordships' opinion—that 'carries' here means 'carries to his knowledge', and that the carrying of a firearm by a person who did not know what he carried would not constitute an offence under this provision."

C No doubt this expression of opinion by the Board was obiter but, it is significant that even in an enactment dealing with so grave a menace to public safety the Board did not think that words which apparently created an absolute offence ought to be so interpreted. No doubt one reason was the drastic penalty. It is much easier to infer an intention to exclude mens rea when the penalty is only pecuniary. I would also refer to a passage in the judgment of the Privy Council in *Lim Chin Aik v. Regina* (42):

E "But it is not enough in their lordships' opinion merely to label the statute as one dealing with a grave social evil and from that to infer that strict liability was intended. It is pertinent also to inquire whether putting the defendant under strict liability will assist in the enforcement of the regulations. That means that there must be something he can do, directly or indirectly, by supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to influence or control, which will promote the observance of the regulations. Unless this is so, there is no reason in penalising him, and it cannot be inferred that the legislature imposed strict liability merely in order to find a luckless victim."

F In *Yeandel v. Fisher* (43) an innkeeper and his wife were charged that they were persons concerned in the management of premises—the inn—used for the purposes of smoking and dealing in cannabis. It was not proved that they knew that this was being done on the premises but an appeal against their conviction was dismissed. This case falls within the well established class of case where persons who carry on some particular activity must do or refrain from doing a particular thing at their peril, if, but only if, this is limited to persons engaged in the day-to-day management; then it is reasonable to suppose that if they were alert they would at least notice something suspicious. LORD PARKER, C.J., pointed out the difference between this provision and that which makes the occupier liable if he "permits" these things. He may well have no knowledge of what is going on, but someone who is or ought to be there constantly ought to be aware of it.

H The only thing that makes me hesitate about this case is the severity of the penalty and the fact that this would be regarded as a truly criminal and disgraceful offence, so that a stigma would attach to a person convicted of it. Applicants for employment, permits or other advantages are often asked whether they have been convicted of any offence. Admission of a conviction of an ordinary offence of this class ought not to be too seriously regarded—and the conviction might be of the man's company and not of the man himself. A man who had, however, to admit a conviction with regard to dangerous drugs might be at a grave disadvantage, and this might not be removed by an explanation that he had only suffered a small penalty. He might even be dismissed by his employer. This

(39) [1950] A.C. 458.

(40) [1950] A.C. at p. 470.

(41) [1950] A.C. at p. 469. (42) [1963] 1 All E.R. at p. 228; [1963] A.C. at p. 174.

(43) [1965] 3 All E.R. 158; [1966] 1 Q.B. 440.



makes me hesitate to impute to Parliament an intention to deprive persons accused of these offences of the defence that they had no mens rea. I would think it difficult to convince Parliament that there was any real need to convict a man who could prove that he had neither knowledge of what was being done nor any grounds for suspecting that there was anything wrong. A

I dissent emphatically from the view that Parliament can be supposed to have been of the opinion that it could be left to the discretion of the police not to prosecute, or that if there was a prosecution justice would be served by only a nominal penalty being imposed. B

I agree with the view of the Privy Council in *Lim Chin Aik v. Reginum* (44) where their lordships disapproved

“... the alternative view that strict liability follows simply from the nature of the subject-matter and that person whose conduct is beyond any sort of criticism can be dealt with by the imposition of a nominal penalty. The latter view can perhaps be supported to some extent by the dicta of KENNEDY, L.J., in *Hobbs v. Winchester Corpn.* (45) and of DONOVAN, J., in *R. v. St. Margaret's Trust, Ltd.* (46). But though a nominal penalty may be appropriate in an individual case where exceptional lenience is called for, the lordships cannot, with respect, suppose that it is envisaged by the legislature as a way of dealing with offenders generally. Where it can be shown that the imposition of strict liability would result in the prosecution and conviction of a class of persons whose conduct could not in any way affect the observance of the law, their lordships consider that, even where the statute is dealing with a grave social evil, strict liability is not likely to be intended.” C

One or other House of Parliament has been asked on more than one occasion in recent years to approve of some change in the law which would increase the chance of convicting offenders, but has refused because it would or might also imperil the innocent. Although I would not entirely agree, I think that the general view still is that it is better that ten guilty men should escape than that one innocent man should be convicted. D

I shall deal more fully later with the decision in *Lockyer v. Gibb* (47) because the main point seems to me to have been what is meant by “possession”. LORD PARKER, C.J., did regard the case as analogous to *Yeandel v. Fisher* (48); but I do not think it is. *Yeandel v. Fisher* (48) was a case where a person engaged in a certain occupation—being concerned in the management of premises—was held to do so at his peril. There is, however, no limitation of the class of persons to whom regulations made under the Dangerous Drugs Act 1965 may apply. These regulations purport to make any ordinary member of the public guilty of a very serious offence if a drug within the meaning of the Act is “in his actual custody”. Any person may, and most people do, from time to time take into their custody an apparently innocent package without ascertaining what it contains, without having the slightest reason to suspect that it may contain anything out of the ordinary, and indeed without having any right to open the package and see what is in it. If every person who takes such a package into his custody must do so at his peril, then this goes immensely farther than any enactment imposing absolute liability has yet been held to go, and I refuse to believe that Parliament can ever have intended such an oppressive result. E

Normally the plain ordinary grammatical meaning of the words of an enactment affords the best guide. But in cases of this kind the question is not what the words mean but whether there are sufficient grounds for inferring that Parliament intended to exclude the general rule that mens rea is an essential element in every F

(44) [1963] 1 All E.R. at pp. 228, 229; [1963] A.C. at pp. 174, 175.

(45) [1910] 2 K.B. at p. 485.

(46) [1958] 2 All E.R. 289 at p. 293.

(47) [1966] 2 All E.R. 653; [1967] 2 Q.B. 243.

(48) [1965] 3 All E.R. 158; [1966] 1 Q.B. 440. G

- A** offence; and the authorities show that it is generally necessary to go behind the words of the enactment and take other factors into consideration. That being so the layman may well wonder why we do not consult the Parliamentary debates for we are much more likely to find the intention of Parliament there than anywhere else. The rule is firmly established that we may not look at HANSARD, and in general I agree with it for reasons which I gave last year in *Beswick v. Beswick* (49). This is not a suitable case in which to reopen the matter, but I am bound to say that this case seems to show that there is room for an exception where examining the proceedings in Parliament would almost certainly settle the matter immediately one way or the other. Members of both Houses are particularly interested in the liberty of the subject, and if it were intended by those promoting a Bill to extend the old but limited class of cases in which absence of mens rea is no defence I would certainly expect Parliament to be so informed. Then, if Parliament acquiesced, those who dislike this kind of legislation would know whom to blame. If, however, the words of the Act are not crystal clear and Parliament has not been told of this intention, I would hold without hesitation that it would be wrong to impute to Parliament an intention to depart from its known desire to prevent innocent persons from being convicted.
- D** As things are we must do our best with the material available to us. The object of this legislation is to penalise possession of certain drugs. So if mens rea has not been excluded what would be required would be the knowledge of the accused that he had prohibited drugs in his possession. It would be no defence, though it would be a mitigation, that he did not intend that they should be used improperly. And it is a commonplace that, if the accused had a suspicion but deliberately shut his eyes, the court or jury is well entitled to hold him guilty. Further, it would be pedantic to hold that it must be shown that the accused knew precisely which drug he had in his possession. Ignorance of the law is no defence and in fact virtually everyone knows that there are prohibited drugs. So it would be quite sufficient to prove facts from which it could properly be inferred that the accused knew that he had a prohibited drug in his possession. That would not lead to an unreasonable result. In a case like this Parliament, if consulted, might think it right to transfer the onus of proof so that an accused would have to prove that he neither knew nor had any reason to suspect that he had a prohibited drug in his possession; I am unable to find sufficient grounds for imputing to Parliament an intention to deprive the accused of all rights to show that he had no knowledge or reason to suspect that any prohibited drug was on his premises or in a container which was in his possession.

- It was suggested in argument that it may always be a defence, even to an absolute offence, to prove absence of mens rea. There are some dicta to that effect, but I do not think that your lordships could introduce such a far reaching doctrine without statutory authority. When we are dealing with the original type of absolute offence—a person engaging in a business where he does certain things at the peril of a pecuniary penalty—it is clearly established that absence of mens rea is no defence. And a right to prove absence of mens rea would sometimes go too far. Mens rea or its absence is a subjective test, and any attempt to substitute an objective test for serious crime has been successfully resisted. If, however, there is to be a halfway house between the common law doctrine and absolute liability, there could be an objective test: not whether the accused knew, but whether a reasonable man in his shoes would have known or have had reason to suspect that there was something wrong. I would not support an objective test where the ordinary member of the public is concerned, but it is not unreasonable to say that if a person engages in some particular business he must behave as, and have the capacity of, the ordinary reasonable man.

LORD PARKER, C.J. referred to a decision of the Supreme Court of Canada, *Beaver v. Reginam* (50), where it was held by a majority that the offence created by legislation against the possession of drugs in terms almost identical with the British Act was not an absolute offence. He said that he preferred the view of the minority. I do not. FAUTEUX, J., for the minority founded on *Chajutin v. Whitehead* (51); but I have already given my reasons for thinking that this decision is out of line with the other authorities.

It is possible to reach the same result in the present case on a narrower ground. The Drugs (Prevention of Misuse) Act 1964, s. 1 (1), provides that "it shall not be lawful for a person to have in his possession" any of the specified substances unless in specified circumstances. So we have to determine what is meant by having a thing in one's possession. The problem here is whether the possessor of a house or box or package is necessarily in possession of everything found in it, or, if not, what mental element is necessary before he can be held to be in possession of the contents. This problem has given rise to a great deal of legal discussion and the numerous authorities are not at all easy to reconcile. I shall not attempt that task. I think that the best approach to this case is to suppose that an innkeeper is handed, in ordinary course, a box or package by a guest for safe keeping. He has no right to open the box—it may be locked. If he is told truthfully what is in it, it may be right to say that he is in possession of the contents; but what if he is told nothing, or is told that it contains jewellery and it contains prohibited drugs? It may contain nothing but drugs or it may contain both jewellery and drugs or it may be an antique trinket apparently empty but containing drugs hidden in a small secret recess. It would in my opinion be irrational to draw distinctions and say that in one such case he is in possession of the drugs and therefore guilty of an offence, but not in another. It is for that reason that I cannot agree with the contention that if the possessor of a box genuinely believes that there is nothing in the box then he is not in possession of the contents, but that on the other hand if he knows there is something in it he is in possession of the contents though they may turn out to be something quite unexpected. In any case this contention does not seem to me to take account of the case where the possessor of the box believes that it does contain jewellery and in fact it does contain jewellery but it contains drugs as well. It would, I think, be absurd to say that the innkeeper is not guilty if he genuinely believes that the box is empty and it has some drugs secreted in it, but that he is guilty of an offence under the Act of 1964 if he truly believes that it contains jewellery, though it also contains some drugs secreted in it. If he is not guilty in the case where the box contains jewellery as well as drugs, on what rational ground can he become guilty if there is no jewellery in the box but only drugs?

In considering what is the proper construction of a provision in any Act of Parliament which is ambiguous one ought to reject that construction which leads to an unreasonable result. As a legal term "possession" is ambiguous at least to this extent: there is no clear rule as to the nature of the mental element required. All are agreed that there must be some mental element in possession, but there is no agreement as to what precisely it must be. Indeed the view which prevailed in *R. v. Ashwell* (52) and was approved in *R. v. Hudson* (53) went so far that a person who received a sovereign thinking it to be a shilling was held not to possess the sovereign until he discovered the mistake. There it was argued that "possession" in this context should be given a popular and not a legal meaning; but even if that were a legitimate way to construe a well-known legal term, I think that it would lead to the same ambiguity. If the ordinary reasonable man were asked what he thought "possession" meant in this context he would probably say that is a puzzle for the lawyers, and if he ventured his own opinion he might say it meant control; but if asked whether

(50) [1957] S.C.R. 531.

(52) (1885), 16 Q.B.D. 190.

(51) [1938] 1 All E.R. 159; [1938] 1 K.B. 506.

(53) [1943] 1 All E.R. 642; [1943] 1 K.B. 458.



A the innkeeper controls the contents of a box handed to him for safekeeping, I think that he would most probably say "No".

*Lockyer v. Gibb* (54) was relied on by the Court of Appeal (55) as the case most nearly in point. There the accused had been in a café with some people when the police came in. A man, whom apparently she did not know, gave her a bottle containing tablets "to look after for him". She put them at the bottom of her shopping bag and when she went out she was stopped by the police. B She was prosecuted under a regulation made under the Dangerous Drugs Act 1965 for being in possession of a scheduled drug. The magistrate held that there was a possibility that she did not know that the tablets contained any of the scheduled drugs. She may have been a very stupid woman, for I would think that any normal person being given a bottle of tablets in such circumstances C would know perfectly well that the tablets must contain prohibited drugs which the man did not want the police to find in his possession. With regard to possession LORD PARKER, C.J., said (56):

"In my judgment, it is quite clear that a person cannot be said to be in possession of some article which he or she does not realise is, or may be, in her handbag, in her room, or in some other place over which she had D control. That, I should have thought, is elementary; if something were slipped into one's basket and one had not the vaguest notion it was there at all, one could not possibly be said to be in possession of it."

I entirely agree; but that destroys any contention that mere physical control or custody without any mental element is sufficient to constitute possession under that enactment. If something is slipped into my bag I have as much E physical control over it as I have over anything else in my bag. I can carry it where I will and I can transfer the whole contents of my bag to some other person without ever realising that this particular thing is included. Then, however, LORD PARKER went on to say (57):

"... in my judgment, under this provision, while it is necessary to show F that the appellant knew she had the articles which turned out to be a drug, it is not necessary that she should know that in fact it was a drug and a drug of a particular character."

With that I cannot agree for reasons which I have already given. I do not think that this distinction will bear critical examination and I do not know what the result would be on this view if, in the present case, both the scent G and the drugs had been in the same parcel. The appellant, if his story were accepted, would have rightly believed that the parcel contained scent, but would have been ignorant of the fact that drugs had been slipped in with the scent. Could it be right that if the appellant had taken possession of the parcel of scent and thereafter the drugs had been slipped in without his knowledge he would be innocent (which is LORD PARKER's view), but that if the drugs had H been slipped in without his knowledge before he took possession then he would be guilty? That seems to me to be quite unreasonable and it seems to me to be equally unreasonable that the fact that there were two parcels and not one should make all the difference between guilt and innocence.

If this case is to be decided on this narrower ground I accept the view of my noble and learned friends, LORD PEARCE and LORD WILBERFORCE. It enables I justice to be done in all cases which resemble this case. But it still leaves subject to injustice persons who in innocent circumstances take into their possession what they genuinely and reasonably believe to be an ordinary medicine, if in fact the substance turns out to be a prohibited drug. Nevertheless this ground is sufficient to show that the learned trial judge must be held to have misdirected the jury in the present case.

(54) [1966] 2 All E.R. 653; [1967] 2 Q.B. 243.

(55) [1967] 3 All E.R. 93.

(56) [1966] 2 All E.R. at p. 655; [1967] 2 Q.B. at p. 248.

(57) [1966] 2 All E.R. at p. 656; [1967] 2 Q.B. at p. 249.

So it remains to consider whether this is a proper case for the application of the proviso as amended by s. 4 of the Criminal Appeal Act 1966. Taking into account the prevarications of the appellant before he produced his final story and the whole circumstances, I cannot believe that any reasonable jury would accept that story. If they did not, they would be certain to return a verdict of guilty. So in my judgment there has been no miscarriage of justice and I would, therefore, dismiss this appeal.

**LORD MORRIS OF BORTH-Y-GEST** My Lords, the charge which was brought against the appellant was that he was in unlawful possession of twenty thousand tablets which, as was proved at the trial, contained amphetamine sulphate. That was a substance specified in the Schedule to the Drugs (Prevention of Misuse) Act 1964. It was not lawful for him to have the tablets in his possession unless he came within one of the groups or classes of people in the case of whom possession is not prohibited. He did not, and there was no suggestion that he did. The charge was laid under s. 1 of the Drugs (Prevention of Misuse) Act 1964. That is an Act, as its long title proclaims, "to penalise the possession and restrict the importation of drugs of certain kinds". Section 1 (1) provides that subject to any exemptions for which provision may be made by regulations made by the Secretary of State and to the provisions of the section which follows

"... it shall not be lawful for a person to have in his possession a substance for the time being specified in the Schedule to this Act unless—

- (a) it is in his possession by virtue of the issue of a prescription by a duly qualified medical practitioner or a registered dental practitioner for its administration by way of treatment to him, or to a person under his care; or
- (b) it is in his possession by virtue of the issue of a prescription by a registered veterinary surgeon or a registered veterinary practitioner for its administration by way of treatment to an animal under his care; or
- (c) he is registered in a register kept for the purposes of this paragraph by the Secretary of State as a manufacturer of, or a dealer in bulk in, substances for the time being specified in that Schedule . . ."

A person "who has a substance in his possession in contravention of the provision" is liable to a fine or to imprisonment or to both as set out in the section.

In sub-s. (2) it is provided that sub-s. (1) shall not be taken to prohibit possession by a person of any one of twelve specified "kinds" (such, for example, as a duly qualified medical practitioner or an authorised seller of poisons) provided that it is in his possession for the purpose of his acting in the capacity of a person of that kind. Other exemptions are provided for by the terms of sub-s. (3) and sub-s. (4). Pursuant to the power given him by s. 1 (1) of the Act the Secretary of State on Sept. 17, 1964, made Regulations (the Drugs (Prevention of Misuse) Exemptions Regulations 1964 (58)) under which the exemptions, subject to stated conditions, were given so that prohibition of possession would not apply (inter alia) to carriers or to those concerned, in the performance of their duty, in the transmission of postal packets by post or in certain specified circumstances to the owner or master of certain ships.

It appears therefore to be clear that unless a person comes within the exclusions and exemptions which are specified and precise it is not lawful for him "to have in his possession" any one of the substances specified in the Schedule to the Act of 1964.

It was for the prosecution to prove that the appellant had the tablets in his possession; if he did so have them then his possession was in contravention of

A s. 1 of the Act of 1964. The appellant was convicted. He appealed to the Court of Appeal (59). One of the grounds of his appeal was that there had been misdirection as to "possession". On June 30, 1967, the Court of Appeal gave judgment dismissing the appeal. On July 28, 1967, the appellant (who was on that occasion unrepresented) applied to the Court of Appeal for leave to appeal. The court adjourned the application but said that while in their view there was a point of law of general public importance they did not consider, having regard to the particular facts of the case, that they ought to give leave to appeal. On a renewal of the application on Oct. 9 leave to appeal was refused. On further consideration on Oct. 19 leave was granted. The point of law of general public importance was stated by the Court of Appeal to be:

C "Whether for the purposes of s. 1 of the Drugs (Prevention of Misuse) Act 1964 a defendant is deemed to be in possession of a prohibited substance when to his knowledge he is in physical possession of the substance but is unaware of its true nature."

It will be seen that there is a certain ambiguity in this formulation.

D Your lordships were not supplied with a transcript of the evidence but were invited to take the facts as recounted or summarised in the summing-up. It appears that on the morning of Nov. 18, 1966, the appellant was driving a mini-van. He was stopped by a police officer. The police officer questioned him as to the contents of his van. In the van there were three cases. Being asked what was in them the appellant said that it was rubbish. Being further asked separately as to each one of the three cases the appellant said that each only contained rubbish which it was his intention to dump. In the words of the summing-up—  
E "Eventually there emerged two packages". They were then opened by the police. One contained bottles of scent. The other contained the twenty thousand tablets containing amphetamine sulphate. The evidence as to what was said at the time was conflicting. The appellant said that the police officer did not ask him where he got the pills, but had said that they looked like "pep pills" and that he (the appellant) had said "I don't know how they got there". The police officer said  
F that he did ask the appellant where he got the pills and that the appellant's explanation was that they came from his address.

Evidence for the defence was given at the trial by the appellant, by the owner of a certain café and by a friend of the appellant. The effect of this evidence was that the appellant (who is by occupation a floor-layer) had by arrangement with his friend been selling scent as a sideline. The owner of the café sometimes  
G allowed customers to leave goods to be called for. The friend called at the café on the morning of Nov. 18 and by permission left a package for the appellant. The café owner put it (one package) under the shelf under the counter. Some ten minutes later the appellant called at the café. He learned that his friend had been but had gone. He enquired whether his friend had left anything for him and was told by the café proprietor: "Yes, it is under the counter." The evidence  
H of the appellant, according to the summing-up, was that he then looked under the counter: "there were two boxes; one was the big box which in fact had the scent in it and on top was the smaller box: I didn't look inside it: I assumed it was scent, so I collected it up and I drove off."

I On the state of the evidence as summarised above the question arises as to the extent of the burden of proof which lay on the prosecution. It was for the prosecution to prove that the prohibited substance was in the possession of the appellant. They undoubtedly proved that the tablets which were inside the package which he had were tablets which contained prohibited substances. They had to prove that the appellant had the tablets in his possession. Did this involve that the prosecution had to establish not only that the appellant had the package in question but also had to establish positively that he knew that the contents of his package were tablets containing amphetamine sulphate tablets? Stated



otherwise, if the appellant says "I had the package and I knew that it had certain contents but I thought that the contents were bottles of scent", is the onus cast on the prosecution to prove that he knew that the contents were not bottles of scent but were prohibited substances? A

If these burdens rested on the prosecution then the summing-up was defective. The jury were directed in these terms:

"Now then, members of the jury, it was under control because 'possession' means that you have control. [The appellant] quite clearly had, and does not deny he had, control of these pills, and if he had, and it is a matter for you to make up your minds about because you are the judges of fact—if you think the evidence is, he does not dispute it, that he had control of that box which in fact turned out to be full of amphetamine sulphate, that creates the original offence; it is only mitigation that he did not know." B C

The first question which arises relates to the meaning of the words "to have in his possession" in s. 1. Let the case be supposed that in a man's pocket there is to his knowledge a package having contents, which contents are in fact prohibited substances which it is not lawful for him to have in his possession, and that when the package is produced from his pocket he says "I thought they were sweets", is the onus cast on the prosecution to prove that he knew that they were not sweets? It is submitted on behalf of the Crown that if a man chooses to have on him a package with contents he takes the risk, if he has not examined what he has, that he may be in possession of that which it is not lawful for him to have. D

It is submitted that if, in some particular circumstances, it is found that the contents of a package which someone deliberately has in his possession are contents which it is not lawful for him to have, but if it appears that by some series of mischances he was under a complete misapprehension as to what he had, there could be good reasons to invite a court to exercise the ample powers it possesses where mitigating circumstances are compelling. E

As the Drugs (Provention of Misuse) Act 1964, does not contain a definition of the word "possession" it must be given a sensible and reasonable meaning in its context in an Act designed to penalise the possession of drugs. The word "possession" is much to be found in the vocabulary of the law and it cannot always be given the same meaning in all its divers contexts; but the notion of being in possession of drugs is not one which as a rule should present difficulty in comprehending. A useful start in considering an Act of Parliament is to take the plain literal and grammatical meaning of the words used. In *A.-G. v. Lockwood* (60), ALDERSON, B., said (61): F G

"The rule of law, I take it, upon the construction of all statutes . . . is, whether they be penal or remedial, to construe them according to the plain, literal and grammatical meaning of the words in which they are expressed, unless that construction leads to a plain and clear contradiction of the apparent purpose of the Act, or to some palpable and evident absurdity." H

On this basis I think that the notion of having something in one's possession involves a mental element. It involves in the first place that one knows that one has something in one's possession. It does not, however, involve that one knows precisely what it is that one has got. I agree with what LORD PARKER, C.J., said in *Lockyer v. Gibb* (62): I

"In my judgment it is quite clear that a person cannot be said to be in possession of some article which he or she does not realise is, or may be, in her handbag, in her room, or in some other place over which she has control. That, I should have thought, is elementary; if something were slipped into

(60) (1842), 9 M. & W. 378.

(61) (1842), 9 M. & W. at p. 398.

(62) [1966] 2 All E.R. at p. 655; [1967] 2 Q.B. at p. 248.

A one's basket and one had not the vaguest notion it was there at all one could not possibly be said to be in possession of it."

In this connexion reference may usefully be made to the case of *R. v. Woodrow* (63) In that case (in 1846) a dealer in tobacco was held liable to the monetary penalty imposed by s. 3 of 5 & 6 Viet. c. 93. There was a provision "that every . . . dealer in or retailer of tobacco who shall . . . have in his possession" any adulterated tobacco should forfeit £200. The dealer had purchased the tobacco as genuine and had no knowledge or cause to suspect that it was not so. The section did not contain the word "knowingly". POLLOCK, C.B., said that s. 3 applied to the case "whether the party knows it or not". PARKE, B., said (64):

C "With respect to the offence itself, I have not the least doubt that the ordinary grammatical construction of this clause is the true one. It is very true that in particular instances it may produce mischief, because an innocent man may suffer from his want of care in not examining the tobacco he has received, and not taking a warranty; but the public inconvenience would be much greater, if in every case the officers were obliged to prove knowledge. They would be very seldom able to do so. The legislature have made a stringent provision for the purpose of protecting the revenue, and have used very plain words. If a man is in possession of an article as the defendant was in this case, and that article falls within the terms mentioned in the statute, there is no question but that the offence is proved."

ALDERSON, B., said (65):

E "... the words of the Act, though they are no doubt very stringent, are nevertheless very clear, and any retailer of tobacco who has an adulterated article in his possession is liable to the penalty. I cannot say that this man had not the tobacco in his possession, because he clearly knew it. He did not know it was in an adulterated state, but he knew he had it in his possession: and the question of 'knowingly', it appears to me, is involved in the word possession. That is, a man has not in his possession that which he does not know to be about him. I am not in possession of anything which a person has put into my stable without my knowledge. It is clear, therefore, that possession includes a knowledge of the facts as far as the possession of the article is concerned."

G In the present case there is no suggestion that any package got inadvertently or surreptitiously in to the appellant's hands. There may be situations in which on particular facts a jury would have to determine whether some parcel or package was in a man's pocket or bag or house or motor-car without any knowledge on his part that it was there. No such question arises in this case.

H If a package or parcel is in a house which is occupied by several people, then there may be facts calling for the consideration of a jury whether it has been proved that the package or parcel was in the possession of some one person. Whatever view, however, a jury might in the present case have formed as to the origin and movements of the package in which were the twenty thousand tablets, the appellant was in my opinion on his own admissions in possession of those tablets. He expected to receive a package. He says that he found a second package. We were told that the second package, though smaller than the one containing scent, was of the size of about a cubic foot. He took both packages I away. He put them in his van. He intended to exercise complete control over both of them. He could have left the second parcel. Presumably he could have opened it. On his story he assumed that it had been left for him. Though we have not seen the transcript of the evidence, it is to be assumed that his friend said that he only left one package (a package containing scent). Taking the appellant's evidence at its face value, however, if he assumed that his friend had left two

(63) (1846), 15 M. & W. 404.

(64) (1846), 15 M. & W. at p. 417.

(65) (1846), 15 M. & W. at p. 418.

packages for him, and if he assumed that both contained scent, when he took both packages and put them in his van and drove away with them he was taking the packages and their contents in his possession. If, in having the tablets in his possession, he became guilty of an offence under s. 1, then if a court considered that in truth he believed that he had scent and not tablets it would be for the court to decide as to the weight of and the effect to give to such mitigating circumstances.

Reference was made in argument to cases in which the question arose whether, if a man received from another a coin of a different denomination from that which it had been intended to hand over, there could be a conviction of larceny. Thus in *R. v. Ashwell* (66), A asked K for a loan of one shilling. K by mistake, intending to hand a shilling coin to A, in fact handed him a sovereign. Could A be convicted of larceny of the sovereign? Had K parted with the possession of the sovereign to A so that A was lawfully in possession of it? The case gave rise to considerable divergence of judicial opinion. A somewhat similar question arose in *R. v. Jacobs* (67), where a half sovereign was by mistake handed over instead of a sixpence. The crime of larceny needed proof of an animus furandi; but it was also necessary to prove that the accused has taken the chattel from the possession of its possessor. Larceny was an offence against possession. If the possessor K had given A possession of the sovereign, then A was not guilty of larceny. If the possessor (K) had handed over the chattel by mistake, did the accused (A) acquire possession? I do not propose to consider these cases or to examine their precise facts for, in my view, they have no bearing on the present problem. There is no suggestion in the present case that the appellant took possession by mistake of the package which contained the tablets. It is difficult to know what are the true facts, but if for present purposes it is assumed that some person (other than one of those who gave evidence) placed a package on the top of the one left by the friend, it would seem likely that possession of that package was not being retained by that person. It would seem probable that the package was left by someone so that the appellant would take it. Conceivably, however, the package could have been left by someone so that someone other than the appellant would take it. Conceivably, also, someone could have just placed the package down while having the intention shortly thereafter himself to take it up again. Even though there are these possibilities, no question of the law of larceny is here involved. It does not seem to me that it can be said that the appellant took the package itself by mistake. He took it quite deliberately. He intended to take it. He did not open it or examine it. He took it away. Acting freely and consciously he intended to take it and its contents away. He placed the package in his van and drove away. If his evidence warranted credence, it would not mean that he took possession by mistake; it would mean that by mischance or lack of care in investigation he found that the contents which he took into his possession were different from what he thought that they were.

Section 1 of the Act of 1964 does not contain any definition of the word "possession". Unless one of the exemptions applies it is not "lawful" for a person "to have in his possession" one of the scheduled substances, and a person who "has a substance in his possession" in contravention of the provision is liable to certain penalties either on summary conviction or on conviction on indictment. The problem presented in this case is, in my view, purely one of construction and interpretation. The intention of Parliament is to be ascertained. Parliament uses words to express its intention. The words that are employed must be considered in their context and in the setting of the purpose which which Parliament has proclaimed. What, then, does "possession" mean? Does "possession" involve that someone must knowingly have control over some thing; does "possession" further involve that there must be knowledge, either in general or with precision, as to what the thing is? In relation to the present case

(66) (1885), 16 Q.B.D. 190.

(67) (1908), 1 Cr. App. Rep. 215; 12 Cox, C.C. 151.



**A** the practical problem that arises is whether it was necessary for the prosecution to prove that the appellant knew that what he had was one of the substances named in the Act of 1964 or at least to prove that he knew that what he had was a parcel of tablets? Though the decision in *Lockyer v. Gibb* (68) was not a decision in regard to the Act of 1964 but related to the Dangerous Drugs Act 1965 and to a regulation (69) which in defining possession had a "deeming" provision, the question now raised concerns the validity or the applicability of the reasoning which was thus expressed in the judgment in that case (70):

"... while it is necessary to show that the appellant knew she had the articles which turned out to be a drug, it is not necessary that she should know that in fact it was a drug and a drug of a particular character."

**C** In my view, the approach denoted by those words is applicable in the present case. The question resolves itself into one as to the nature and extent of the mental element which is involved in "possession", as that word is used in the section now being considered. In my view, in order to establish possession the prosecution must prove that an accused was knowingly in control of something in circumstances which showed that he was assenting to being in control of it.

**D** They need not prove that in fact he had actual knowledge of the nature of that which he had. In *Lockyer v. Gibb* (68), LORD PARKER, C.J., gave the illustration of something being slipped into a person's basket. While the person was unaware of what had happened there would be no possession. But in such circumstances on becoming aware of the presence of the newly discovered article there would be opportunity to see what the article was: whether the opportunity was availed of or not, if the article was deliberately retained there would be possession of it.

**E** So also in the illustration given by ALDERSON, B., in 1846 in *R. v. Woodrow* (71). Something is placed in a man's stable without his knowledge. He is not in possession of it. If he goes to his stable and sees the unexpected presence of the article then, according to the particular circumstances, he might with knowledge so act as to assume control of it. He would then be in possession of the article.

**F** On the admitted facts in the present case the appellant was, in my view, in possession of the tablets. Though the summing-up was inadequate in its references to the conception of possession, on the admitted facts of this particular case the omissions in the summing-up do not vitiate the conviction. In other cases, however, it would be necessary to give a more complete and careful direction to a jury as to what the prosecution must prove in regard to possession. A jury must not convict unless they are satisfied that possession in an accused has been proved. There can be no rigid formula to be used in directing a jury. Varying sets of facts and circumstances will call for guidance on particular matters. The conception to be explained, however, will be that of being knowingly in control of a thing in circumstances which have involved an opportunity (whether availed of or not) to learn or to discover, at least in a general way, what the thing is.

**H** The same result might follow if it was a matter of indifference whether there was such opportunity or not. If there is assent to the control of a thing, either after having the means of knowledge of what the thing is or contains or being unmindful whether there are means of knowledge or not, then ordinarily there will be possession. If there is some momentary custody of a thing without any knowledge or means of knowledge of what the thing is or contains - then,

**I** ordinarily, I would suppose that there would not be possession. If, however, someone deliberately assumes control of some package or container, then I would think that he is in possession of it. If he deliberately so assumes control knowing that it has contents, he would also be in possession of the contents. I cannot think that it would be rational to hold that someone who is in possession

(68) [1966] 2 All E.R. 653; [1967] 2 Q.B. 243.

(69) The Dangerous Drugs (No. 2) Regulations 1964 (S.I. 1964 No. 1811).

(70) [1966] 2 All E.R. at p. 656; [1967] 2 Q.B. at p. 249.

(71) (1846), 15 M. & W. 404.

of a box which he knows to have things in it is in possession of the box but not in possession of the things in it. If he had been misinformed or misled as to the nature of the contents, or if he had made a wrong surmise as to them, it seems to me that he would nevertheless be in possession of them. Similarly, if he wrongly surmised that a box was empty which in fact had things in it possession of the box (if established in the way which I have outlined) would involve possession of the contents. For the purposes of the present Act, however, I do not consider that, in order to prove possession of a prohibited substance, it is necessary to prove knowledge that the thing possessed was in fact a prohibited substance.

It is to be observed that in *Lockyer v. Gibb* (72) the appellant did not assert that the prosecution had to prove that she knew that she had a particular drug or even a dangerous drug, but it was submitted that at least it had to be proved that she knew that what she had was a drug. In a similar way it has not been contended on behalf of the appellant in the present case that the prosecution had to prove that the appellant knew that the substance which he had was a substance specified in the Schedule to the Act of 1964. What was contended was that the prosecution had to prove that the appellant knew that he had some substance other than scent and that he did not believe that he had lawful authority to have what he had or, stated otherwise, that the prosecution had to prove that the appellant did not believe that he had an innocent purpose in having what he had. My lords, I find this not only vague and imprecise and unworkable but also illogical. Accepting that the words "to have in his possession a substance" carry with them an involvement of knowledge, I could have understood a submission that in a prosecution under s. 1 of the Act of 1964 the prosecution must both prove that someone with knowledge has possession of a thing and also prove that he knew what was the quality of the thing, i.e., that the thing was or contained a substance specified in the Schedule to the Act of 1964. I can, however, see no reason for, and I know of no authority for, the contention advanced on behalf of the appellant.

The present case concerns wording which is different from that which was considered in *R. v. Hallam* (73). That case required a construction of the words in s. 4 (1) of the Explosive Substances Act, 1883, which were:

"Any person who . . . knowingly has in his possession or under his control any explosive substance, under such circumstances as to give rise to a reasonable suspicion that he . . . does not have it in his possession or under his control for a lawful object, shall, unless he can show that he . . . had it in his possession . . . for a lawful object, be guilty of felony."

LORD GODDARD, C.J., in giving the judgment of the court said that the point raised was purely a matter of construction of the sentence. He said (74):

"The question is whether the word 'knowingly' means that he must know, not only that he has a parcel or a substance in his possession but also that it is an explosive. The words, I repeat, are 'knowingly has in his possession any explosive substance'. Having given the best consideration that we can to this case, we think that the words must mean that he must know that it is an explosive substance."

Inasmuch as this case depends on the interpretation of s. 1 of the Act of 1964 now in question I doubt whether it would be profitable, even if it were practicable, to attempt to refer to, or to review all the very numerous cases in which courts have held that in particular legislation Parliament has used words which exclude wholly or partially the requirement of mens rea. That Parliament may so legislate admits of no doubt.

I think that it is important to recognise and to affirm that it is a general

(72) [1966] 2 All E.R. 653; [1966] 2 Q.B. 243.

(73) [1957] 1 All E.R. 665; [1957] 1 Q.B. 569.

(74) [1957] 1 All E.R. at p. 665; [1957] 1 Q.B. at p. 572.

A principle of our law that to commit an offence a man must have a guilty mind. Generally speaking, a statute will be applied as though that principle was incorporated into the enactment. I think, however, that it may be too sweeping to say that, if Parliament introduces the word "knowingly", it merely states what would be implied. The presence or absence of the word "knowingly" may in some cases be of great importance in construing particular words in a particular enactment.

In *R. v. Sleep* (75), the accused was charged under a legislative enactment, 9 & 10 Wm. 3 c. 41, which was designed for the protection of government property which would be marked with broad arrows. The accused had despatched certain copper: it was proved that some of the copper had broad arrow marks. The relevant statutory words were: "in whose possession . . . goods . . . marked as aforesaid shall be found". At the trial a question was left to the jury: "Whether the prisoner knew that the copper or any part of it was so marked?". The answer of the jury was: "We have not sufficient evidence before us to show that he knew it." It was held in the Court for Crown Cases Reserved that he ought not to have been convicted. In giving judgment SIR ALEXANDER COCKBURN, C.J. used these words (76):

"It has been contended that mere possession constitutes the offence provided against by the 9 & 10 Wm. 3 c. 41; but I am unable to adopt that view. It is a principle of our law that to constitute an offence there must be a guilty mind; and that principle must be imported into the statute, as has already been laid down in *R. v. Cohen* (77), although the Act itself does not in terms make a guilty mind necessary to the commission of the offence. Cases of innocent possession might be put in which it would be clear that the possessor had not that guilty mind. The authorities which have been cited may be reconciled in this way, viz., that it is a fair presumption, where a man is found in possession of marked articles, that he knew them to be marked; but that presumption may be rebutted by the circumstances of the case. Here it is manifest, if the prisoner's statement is to be believed, that he was ignorant of the fact that the copper was marked; and the ordinary presumption is rebutted. The jury might, indeed, have come to the opposite conclusion; and in my opinion they ought to have done so. They have not done so: but have taken the prisoner's statement as true."

The decision was in accord with two earlier cases: *R. v. Willmet* (78) and *R. v. Cohen* (77). I refer to just a few other cases merely by way of illustration of the problems that have confronted courts in reference to other Acts. I do not think it necessary to venture any opinion as to the correctness or otherwise of these cases. Thus in 1880 in *R. v. Bishop* (79), the defendant was convicted under 8 & 9 Vict. c. 100 s. 44, of receiving two or more lunatics into her house, not being a registered asylum or hospital, or a house licensed under the Act or any previous Act though the jury who convicted found specially that though the persons so received were lunatic, the defendant honestly, and on reasonable grounds, believed that they were not lunatic. It was held by the Court for Crown Cases Reserved that such belief was immaterial and that the conviction was right. In the case of *Blaker v. Tillstone* (80), there was a summons under s. 117 of the Public Health Act, 1875, charging a person with having had meat in his possession and deposited on his premises for the purpose of preparation for sale and intended for the food of man which meat was unsound and unfit for the food of man. It was held that it was not necessary to show that the accused had personal knowledge of the condition of the meat. LORD COLERIDGE, C.J., said that the decisions under the Act of 9 & 10 Wm. 3 c. 41 (to which I

(75) [1861-73] All E.R. Rep. 248; (1861), Le. & Ca. 44.

(76) (1861), Le. & Ca. at p. 54; [1861-73] All E.R. Rep. at pp. 250, 251.

(77) (1858), 8 Cox, C.C. 41.

(78) (1848), 11 L.T.O.S. 495; 3 Cox, C.C. 281.

(79) (1880), 5 Q.B.D. 259.

(80) [1894] 1 Q.B. 345.



have referred above—see *R. v. Sleep* (81)) were not in point, being decisions under a statute having a different object—i.e., the protection of the Queen's stores. He said (82):

"The question for us is whether the magistrate is bound to insist on direct proof of knowledge on the part of the seller of the bad condition of the stuff sold. Perhaps it might be an answer to this contention to say that the Act of Parliament would be nugatory if such proof were insisted on, for it would then always be open to the defendant to say that he was not aware of the condition of the article sold, and that it was not his duty under the statute to make any inquiries on the point, with the obvious result that a man might in practice go on selling meat which was positively injurious without the possibility of getting a conviction against him. The Act would thus be made nugatory; but that would be no answer if its meaning were clear, though it would be a reason for holding (if it were open to us to do so) that that could not be the meaning of the Act."

The cases show, in my view, that what always has to be decided is the meaning of the particular statutory enactment. While recognising that mens rea is a pre-requisite of a criminal conviction the question always is whether Parliament in a particular instance has enacted that on proof of certain facts strict or absolute liability is to follow? Whether the subject-matter of the legislation is such that a conviction would be regarded as involving serious stigma, or whether the subject-matter is such that a conviction would be regarded as involving minimal stigma, cannot affect the question as to what Parliament has in fact enacted. It is to the words used by Parliament that attention has to be directed.

Some of the decisions seem to be in conflict with others. *Cundy v. Le Cocq* (83) was a case under s. 13 of the Licensing Act, 1872. The keeper of licensed premises was held guilty of having sold intoxicating liquor to a drunken person even though the latter had given no indication of intoxication and even though there was no awareness on the part of the publican or his servants. It was held that the prohibition was absolute and that knowledge of the condition of the person served with liquor was not necessary to constitute the offence. STEPHEN, J. said (84):

"I am of opinion that the words of the section amount to an absolute prohibition of the sale of liquor to a drunken person, and that the existence of a bona fide mistake as to the condition of the person served is not an answer to the charge, but is a matter only for mitigation of the penalties that may be imposed. I am led to that conclusion both by the general scope of the Act, which is for the repression of drunkenness, and from a comparison of the various sections under the head 'offences against public order'."

He proceeded to point out that in some sections, but not in the section in question, there was the word "knowingly". In reference to the maxim that in every criminal offence there must be a guilty mind STEPHEN, J. said (85):

"In old time, and as applicable to the common law or to earlier statutes, the maxim may have been of general application; but a difference has arisen owing to the greater precision of modern statutes. It is impossible now, as illustrated by the cases of *R. v. Prince* (86) and *R. v. Bishop* (87) to apply the maxim generally to all statutes, and the substance of all the reported cases is that it is necessary to look at the object of each Act that is under consideration to see whether and how far knowledge is of the essence of the offence created."

(81) [1861-73] All E.R. Rep. 248; (1861), L.C. & Ca. 44. (82) [1894] 1 Q.B. at p. 348.

(83) [1881-85] All E.R. Rep. 412; (1884), 13 Q.B.D. 207.

(84) (1884), 13 Q.B.D. at p. 209; [1881-85] All E.R. Rep. at p. 413.

(85) (1884), 13 Q.B.D. at p. 210; [1881-85] All E.R. Rep. at pp. 413, 414.

(86) [1874-80] All E.R. Rep. 881; (1875), L.R. 2 C.C.R. 154.

(87) (1880), L.R. 5 Q.B.D. 259.

A In contrast to *Cundy v. Le Cocq* (88) was the decision in *Sherras v. de Rutzen* (89) where it was held that s. 16 (2) of the Licensing Act, 1872, which prohibits the supplying by a licensed person of liquor to a constable on duty did not apply where the licensed person bona fide believed that the constable was off duty. WRIGHT, J. said (90):

B “The presumption is, that mens rea, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals, and both must be considered: *Nichols v. Hall* (91).”

C In his judgment WRIGHT, J., noted certain groups or classes of cases which he felt could be regarded as exceptions to the general rule that mens rea is an essential ingredient in an offence.

Cases which have required decisions in regard to particular words in particular enactments may be of value in recording lines of approach. I would cite some words of LORD GODDARD, C.J., when in *Brend v. Wood*, (92), he said (93):

D “It should first be observed that at English common law there must always be mens rea to constitute a crime; if a person can show that he acted without mens rea that is a defence to a criminal prosecution. There are statutes and regulations in which Parliament has seen fit to create offences and make people responsible before criminal courts although there is an absence of mens rea; but it is certainly not the court’s duty to be acute to find that mens rea is not a constituent part of a crime. It is of the utmost importance for the protection of the liberty of the subject that a court should always bear in mind that, unless a statute either clearly or by necessary implication, rules out mens rea as a constituent part of a crime, the court should not find a man guilty of an offence against the criminal law unless he has a guilty mind.”

E In *Harding v. Price* (94) LORD GODDARD, C.J., re-affirmed the principle which he had expressed and pointed to the great importance of adhering to it in days when offences are multiplied to an extent which makes it difficult for the most law-abiding subjects in some way or at some time to avoid offending against the law. He expressed the view (95):

F “If, apart from authority, one seeks to find a principle applicable to this matter it may be thus stated. If a statute contains an absolute prohibition against the doing of some act, as a general rule mens rea is not a constituent of the offence; but there is all the difference between prohibiting an act and imposing a duty to do something on the happening of a certain event. Unless a man knows that the event has happened, how can he carry out the duty imposed?”

G I pass, then, to a consideration of the Act of 1964, with which alone is this case concerned. I proceed on the basis that, unless a statute otherwise provides, there should be no conviction if there is no mens rea. A statute may by express provision enact that in certain circumstances there will be what is often called strict or absolute liability. Parliament may consider that it is so important to prevent some particular act from being committed that it absolutely forbids it to be done (see per CHANNELL, J. in *Pearks, Gunston and Tee, Ltd. v. Ward* (96)).

I It is important to consider what is meant when it is said that before there can be a conviction under s. 1 of the Act of 1964 there must be “mens rea”.

(88) [1881-85] All E.R. Rep. 412; (1884), 13 Q.B.D. 207.

(89) [1895-99] All E.R. Rep. 1167; [1895] 1 Q.B. 918.

(90) [1895-99] All E.R. Rep. at p. 1169; [1895] 1 Q.B. at p. 921.

(91) (1873), L.R. 8 C.P. 322.

(92) (1946), 175 L.T. 306.

(93) (1946), 175 L.T. at p. 307.

(94) [1948] 1 All E.R. 283; [1948] 1 K.B. 695.

(95) [1948] 1 All E.R. at p. 285; [1948] 1 K.B. at p. 701.

(96) [1900-03] All E.R. Rep. 228 at p. 232; [1902] 2 K.B. 1 at p. 11.

When it was enacted that "a person who has a substance in his possession" in contravention of the provision in the early part of s. 1 should be liable to punishment, did Parliament intend that a person should only be so liable if he knowingly had such a substance in his possession and knowingly had it with a guilty mind? The word "knowingly" is not used. Should it be implied as being ordinarily a requirement in a criminal prosecution? Must the prosecution prove that an accused had a guilty mind?

In considering these questions the wording in the Act of 1964 must be regarded. It is a declared purpose of the Act to prevent the misuse of drugs. If actual possession of particular substances which are regarded as potentially damaging is not controlled there will be danger of the misuse of them by those who possess them. They might be harmfully used; they might be sold in most undesirable ways. Parliament set out therefore to "penalise" possession. That was a strong thing to do. Parliament proceeded to define and limit the classes and descriptions of people who alone could possess. All the indications are that save in the case of such persons Parliament decided to forbid possession absolutely.

It might well happen that a police constable acting in the course of his duty would come into possession of a prohibited substance. He might come into possession after being armed with a search warrant to search some premises. He would know what he had but no one could say that he would have a guilty mind. Yet Parliament found it necessary to make express provision to withdraw the prohibition in such a case. It is enacted in s. 1 (4) of the Act of 1964:

"Subsection (1) above shall not be taken to prohibit the possession of a substance by any servant of Her Majesty or constable acting in the course of his duty as such."

Servants of Her Majesty acting in the course of their duty would certainly not have a guilty mind.

If a prohibited substance was put in a sealed package and sent by post the postmen who, in the performance of their duty, handled the package would neither know of the contents of the package nor would they have guilty minds. They are, however, given immunity by the regulation (97) which was made on Sept. 17, 1964, and laid before Parliament on Sept. 24, 1964. In the same way carriers and those employed by carriers when acting as such might be in possession of prohibited substances without having knowledge of what it was they possessed; they would not have guilty minds. They also have the protection given them by the regulation to which I have referred.

In my view, the wording of s. 1 of the Drugs (Prevention of Misuse) Act 1964 is clear and emphatic. Unless a person has justification as specifically laid down "it shall not be lawful" for him to have a prohibited substance in his possession. For the reasons that I have earlier given I think that, before the prosecution can succeed, they must prove that a person knowingly had in his possession something which in fact was a prohibited substance. In my view, the prosecution has discharged that onus in this case. Was it, however, for the prosecution to prove that the appellant knew the nature and quality of that which he had? In my view, it was not. The evidence proved that what the appellant had in his possession was B-aminopropylbenzine or a salt of that substance. I cannot think, and indeed it could hardly be suggested, that the intention of Parliament as shown by the words of the enactment was that it had to be proved by the prosecution that the appellant, being consciously in possession of something, was in fact consciously in possession of what he knew to be a salt of B-aminopropylbenzine. Though the appellant shrank from asserting that such obligation of proof rested on the prosecution, I find it difficult to see that there is any justification for a suggestion of a sort of half-way obligation on the prosecution, i.e., of proving that the appellant did not believe that he had lawful authority to have what he had.

(97) The Drugs (Prevention of Misuse) Exemptions Regulations 1964, S.I. 1964 No. 1528.



- A For the reasons which I have set out I conclude, therefore, that the appellant was shown "to have in his possession a substance for the time being specified in the Schedule" to the Act of 1964. What follows? The words of s. 1 are quite clear. "It shall not be lawful for a person to have in his possession" such a substance. If the appellant did have such possession it was not lawful. The lawfulness or unlawfulness of his possession cannot depend on whether or not he knew the provisions of the Act of 1964. Ignorantia juris non excusat. If he had possession and if none of the exceptions or exemptions or permissions applied, then it was unlawful possession. The Act of 1964 so proclaimed. Unauthorised possession of a scheduled substance is strictly prohibited and is unlawful. It cannot become lawful because a possessor does not know of the Act of Parliament. Nor can it become lawful because the possessor does not know or realise that what he in fact possesses is a scheduled substance. All possession of a scheduled substance is unlawful unless it is authorised possession and "a person who has a substance in his possession in contravention of the foregoing provision shall be liable" to certain penalties.

- The intention of Parliament is revealed by the words used in their context in an Act which, with the object of preventing the misuse of certain drugs, penalises their very possession except in strictly limited and carefully defined cases. If there is possession which is unlawful, there is a liability to certain penalties. No exemptions are made. Once possession is established, with such mental element as is involved in the proof of possession, then (if it is unauthorised) a liability to certain penalties up to certain maxima, according to whether there is a summary conviction or conviction on indictment, inevitably arises.

- E I think that in criminal matters it is important to have clarity and certainty. I have endeavoured to set out my view as to what the Act of 1964 denotes by the words "to have in his possession". So far as a summary is possible my conclusion is that in a prosecution under s. 1 it is for the prosecution to prove (a) that the accused was knowingly in control of some article or thing or substance or package or container in circumstances which had enabled him to know or to discover (or could have enabled him, had he so wished, to know or to discover) what it was that he had before assuming control of it or continuing to be in control of it, and (b) that, whether the accused knew this or not, the article or thing or substance or package or container that he had, consisted of, or contained, a prohibited substance.

I would dismiss the appeal.

- G LORD GUEST: My Lords, the appellant was convicted at the Inner London Quarter Sessions on a charge that he on Nov. 18, 1966, not being authorised, had in his possession a substance specified in the schedule to the Drugs (Prevention of Misuse) Act 1964, namely, twenty thousand tablets containing amphetamine sulphate. He appealed to the Court of Appeal (Criminal Division) (98) *inter alia* on the ground that the learned chairman had misdirected the jury in law. The alleged misdirection was contained in the following passages from the summing-up:

- I "There is absolute prohibition in law unless you have lawful authority, that is to say, a medical prescription or something of the kind; it is absolute prohibition for anybody to have . . . Now you have just listened to an argument going on. There are statutes in law which charge matters relating to possession, but they use the words 'knowingly had in your possession'. This statute does not. This statute says you must not have in your possession in any circumstances whatsoever, unless you have got a lawful excuse . . . Now then, members of the jury, it was under control because 'possession' means that you have control. [The appellant] quite clearly had, and does not deny he had, control of these pills, and if he had, and it is a matter for you to make up your minds about because you are the judges of fact—if you

think the evidence is, he does not dispute it, that he had control of that box which in fact turned out to be full of amphetamine sulphate, that creates the original offence; it is only mitigation that he did not know."

His appeal was dismissed, but the court granted him leave to appeal to the House of Lords on the following certificate:

"Whether for the purposes of s. 1 of the Drugs (Prevention of Misuse) Act 1964, a defendant is deemed to be in possession of a prohibited substance when to his knowledge he is in physical possession of the substance but is unaware of its true nature."

[HIS LORDSHIP read s. 1 (1) of the Drugs (Prevention of Misuse) Act 1964, which is set out at p. 370, letters E and F, ante, and continued:] The facts of the case are not entirely clear and can only be derived from the chairman's summing-up to the jury. On Nov. 18, 1966, the appellant who was driving a mini-van was stopped by a policeman and questioned as to the contents of the van. There were three cases in the van and in answer to the policeman's questions he said it was rubbish which he was intending to dump. The packages were opened by the police; in one of them was scent and in the other a package of twenty thousand tablets of amphetamine sulphate. The accused in evidence gave this description of the origin of the package. He said he was selling the scent as a side line and that he had arranged to meet a friend in a café in Walthamstow. When he went there, the proprietor told him that his friend had been in but had gone away and had left something for him under the counter. The accused looked under the counter and found two boxes, both of which he assumed contained scent. He collected them and drove away. The accused said he took the box containing the pills by accident, that he had no idea what was in the box or how they got there. The proprietor of the café says that a man came in and left one parcel which he, the proprietor, put under the counter. When he put it there, there was only one box. He could give no account of how the second box came to be there.

The first issue which is raised very sharply is whether the court below (99) were correct in their interpretation of s. 1 of the Act of 1964. Is it right to say that the accused is in possession of a prohibited substance when he knows he is physically in possession of the substance but is unaware of its true nature? A great number of authorities were referred to in which the meaning of "possession" has been considered. The burden of these cases is that there must be knowledge before there can be possession. There is no possession by a man until he knows what he has got. This, however, leaves the question of what is meant by "what". In *R. v. Ashwell* (100) the accused asked for the loan of a shilling. The prosecutor gave him a sovereign, both believing it was a shilling; subsequently the accused discovered that the coin was a sovereign. A court of fourteen judges were equally divided as to whether he was guilty of larceny at common law when he fraudulently appropriated the sovereign to his own use. A much quoted passage is that of CAVE, J. (101):

"If these cases are rightly decided, as I believe them to be, they establish the principle that a man has not possession of that of the existence of which he is unaware. A man cannot without his consent be made to incur the responsibilities towards the real owner which arise even from the simple possession of a chattel without further title, and if a chattel has, without his knowledge, been placed in his custody, his rights and liabilities as a possessor of that chattel do not arise until he is aware of the existence of the chattel, and has assented to the possession of it."

Also by LORD COLERIDGE, C.J., who said (102):

"In good sense it seems to me he did not take it till he knew what he had got; and when he knew what he had got, that same instant he stole it."

(99) [1967] 3 All E.R. 93.

(101) (1885), 16 Q.B.D. at p. 201.

(100) (1885), 16 Q.B.D. 190.

(102) (1885), 16 Q.B.D. at p. 225.

**A** Thereafter the decisions are difficult to reconcile, compare *Cundy v. Le Cocq* (103) with *Sherras v. de Rutzen* (104).

While these cases were mainly decided in relation to the crime of larceny, they do illustrate the principle that there must, in relation to possession, be some conscious mental element present. The sleeper who has a packet put into his hand during sleep has not got possession of it during sleep, but if when he wakes up he

**B** grasps the article, it is then in his possession. If someone surreptitiously puts something into my pocket, I am not in possession of it until I know that it is there. The remarks of ALDERSON, B., in *R. v. Woodrow* (105) are to this effect (106):

“ . . . the words of the Act, though they are no doubt very stringent, are nevertheless very clear, and any retailer of tobacco who has an adulterated article in his possession is liable to the penalty. I cannot say that this man had not the tobacco in his possession, because he clearly knew it. He did not know it was in an adulterated state, but he knew he had it in his possession; and the question of ‘ knowingly ’, it appears to me, is involved in the word possession. That is, a man has not in his possession that which he does not know to be about him. I am not in possession of anything which a person has put into my stable without my knowledge. It is clear, therefore, that possession includes a knowledge of the facts as far as the possession of the article is concerned.”

**D**

This would seem to accord with commonsense. In the *DICTIONARY OF ENGLISH LAW* (EARL JOWITT) 1959 at p. 1367 “ possession ” is defined as follows:

**E** “ POSSESSION, the visible possibility of exercising physical control over a thing, coupled with the intention of doing so, either against all the world, or against all the world except certain persons. There are, therefore, three requisites of possession. First, there must be actual or potential physical control. Secondly, physical control is not possession, unless accompanied by intention; hence, if a thing is put into the hand of a sleeping person, he has not possession of it. Thirdly, the possibility and intention must be visible or evidenced by external signs, for if the thing shows no signs of being under the control of anyone, it is not possessed; . . . ”

**F**

In the end of all, however, the meaning of “ possession ” must depend on the context. *Lockyer v. Gibb* (107) was a case under reg. 9 of the Dangerous Drugs (No. 2) Regulations 1964, which is in similar terms to s. 1 of the Drugs (Prevention of Misuse) Act 1964. Regulation 20 defines “ possession ” for the purposes

**G** of these regulations in the following way:

“ For the purposes of these regulations a person shall be deemed to be in possession of a drug if it is in his actual custody or is held by some other person subject to his control or for him and on his behalf.”

In that case LORD PARKER, C.J., said (108):

**H** “ In my judgment, before one comes to a consideration of a necessity for mens rea or, as it is sometimes said, a consideration of whether the regulation imposed an absolute liability, it is of course necessary to consider possession itself. In my judgment, it is quite clear that a person cannot be said to be in possession of some article which he or she does not realise is, or may be, in her handbag, in her room, or in some other place over which she had control.

**I** That, I should have thought is elementary; if something were slipped into one’s basket and one had not the vaguest notion it was there at all, one could not possibly be said to be in possession of it.”

(103) [1881-85] All E.R. Rep. 412; (1884), 13 Q.B.D. 207.

(104) [1895-99] All E.R. Rep. 1167; [1895] 1 Q.B. 918.

(105) (1846), 15 M. & W. 404.

(106) (1846), 15 M. & W. at p. 418.

(107) [1966] 2 All E.R. 653; [1967] 2 Q.B. 243.

(108) [1966] 2 All E.R. at p. 655; [1967] 2 Q.B. at p. 248.



Later he said (109):

"... in my judgment, under this provision, while it is necessary to show that the appellant knew that she had the articles which turned out to be a drug, it is not necessary that she should know that in fact it was a drug or a drug of a particular character."

In my view this is the correct connotation of "possession" in the context of the Act of 1964.

It is said, however, that to constitute an offence under s. 1 (1) of the Act of 1964, mens rea is necessary. To the extent that there must be knowledge that the accused has possession of the package or bottle which contains the drugs I agree; but the appellant's argument went further, to the extent that this is not an absolute offence but requires knowledge not only of the existence of the package but also of the substance itself, although not of its precise nature. For my part I can see no halfway house between the offence being absolute in the sense that mere possession of the container constitutes the offence and the offence being only constituted by knowledge in the full sense. If knowledge is necessary, this must mean that "knowingly" must precede in s. 1 (1) the words "to have in his possession". Which construction is to be preferred must depend on the language of the section.

In construing the section certain considerations have to be borne in mind. The title of the Act is "Drugs (Prevention of Misuse) Act 1964" and the long title is "An Act to penalise the possession, and restrict the importation, of drugs of certain kinds". The title thus indicates that the evil is the misuse of drugs and that their possession is to be penalised. The actual words of s. 1 (1) "it shall not be lawful for a person to have in his possession" a prohibited substance could not make it clearer that subject to certain exemptions the possession of prohibited drugs is an offence. With respect to those who hold that this is not an absolute offence I cannot conceive of any words which could make the offence more absolute. It is as absolute as it can be. I am not inclined to place much weight on whether there is or is not a presumption that mens rea is a necessary ingredient in a statutory offence, but if there was, the presumption has to some extent been whittled down in recent years (see *Harding v. Price* (110)) and in any event the language of s. 1 in my view is sufficient to rebut any such presumption. The very doing of the act, as has been said, imputes mens rea. Other factors which are relevant to be taken into account are the mischief aimed at and the object of the prohibition. The mischief is clearly the unauthorised possession of the drugs which are injurious to health unless administered under prescription. The social evil of the trafficking of drugs is clearly struck at.

Last, but by no means least, there must be consideration of the case of evasion of the offence if mens rea is required. The very nature of the drug, namely, small pills, makes secretion, easy and detection difficult. If the correct interpretation of s. 1 of the Act of 1964 is that the prosecution are required to prove knowledge by the accused of the existence of the substance this will be, in my view, a drug peddler's charter in which a successful prosecution will be well-nigh impossible in the case of the trafficker who conceals the drugs and on questioning remains silent or at any rate refuses to disclose the origin of the drug. If the offence involves knowledge, this knowledge must extend not only to the prohibited act but also the totality of the prohibition (see *Gaumont British Distributors v. Henry* (111)). If, therefore, this is not an absolute offence the prosecution will, in my view, require to establish knowledge by the accused not only of possession of the actual substance but also of the nature of the substance, namely, that it is a prohibited drug under the Act of 1964. This would, in my view, lead to wide-scale evasion of the Act. The test has sometimes been put as to which interpretation

(109) [1966] 2 All E.R. at p. 656; [1967] 2 Q.B. at p. 249.

(110) [1948] 1 All E.R. at p. 285; [1948] 1 K.B. at p. 701.

(111) [1939] 2 All E.R. 808; [1939] 2 K.B. 711.

- A would best assist in achieving the object of the Act (see *Lim Chin Aik v. Reginam* (112), per LORD EVERSHED). To this question I unhesitatingly answer that the offence is absolute. In fact I would go further and say that to require mens rea would very largely defeat the purpose and object of the Act of 1964. A further indication that an absolute offence was intended is, in my view, that certain exemptions are provided in the Act and the Secretary of State is empowered to
- B grant further exemptions which he has done in relation to public carriers and the post office (The Drugs (Prevention of Misuse) Exemptions Regulations 1964).

The precise question arose in the Canadian case of *Beaver v. Reginam* (113) where a court of five judges were divided three and two and held that it was not an absolute offence. The arguments pro et con are clearly set out in the judgment of the majority given by CARTWRIGHT, J., and of the minority by FAUTEUX, J.

- C I prefer the minority judgment.

Absolute offences are by no means unknown to our law and have been created inter alia in relation to firearms (Firearms Act, 1937 (114)), and shotguns (Criminal Justice Act 1967, s. 85) which Acts create serious offences. A common feature of these Acts and the Drugs Act is that they all deal with dangerous substances where the object is to prevent unauthorised possession and illegal

- D trafficking in these articles.

In *Chajutin v. Whitehead* (115) it was an offence under the Aliens Order, 1920, to be in possession of an altered passport without lawful authority. The court held that if a person is in possession of an altered passport, it is not necessary for the prosecution to prove guilty knowledge of the alteration. In the earlier case of *R. v. Woodrow* (116) a dealer in and retailer of tobacco was convicted of having

E in his possession adulterated tobacco, although he had purchased it as genuine and had no knowledge or cause to suspect that it was not so. These cases bear a strong resemblance to the present.

The argument for the appellant, which has found favour with some of your lordships, is that where knowledge of possession of the article is proved, if there is absence of knowledge of the quality of the article then that is possession under

F the Act; but if there is knowledge of the existence of the package but no knowledge of the contents of the package, that is not possession. With great respect to those who hold this view I am unable to see how, if I know that I have a parcel in my possession I am not also in possession of its contents. The argument seems to be a metaphysical distinction which Parliament could not have intended to enter into the construction of this Act of Parliament, the express purpose of which is to

- G penalise the possession of prohibited drugs. This construction of the Act moreover will not prevent the conviction of a so-called "innocent possessor" of drugs, who knows what they are but has them in his possession for a perfectly legitimate though not authorised purpose. It will, however, assist in the acquittal of the peddler who has drugs concealed in a package. To take a concrete example, however innocent the purpose for which a person has a drug openly in his possession, provided he is not an exempt person he will be guilty, but if he conceals the drug he will not be convicted, unless there are circumstances from which knowledge can be inferred. This construction is to import the element of mens rea into the offence because it requires knowledge of the existence of the very thing or res which is the subject of the charge. I may ask—"Why stop there? Why not require also knowledge of the quality of the substance because it is the possession
- I of the prohibited substance that is the offence under the Act?"

In my opinion, the Court of Appeal (Criminal Division) (117) were right and the appeal should be dismissed.

(112) [1963] 1 All E.R. at p. 228; [1963] A.C. at p. 174.

(113) [1957] S.C.R. 531.

(114) Now Firearms Act 1965.

(115) [1938] 1 All E.R. 159; [1938] 1 K.B. 506.

(116) (1846), 15 M. & W. 404.

(117) [1967] 3 All E.R. 93.

**LORD PEARCE:** My Lords, the illicit drug traffic is a very serious evil. Parliament intended by the Act of 1964 to prevent it so far as possible by penalising the unauthorised possession of certain drugs. There are three methods, broadly speaking, by which Parliament may have intended to achieve its purpose. The first (for which the appellant contends) is this. Parliament, it is said, intended that the word "possession" should connote some knowledge of the thing possessed and of its quality. It also intended that a defendant should only be convicted if he had a guilty mind. The extent of the knowledge and the exact nature of the guilty mind are problems which obviously overlap. The second possible view (for which the Crown contend) is that Parliament intended that the defendant, even if innocent of any knowledge of the nature of the drug or any guilty knowledge, must be convicted when once it was shown that he had to his knowledge physical control of a thing which (whether he knows it or not) is or contains unlawful drug. Thirdly, Parliament may have intended what was described as a "half-way house" in the full and able argument by counsel on both sides. Each acknowledged its possibility and certain obvious advantages, but neither felt able to give it any very solid support. By this method the mere physical possession of drugs would be enough to throw on a defendant the onus of establishing his innocence, and unless he did so (on a balance of probabilities) he would be convicted. The Explosive Substances Act, 1883, produces this fair and sensible result but it does so by express words ("Unless he can show that he had it in his possession for a lawful object"). Support for such a result is to be found in the dictum of DAY, J., in *Sherras v. de Rutzen* (118) where he founds his view on the absence of the word "knowingly". Again, there is some support for this view in *Harding v. Price* (119) (see the judgment of SINGLETON, J.). In *Roper v. Taylor's Central Garages (Exeter), Ltd.* (120), however, DEVLIN, J., puts forward cogent reasons against it. Again in *Lim Chin Aik v. Regina* (121), the Judicial Committee expresses a view against it. Unfortunately I do not find the half-way house reconcilable with the speech of VISCOUNT SANKEY, L.C., in *Woolmington v. Director of Public Prosecutions* (122). Reluctantly, therefore, I am compelled to the decision that it is not maintainable. Ultimately the burden of proof is always on the prosecution, unless it has been shifted by any statutory provision. If, therefore, there is initially in the crime an element of knowledge or guilty mind, the jury must at the end of the case acquit, if they are left in doubt.

Thus one is left with a choice between two alternatives to each of which there are objections. If this is an absolute offence, without an element of knowledge, people with no intention to break the law may find themselves with no defence, because they innocently have unlawful drugs in their physical possession. Various circumstances which could produce this result have been envisaged in argument. If, on the other hand, knowledge or guilty mind must be proved this is difficult for the prosecution to prove and it is much easier for the drug peddler to escape by some story which is just plausible enough to raise some doubt. These considerations are well set out, together with the various authorities, in the conflicting judgments in *Beaver v. Regina* (123) in the Supreme Court of Canada, a case concerned with "being in possession of a drug" under the Canadian Opium and Narcotic Act, 1952.

The express words of the Drugs (Prevention of Misuse) Act 1964, "have in his possession" admittedly connote knowledge of some sort. It is conceded by the Crown that these words do not include goods slipped into a man's pocket without his knowledge. In *Lockyer v. Gibb* (124) an offence under the Dangerous

(118) [1895-99] All E.R. Rep. at p. 1169; [1895] 1 Q.B. at p. 921.

(119) [1948] 1 All E.R. at p. 286; [1948] 1 K.B. at p. 704.

(120) (1951), 2 T.L.R. 285.

(121) [1963] 1 All E.R. at p. 228; [1963] A.C. at p. 173.

(122) [1935] 1 All E.R. 1 at p. 8; [1935] A.C. 462 at p. 481.

(123) [1957] S.C.R. 531.

(124) [1966] 2 All E.R. 653; [1967] 2 Q.B. 243.



- A** Drugs Act 1964 (and regulations made thereunder) was held to be absolute; but LORD PARKER, C.J., there rightly said (125):

“ In my judgment, it is quite clear that a person cannot be said to be in possession of some article which he or she does not realise is, or maybe, in her handbag, in her room, or in some other place over which she has control. That I should have thought is elementary; if something were slipped into one’s basket and one had not the vaguest notion it was there at all, one could not possibly be said to be in possession of it.”

- B** The difficulty comes when a “ possessor ” knows that he has something, but is either unaware what it is or is completely mistaken as to its qualities, e.g., thinks that the package contains scent (as was suggested here) or thinks that the tablets are innocent aspirin when really they are guilty heroin. On the Crown’s contention it is enough if a man knows that he physically possesses a thing even though he does not know its nature or is mistaken in its qualities.

- C** For the purposes of the crime of larceny there are many intricate authorities dealing with possession. In *R. v. Ashwell* (126) a full court of fourteen judges was evenly divided. The main point of the dispute was whether for the purposes of larceny the recipient of a coin which both he and the giver thought to be a shilling but which the recipient later found to be a sovereign took possession of the coin at the earlier time when he first received it in ignorance of its true nature, or at the later time when he discovered that it was a sovereign. CAVE, J., after referring to earlier authorities said (127):

- E** “ If these cases are rightly decided, as I believe them to be, they establish the principle that a man has not possession of that of the existence of which he is unaware.”

- When, however, a man knows that he physically has an article in his possession, how far does a mistake as to its essential attributes nullify the apparent possession? It would be, for instance, quite unreal (and particularly in such a context as one is here considering) to say that a man who bought and kept a so-called authentic Rembrandt for years, never had it in his possession because he later found by X-ray examination that it was a skilful fake. When once one draws a distinction between a thing and its qualities, one gets involved in philosophic intricacies which are not very appropriate to a blunt Act of Parliament intended to curb the drug traffic. *R. v. Ashwell* (126) was concerned with the transfer of ownership and no relevant deductions can be drawn from it in the present case. I agree with my noble and learned friend, LORD WILBERFORCE, in his analysis of the concept of possession and, indeed, with the whole of his opinion in this matter.

- G** LORD READING, C.J., in *Webb v. Baker* (128) said that the word “ possession ” should be given a popular and not a narrow construction for the purpose of the provision there in question (Public Health Act, 1875, s. 117). VISCOUNT CALDECOTE, C.J., in *Oliver v. Goodger* (129) also remarked that it was not a term of art. Again, LORD PARKER, C.J., in *Towers & Co., Ltd. v. Gray* (130) after observing that the term “ possession ” is always giving rise to trouble, and after considering various cases there cited, concluded, rightly as I think, that in each case its meaning must depend on the context in which it was used.

- H** One must, therefore, attempt from the apparent intention of the Act itself to reach a construction of the word “ possession ” which is not so narrow as to stultify the practical efficacy of the Act or so broad that it creates absurdity or injustice.

(125) [1966] 2 All E.R. at p. 655; [1967] 2 Q.B. at p. 248.

(126) (1885), 16 Q.B.D. 190.

(127) (1885), 16 Q.B.D. at p. 201.

(128) [1916] 2 K.B. 753 at p. 759.

(129) [1944] 2 All E.R. 481 at p. 482.

(130) [1961] 2 All E.R. 68 at p. 71; [1961] 2 Q.B. 351 at p. 361.

Parliament was clearly intending to prevent or curtail the drug traffic. Having defined a series of persons who may lawfully possess the drugs, it makes possession by all others unlawful, thus putting the drugs out of the reach of unauthorised persons. It was not merely forbidding them to possess drugs for unlawful or guilty objects. It was forbidding them to possess the drugs at all. Thus it would block up all unauthorised channels through which drugs might flow and would thereby establish a strict control of their dissemination. It was forbidding unauthorised possession even for worthy motives, e.g., by the person who, though not authorised, volunteers to carry them from the chemist (who is entitled to sell them) to the patient (who is entitled to consume them). This is made clear by the exemption (in s. 1 (4)) of "any servant of Her Majesty or constable acting in the course of his duty as such". There is an assumption that the Act of 1964 was intending to penalise those with no guilty intentions, since otherwise such an exemption would be unnecessary and absurd. As soon as everyone who has a good motive may with impunity possess them, the efficacy of the control is injured. For that reason it cannot, I think, have been intended that it should be a defence for an unauthorised person to show that he may have possessed the drugs for a laudable object or with no guilty intentions. For the unauthorised person is simply not allowed to have them for any object whatever.

For the same reason I do not think that possession was intended to be limited by legal technicalities to one of two alternatives, namely, either to mere physical possession or to mere legal possession. Both are forbidden. A man may not lawfully own the drugs of which his servant or his bailee has physical possession or control. Nor may he lawfully have physical possession or control as servant or bailee of drugs which are owned by others. By physical possession or control I include things in his pocket, in his car, in his room and so forth. That seems to me to accord with the general popular wide meaning of the word "possession" and to be in accordance with the intention of the Act.

On the other hand, I do not think that Parliament intended to make a man guilty of possessing something when he did not know that he had the thing at all. It is here that the real difficulties begin.

LORD PARKER, C.J., in *Lockyer v. Gibb* (131) was right (and this is conceded by both sides) in taking the view that a person did not have possession of something which had been "slipped into his bag" without his knowledge. One may, therefore, exclude from the "possession" intended by the Act of 1964 the physical control of articles which have been "planted" on him without his knowledge; but how much further is one to go? If one goes to the extreme length of requiring the prosecution to prove that "possession" implies a full knowledge of the name and nature of the drug concerned, the efficacy of the Act is seriously impaired, since many drug peddlars may in truth be unaware of this. I think that the term "possession" is satisfied by a knowledge only of the existence of the thing itself and not its qualities, and that ignorance or mistake as to its qualities is not an excuse. This would comply with the general understanding of the word "possess". Though I reasonably believe the tablets which I possess to be aspirin, yet if they turn out to be heroin I am in possession of heroin tablets. This would be so I think even if I believed them to be sweets. It would be otherwise if I believed them to be something of a wholly different nature. At this point a question of degree arises as to when a difference in qualities amounts to a difference in kind. That is a matter for a jury who would probably decide it sensibly in favour of the genuinely innocent but against the guilty.

The situation with regard to containers presents further problems. If a man is in possession of the contents of a package, prima facie his possession of the package leads to the strong inference that he is in possession of its contents;

- A** but can this be rebutted by evidence that he was mistaken as to its contents? As in the case of goods that have been "planted" in his pocket without his knowledge, so I do not think that he is in possession of contents which are quite different in kind from what he believed. Thus the *prima facie* assumption is discharged if he proves (or raises a real doubt in the matter) either (a) that he was a servant or bailee who had no right to open it *and* no reason to suspect
- B** that its contents were illicit or were drugs or (b) that although he was the owner he had no knowledge of (including a genuine mistake as to) its actual contents or of their illicit nature and that he received them innocently and also that he had had no reasonable opportunity since receiving the package of acquainting himself with its actual contents. For a man takes over a package or suit-case at risk as to its contents being unlawful if he does not immediately examine it
- C** (if he is entitled to do so). As soon as may be he should examine it and if he finds the contents suspicious reject possession by either throwing them away or by taking immediate sensible steps for their disposal.

So to read the Act of 1964 would, I think, accord with what Parliament intended and would give it a sense which would accord with the practical views of a jury, although I realise that a deeper investigation of the legal implications

- D** of possession might support various differing views. It would leave some unfortunate victims of circumstances who move innocently but rashly in shady surroundings and who carry packages or tablets for strangers or unreliable friends. I think, however, that even they would have an opportunity of ventilating their story and in some cases, if innocent of any knowledge and bad motives, obtaining an acquittal. Some of the persons in some of the rather far-fetched
- E** circumstances which have been envisaged in argument would still be left in difficulties; but I do not think that Parliament intended to cater for them in its efforts to stop a serious evil.

*Lockyer v. Gibb* (132) held that a similar offence under the Dangerous Drugs Act 1964, was an absolute offence. The fact that in that case there was a regulation made under the Act with regard to the meaning of the word "possession" cannot affect the question whether the Act was creating an absolute offence. Moreover in other respects the arguments as to whether an absolute offence was intended are the same under both Acts. I think under both Acts an absolute offence was intended.

- F** Had there been a minimum penalty imposed, as under the Canadian Act considered in *Beaver v. Reginam* (133) that would have been a strong argument
- G** in favour of the offence not being absolute. But here there is no minimum penalty. In an appropriate case the judge may inflict no penalty.

- Again, if the meaning of the words "unlawful possession" included articles which had been "planted" on a man, or insinuated into his possession without his knowledge, that would be a very strong argument indeed against the offence being absolute. Since, however, there is, in my opinion, some limited element
- H** of knowledge in the word "possession" the force of that argument is lessened.

- The gravity of the evil which the Act of 1964 is seeking to prevent and the dangers which are presented by the passing of drugs through informal or unauthorised channels, even where some of the unauthorised persons have no improper motives or are merely careless or indifferent, indicate the importance
- I** of closing them altogether. The Act forbids them. It expressly exempts certain persons who would obviously have no *mens rea*. The further exemption from the Act of all those who cannot be shown to have a guilty intention would seriously impair its effectiveness and the express exemptions show that this was not intended. While appreciating the force of the arguments which have been put against it, I am of opinion that the Act of 1964 comes within the class of

(132) [1966] 2 All E.R. 653; [1967] 2 Q.B. 243.

(133) [1957] S.C.R. 531.



Acts referred to by WRIGHT, J. in *Sherras v. de Rutzen* (134) in which the offence is absolute. A

It would, I think, be an improvement of a difficult position if Parliament were to enact that when a person has ownership or physical possession of drugs he shall be guilty unless he proves on a balance of probabilities that he was unaware of their nature or had reasonable excuse for their possession. In the present case, therefore, there was a very strong *prima facie* inference of fact B that the accused was in possession of the drugs; but he was entitled to try to rebut (or raise a doubt as to) that inference by putting before the jury his defence that, although the package itself was clearly in his possession, the contents were not. He could have sought to persuade them in spite of his lies and evasions that he received the contents innocently, that he genuinely believed the package to contain scent, and that he had no reasonable opportunity of examining its C contents. The chairman, however, told the jury:

"If you think the evidence is, he does not dispute it, that he had control of that box which in fact turned out to be full of amphetamine sulphate, that creates the original offence; it is only mitigation that he did not know."

The direction to which the appellant was entitled would, in my opinion, be approximately as follows. The Drugs (Prevention of Misuse) Act 1964 forbids D possession of these drugs. Whether he possessed them with an innocent or guilty mind or for a laudable or improper purpose is immaterial, since he is not allowed to possess them. If he possessed them, he is guilty. If a man has physical control or possession of a thing that is sufficient possession under the Act of 1964 provided that he knows that he has the thing; but a man does not (within E the meaning of the Act of 1964) possess things of whose existence he is unaware. The prosecution have here proved that he possessed the parcel, but have they proved that he possessed its contents also? There is a very strong inference of fact in any normal case that a man who possesses a parcel also possesses its contents, an inference on which a jury would in a normal case be justified in finding possession. A man who accepts possession of a parcel normally accepts F possession of the contents. That inference, however, can be disproved or shaken by evidence that, although a man was in possession of a parcel, he was completely mistaken as to its contents and would not have accepted possession had he known what kind of thing the contents were. A mistake as to the qualities of the contents, however, does not negative possession. Many people possess things of whose exact qualities they are unaware. If the accused knew that the contents G were drugs or were tablets, he was in possession of them, though he was mistaken as to their qualities. Again if, though unaware of the contents, he did not open them at the first opportunity to ascertain (as he was entitled to do in this case) what they were, the proper inference is that he was accepting possession of them. (It would be otherwise if he had no right to open the parcel.) Again, if he suspected that there was anything wrong about the contents when he received H the parcel, the proper inference is that he was accepting possession of the contents by not immediately verifying them. (This would, in my opinion, apply also to a bailee.)

In the present case you may think that the difference between scent and I tablets is a sufficient difference in kind to entitle the accused to an acquittal if on the whole of the evidence it appears that he may have genuinely believed that the parcel contained scent, and that he may not have had any suspicions that there was anything illicit in the parcel, and that he had no opportunity of verifying its contents. For in that case it is not proved that he was in possession of the contents of the parcel.

The appellant has, therefore, been deprived of the chance of putting before the jury a defence which was in theory open to him on the facts of this case; but

**A** the evidence against him was so strong that no jury properly directed would have acquitted him. In my opinion, therefore, the proviso should be applied and I would dismiss the appeal.

**B** **LORD WILBERFORCE:** My Lords, the appellant was charged with an offence under s. 1 of the Drugs (Prevention of Misuse) Act 1964. This section provides that:

“Subject to any exemptions for which provision may be made by regulations made by the Secretary of State and to the following provisions of this section, it shall not be lawful for a person to have in his possession a substance for the time being specified in the Schedule to this Act unless . . .”

**C** There follow conditions as to possession by virtue of a medical prescription. Subsection (2) gives a considerable list of exempted persons, possession by whom is not prohibited, and more exemptions are stated in sub-s. (3) and sub-s. (4). The Secretary of State has exercised his power of further exemption under sub-s. (1) by statutory instrument.

The question certified as fit for the decision of this House is:

**D** “Whether for the purposes of s. 1 of the Drugs (Prevention of Misuse) Act 1964, a defendant is deemed to be in possession of a prohibited substance when to his knowledge he is physically in possession of the substance but is unaware of its true nature.”

**E** I take this as raising the general question as to the nature and extent of knowledge, or awareness, which must be shown against an accused person found in actual control of a prohibited substance, in order that the section may apply.

When a person is found, as was the appellant, having control of a prohibited drug (I use control to describe a purely physical situation, including that of having control of a container or package in which the drug may be discovered), the question whether, in order to found a charge under the section, any degree of knowledge that he had the drug must be shown may be raised in two ways.

**F** It may be asked whether in order to constitute possession some intention or knowledge must be shown in addition to the fact of control, or the question may be whether, in order that the statutory offence may be committed, some guilty intention or knowledge, or mens rea, must be proved. It is obvious that these two questions are related. For if one comes to the conclusion that knowledge is required for possession, then in proving possession a sufficient mens rea is

**G** likely to have been established, and no second stage is needed. Conversely if one believes that mens rea is necessary in order to constitute an offence, then it cannot be said that mere ignorant control would satisfy the section. In my opinion, rather than split up the section into two separate parts, it should be regarded as a whole and one single question should be asked—what kind of control with that mental element does the Act intend to prohibit?

**H** I can say at once that I am strongly disinclined, unless compelled to do so, to place a meaning on the Act of 1964 which would involve the conviction of a person consequent on mere physical control, without consideration, or the opportunity for consideration, of any mental element. The offence created by the Act of 1964 is a serious one and even though nominal sentences, or conditional discharges, may meet some cases, there may be others of entirely innocent

**I** control where anything less than acquittal would be unjust. This legislation against a social evil is intended to be strict, even severe, but there is no reason why it should not at the same time be substantially just. One may venture to regret that Parliament has not, in defining this and other offences relating to the possession of drugs, been more specific—as it has, for example, in relation to explosives—as to the facts required to be proved to show guilt or innocence.

The Act of 1964 refers to possession, a concept which is both central in many areas of our legal system, and also lacking in definition. As Viscount Jowitt has said of it “the English law has never worked out a completely logical and

exhaustive definition of possession" (*United States of America v. Dollfus Mieg et Compagnie S.A.* (135)). In relation to it we find English law, as so often, working by description rather than by definition. Ideally, a possessor of a thing has complete physical control over it; he has knowledge of its existence, its situation and its qualities; he has received it from a person who intends to confer possession of it and he has himself the intention to possess it exclusively of others. But these elements are seldom all present in situations with which the courts have to deal, and where one or more of them is lacking, or incompletely present, it has to be decided whether the given approximation is such that possession may be held sufficiently established to satisfy the relevant rule of law. As it is put by POLLOCK AND WRIGHT (136), possession is defined by modes or events in which it commences or ceases, and by the legal incidents attached to it.

Naturally this has led to a number of distinctions and even inconsistencies in borderline cases, such as where a person receives something without knowledge of either the existence or character of other things contained in it, or where he receives one thing thinking that it is something else, or that it has a different value or a different character from what it really has. It is not surprising that this has led to differences of opinion. So we find varying solutions adopted according to whether the question to be solved is one of dishonest intent, as in the larceny cases (*R. v. Ashwell* (137); *R. v. Hehir* (138)), intention to pass property as in the secret drawer cases (*Cartwright v. Green* (139); *Merry v. Green* (140)), intention to control property as in cases about finders of goods on premises (*Bridges v. Hawkesworth* (141); *South Staffordshire Water Co. v. Sharman* (142); *Hibbert v. McKiernan* (143)) or in relation to sovereign immunity (*United States of America v. Dollfus Mieg et Compagnie S.A.* (144)). That the solution adopted ultimately depends on the need justly and adequately to meet the requirements of the relevant legal rule is well shown in the words of WILLS, J., in a case about finding on premises—"a decision to the contrary effect would . . . be a great encouragement to dishonesty" (*South Staffordshire Water Co. v. Sharman* (145)). We are in that field here, for too close an insistence that all the ideal constituents of possession should be present would encourage the distribution of drugs: correspondingly, we must reckon that too great a departure from them might lead to the conviction of the patently innocent.

The Drugs (Prevention of Misuse) Act 1964, penalises the "possession" of drugs; it makes it unlawful to "have in possession" a specified substance. Significantly, it provides, both through a comprehensive list, and through the mechanism of regulations which may be made, for exemptions designed to preserve from penalty many obvious cases of innocent possession, for example under prescription. The effect of this is to reduce the area within which the statutory prohibition of possession is to apply. It still leaves an area, which includes, in effect, the ordinary members of the public, within which the critical question arises.

What is prohibited is possession—a term which is inconclusive as to the final shades of mental intention needed, leaving these to be fixed in relation to the legal context in which the term is used. How should the determination be made?

(135) [1952] 1 All E.R. 572 at p. 581; [1952] A.C. 582 at p. 605.

(136) An Essay on Possession to the Common Law by Frederick Pollock and Robert Samuel Wright, (1888), Part III, Ch. 1, p. 119, per R. S. Wright.

(137) (1885), 16 Q.B.D. 190.

(138) [1895] 2 I.R. 709.

(139) (1803), 2 Leach, 952.

(140) (1841), 7 M. & W. 623.

(141) [1843-60] All E.R. Rep. 122.

(142) [1895-99] All E.R. Rep. 259; [1896] 2 Q.B. 44.

(143) [1948] 1 All E.R. 860; [1948] 2 K.B. 142.

(144) [1952] 1 All E.R. 572; [1952] A.C. 582.

(145) [1895-99] All E.R. Rep. at p. 261; [1896] 2 Q.B. at p. 48.



- A If room is to be found, as in my opinion it should, in legislation of this degree of severity, for acquittal of persons in whose case there is not present a minimum of the mental element, a line must be drawn which juries can distinguish. The question to which an answer is required, and in the end a jury must answer it, is whether in the circumstances the accused should be held to have possession of the substance rather than mere control. In order to decide between these two, the
- B jury should, in my opinion, be invited to consider all the circumstances—to use again the words of POLLOCK AND WRIGHT—the “modes or events” by which the custody commences and the legal incident in which it is held. By these I mean relating them to typical situations, that they must consider the manner and circumstances in which the substance, or something which contains it, has been received, what knowledge or means of knowledge or guilty knowledge as to the
- C presence of the substance, or as to the nature of what has been received, the accused had at the time of receipt or thereafter up to the moment when he is found with it, his legal relation to the substance or package (including his right of access to it). On such matters as these (not exhaustively stated) they must make the decision whether, in addition to physical control, he has, or ought to have imputed to him the intention to possess, or knowledge that he does possess, what is in fact a
- D prohibited substance. If he has this intention or knowledge, it is not additionally necessary that he should know the nature of the substance. I see no difficulty in making clear to the jury what is required in order to establish possession and on this point I desire to associate myself with the observations of my noble and learned friend LORD PEARCE.

- To illustrate by some examples. There is no difficulty in the case of wholly
- E ignorant control, put by LORD PARKER, C.J., in *Lockyer v. Gibb* (146), where something is slipped into a person's custody without his knowing it is there. This is the classic case of the money in the sacks of Joseph's brethren brought into the law by GIBSON, J., in *R. v. Hehir* (147). In the same category, in my opinion, would be a case such as that put by CARTWRIGHT, J., in the Canadian appeal of *Beaver v. Reginam* (148), where a man asks for a harmless remedy and is given by
- F mistake a package containing a prohibited substance: this should not be possession under the Act at least until he knew or possibly had the opportunity of knowing what he had received.

- On this same basis, the actual decision of the Court of Criminal Appeal in *Lockyer v. Gibb* (146) was, I think, correct, for there the accused had, and knew that she had, control of the tablets, but possibly did not know what they were.
- G She was held to be in possession of them. One can only hold this decision to be wrong if the view is taken that to constitute possession under this legislation knowledge not merely of the presence of the thing is required, but also knowledge of its attributes or qualities. Nevertheless (except perhaps under the old law of larceny) no definition or theory of possession requires so much, nor does the language or scheme of the Act postulate that such a degree of knowledge should
- H exist. I think that the line was drawn here at the right point. On the same lines is the South African decision of *R. v. Langa* (149). There the drug (“dagga”) was contained in a suitcase. The court held that mere physical control of it was not enough but, it was the opinion of WATERMEYER, J., that the necessary knowledge—viz., guilty knowledge—might have been inferred from the fact that the accused took the suitcase to a witness by night and asked him to keep it,
- I and that on arrest he told an implausible story about the suitcase and later in the box denied all knowledge of it. The Canadian case of *Beaver v. Reginam* (150) was another package case, and, as here, the question for the court was whether mere

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(146) [1966] 2 All E.R. 653; [1967] 2 Q.B. 243.

(147) [1895] 2 I.R. 709.

(148) [1957] S.C.R. at p. 536.

(149) [1936] S.A.L.R. (C.P. Div.) 158.

(150) [1957] S.C.R. 531.

custody (control) was sufficient. The accused's story was that he believed the package to contain an innocent substance. The majority of the Supreme Court, with whose judgment I agree, held that mere custody (control) was not sufficient and it was clearly their view that if the accused had proved that he honestly believed the contents of the package to be innocent, he should have been acquitted of the charge of possession. A

I would also agree with the decision (so far as comprehensible from the brief report) of the Court of Criminal Appeal in *R. v. Carpenter* (151). The terminology ascribed to the court is perhaps not scientific, but the distinction between possession in a strictly legal sense (i.e., control) and "conscious possession" or "positive possession" appears to correspond with that drawn in the other authorities which I have cited. B

Other typical package cases can be similarly resolved. A package is handed to a bailee whose business it is to receive and hold it for reward. Possession is certainly taken of the package, but the bailee has no right to open it and would commit a wrong if he did so. No possession of the contents should be imputed to him. A package is handed over by an unknown man, at an unusual rendezvous, with no, or no satisfactory, explanation and for no explained purpose; the inference may well be drawn either that it was accepted with whatever it contained, or that it was handed over so that the holder had the right to possess himself of the contents. D

In either case possession might be found.

In all such cases, the starting point will be that the accused had physical control of something—a package, a bottle, a container—found to contain the substance. This is evidence—generally strong evidence—of possession. It calls for an explanation. The explanation will be heard and the jury must decide whether there is genuine ignorance of the presence of the substance, or such an acceptance of the package with all that it might contain, or with such opportunity to ascertain what it did contain or such guilty knowledge with regard to it as to make up the statutory possession. Of course it would not be right, or consistent with the terms of the Act of 1964, to say that the onus of showing innocent custody rests on the accused. The prosecution must prove the offence, and establish its ingredients. E

But one starts from the point that the Act itself has exempted the great majority of cases of innocent possession, so that once the prosecution has proved the fact of physical control in circumstances not covered by an exemption and something of the circumstances in which this was acquired or held, this, in the absence of explanation, may be sufficient to enable a finding of possession to be made. On the other hand, the duty to submit the question of possession to the jury in this way does give the opportunity of acquittal to innocent carriers and custodians, who can put forward an explanation of the physical fact which a jury accepts. F

If this analysis is right, two things follow. First, in my opinion, there is no need, and no room, for an enquiry whether any separate requirement of mens rea is to be imported into the statutory offence. We have a statute, absolute in its terms, exempting a large number of "innocent" cases, prohibiting and penalising cases which remain for a possession which involves to the extent that I have endeavoured to describe knowledge or means of knowledge, or guilty knowledge. G

No separate problem of the mental element in criminal offences in my opinion arises; the statute contains its own solution as to the kind of control penalised by the Act of 1964. H

Secondly, it follows that the direction to the jury in the present case was not correct, for they were told in effect that possession meant control, that control was shown and not denied, and that they need not enquire any further. If this was the basis on which they were asked to decide—and they may well have thought so—it was insufficient, and the verdict would not be sustainable. The summing-up, however, did in fact, in addition, put before them, as, in my view it should have done, the circumstances in which the package was received by the I

A accused and found in his custody and the unsatisfactory explanations which he offered to the police. These were just what the jury should have been asked to consider on the question of possession. If the direction was defective, the facts were such, in my opinion, that a properly directed jury must have found the accused guilty and I would apply the proviso.

On this basis I would dismiss the appeal.

*Appeal dismissed.*

B Solicitors: *Sampson & Co.* (for the appellant); *Solicitor, Metropolitan Police* (for the Crown).

[*Reported by S. A. HATTEEA, Esq., Barrister-at-Law.*]

## C Re DUNCAN (deceased). GARFIELD v. FAY.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Ormrod, J.), March 20, 1968.]

*Discovery—Production of documents—Privilege—Communications with foreign lawyers—Documents coming into existence for the purposes of proceedings contemplated in foreign courts—Action in England—Contemplated foreign litigation relating to same subject of dispute—English proceedings not contemplated until a date after that at which foreign proceedings were first contemplated—R.S.C., Ord. 24, r. 7.*

D The defendant was the executor and the universal legatee of a will dated July 19, 1961, and made in Rome by the testator, who was not domiciled in England and who died in 1964. On Feb. 12, 1965, the defendant was granted letters of administration with the will annexed. The plaintiff, a partner in a firm of solicitors who were acting as his solicitor, claimed to be an executor of two earlier wills made in 1960 by the testator at Berne and Montreux. From the time of the testator's death onwards, the plaintiff and other people contemplated proceedings in Switzerland, France and Monaco relating to the testator's estate and to the validity of the wills made in Rome and Berne. On Feb. 23, 1965, the plaintiff first contemplated proceedings in England, having discovered that there was a small part of the estate in England; and on Feb. 25, 1965, the writ in the present action was issued by the plaintiff, claiming revocation of the grant of letters of administration to the defendant. On a summons by the defendant for an order under R.S.C., Ord. 24, r. 7, that the plaintiff should give discovery of certain classes of documents, questions arose (a) whether privilege from production extended to documents passing between a client and his foreign legal advisers and whether the position was different once foreign legal proceedings were started, and (b) whether the privilege extended to documents coming into existence for the purposes of foreign proceedings but before proceedings in England were contemplated.

H **Held:** (i) all the documents which were communications passing between the plaintiff and his foreign legal advisers were privileged, whether or not proceedings in this or any other court were or were not contemplated when the documents came into existence (see p. 399, letter C, post).

Dictum of LORD COTTENHAM, L.C., in *Reid v. Langlois* ((1849), 1 Mac. & G. at p. 638) applied.

I (ii) if the documents which came into existence after proceedings in any foreign court were first contemplated were prepared in connexion with proposed or actual litigation in a foreign court or courts (being litigation relating to the same subject as that involved in the present action), they would be just as entitled to privilege in the present action as if they were prepared for it (see p. 400, letter E, post).

Dicta of JAMES, L.J., in *Anderson v. Bank of British Columbia* ((1876), 2 Ch.D. at p. 656) and of LINDLEY, L.J., and A. L. SMITH, L.J., in *Re Strachan* ([1895] 1 Ch. at pp. 445, 447, 448) applied.



[As to privilege from production of documents between client and legal adviser, see 12 HALSBURY'S LAWS (3rd Edn.) 42, 43, para. 59; and for cases on the subject, see 18 DIGEST (Repl.) 94-98, 770-818.]

Cases referred to:

- Anderson v. Bank of British Columbia*, [1874-80] All E.R. Rep. 396; (1876), 2 Ch.D. 644; 45 L.J.Ch. 449; 35 L.T. 76; 18 Digest (Repl.) 102, 863. B
- Brooks v. Prescott*, [1948] 1 All E.R. 907; [1948] 2 K.B. 133; 112 J.P. 312; 18 Digest (Repl.) 120, 1037.
- Bunbury v. Bunbury*, (1839), 2 Beav. 173; 9 L.J.Ch. 1; 48 E.R. 1146; 18 Digest (Repl.) 102, 860.
- Goldstone v. Williams, Deacon & Co.*, [1899] 1 Ch. 47; 68 L.J.Ch. 24; 79 L.T. 373; 18 Digest (Repl.) 93, 762.
- Lawrence v. Campbell*, (1859), 4 Drew. 485; 28 L.J.Ch. 780; 62 E.R. 186; sub nom. *Laurence v. Campbell*, 33 L.T.O.S. 355; 18 Digest (Repl.) 102, 861. C
- Minet v. Morgan*, (1873), 8 Ch. App. 361; 42 L.J.Ch. 627; 28 L.T. 573; 18 Digest (Repl.) 96, 793.
- Reid v. Langlois*, (1849), 1 Mac. & G. 627; 19 L.J.Ch. 337; 41 E.R. 1408; 18 Digest (Repl.) 102, 868. D
- Strachan, Re*, [1895] 1 Ch. 439; 64 L.J.Ch. 321; 72 L.T. 175; 59 J.P. 102; 60 J.P. 36; 18 Digest (Repl.) 27, 205.
- U.S.A. v. Macrae*, (1867), 3 Ch. App. 79; 37 L.J.Ch. 129; 17 L.T. 428; 18 Digest (Repl.) 160, 1428.
- Wheeler v. Le Marchant*, (1881), 17 Ch.D. 675; 50 L.J.Ch. 793; 44 L.T. 632; 45 J.P. 728; 18 Digest (Repl.) 90, 743. E

**Summons.**

This was a summons by the defendant, Miss Elizabeth Marie-Pauline Fay, for an order under R.S.C., Ord. 24, r. 7, that the plaintiff, Herbert Sidney Garfield, give discovery of three classes of specified documents described in the summons. The summons was referred to the judge by the registrar under R.S.C., Ord. 32, r. 12. The facts are set out in the judgment which was delivered in open court. F

*S. A. Stamler* for the plaintiff.

*A. L. J. Lincoln* for the defendant.

**ORMROD, J.:** This is a summons by the defendant asking for an order under R.S.C., Ord. 24, r. 7, that the plaintiff do give discovery of three classes of specific documents which are fully described in the summons. The matter originally came before the learned registrar who, very properly, referred it to the judge under R.S.C., Ord. 32, r. 12. [His LORDSHIP referred to certain amendments and the adjournment of further argument on para. 1, stated that he was about to give judgment on para. 3 of the summons as there was no longer a live issue on para. 2 of the summons and continued:] This is an action by the plaintiff, Mr. Herbert Sidney Garfield, a solicitor of the Supreme Court and a partner in Herbert Oppenheimer, Nathan & Vandyk, who are acting as his solicitors, to revoke a grant dated Feb. 12, 1965, of letters of administration with a will, dated July 19, 1961, annexed, to the defendant, Miss Fay. Miss Fay is the executor and the universal legatee of a will bearing this date and made in Rome by the testator, Sir Oliver Duncan, who died on Sept. 20, 1964. This will may for convenience be called the Rome will. The plaintiff claims to be an executor of two earlier wills made by Sir Oliver Duncan on July 13, 1960, at Montreux and July 29, 1960, at Berne, called, respectively, the Montreux will, and the Berne will. The plaintiff's case is that the defendant and her associates persuaded the testator to execute the Rome will by fraud, undue influence and compulsion, of which elaborate details appear in the statement of claim. The will is attacked on other grounds also, which are not material to this judgment. Sir Oliver Duncan died in Rome. G  
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- A His actual domicile is in issue, but it is common ground that he was not domiciled in England. He left a very large fortune indeed, almost all of which is not in this country. He had married at the age of sixty-eight in 1958 and, at the times when all three wills were executed, he was on the worst possible terms with his wife. At the date of his death, divorce proceedings between them were still pending in Switzerland. The plaintiff was well aware that, some time before
- B Sir Oliver's death, a serious change had occurred in the relationship between them. Sir Oliver had ceased to instruct him or his firm who had acted as his English solicitors for many years. The reasons for this change are the central matter in issue in this action. It appears from the plaintiff's affidavit of Jan. 12, 1968, that, from the time of Sir Oliver's death on Sept. 20, 1964, onwards, he and other people contemplated proceedings in Switzerland, France and Monaco relating to Sir Oliver's estate and to the validity of the Rome will and the Berne will. It is common ground that he did not contemplate proceedings in England until Feb. 23, 1965, on which date he discovered for the first time that there was a small part of the estate, amounting in value to about £17,000, in England. On Feb. 25, 1965, the writ in this action was issued, some twelve or thirteen days after the defendant had obtained a grant of administration in common form in this court. It is unnecessary to refer to the terms of the will except to say that Lady Duncan had a comparatively trifling interest under the Berne will and none at all under the Rome will.

The documents specified in para. 3 of the summons are:

- E "All correspondence before or since the death of the deceased, Sir Oliver Duncan touching the questions in issue herein passing between the plaintiff and all or any of the following persons:—(a) Lady Duncan, her agents and lawyers, including Messrs. Payne, Hicks, Beach & Co., solicitors and Mr. Leigh-Howard, a partner in such firm; (b) his agents and legal advisers."

- In his original list of documents the plaintiff disclosed documents of this description in Part 2 of Sch. 1 in the usual omnibus form in which privilege is claimed
- F for documents coming into existence as part of the preparation of the case. It is admitted that this was inadequate, but it has been put right in para. 13 of his affidavit in which he now claims privilege in proper form. It is agreed by counsel that, in order to save time, the two formal stages of discovery and production for inspection can be telescoped together and that I should now decide the real issue between them, namely, whether the documents specified are
- G privileged from production. There is also a subsidiary question, namely, whether the court ought, in the exercise of any discretionary powers which it may have, to decline to order discovery of these documents. It is common ground that documents in class 3 coming into existence after the date on which proceedings in England were first contemplated by the plaintiff, that is, Feb. 23, 1965, are privileged in the usual way. The issue between the parties is whether
- H privilege extends to documents coming into existence after proceedings in any foreign court were first contemplated. There is also an issue as to the extent of the privilege covering communications between the plaintiff and his English solicitors and various foreign lawyers acting on his behalf in the relation of lawyer and client. It is a matter of some surprise that neither counsel, in spite of exhaustive researches, have been able to find any reported case on these points,
- I in particular on the effect of foreign proceedings between the same parties relating to the same subject-matter, on the question of privilege in litigation in this country.

Counsel for the plaintiff, in his very lucid argument, submitted that there are two basic heads of privilege relevant to this case which differ in extent and in the stage when they become operative. He submits, first, that confidential communications between a client and his solicitors, made for the purpose of obtaining legal advice, are privileged, no matter when the communication was made; in other words, that this area of privilege exists independently of the contemplation

of litigation but is restricted to communications between solicitor and client, although it includes communication to intermediaries between them. He concedes that this head of privilege does not cover communications to or from other parties connected with the obtaining of such legal advice. Secondly, he submits that, once proceedings are contemplated, the privilege extends to communications to and from third parties in the course of preparing the case for the contemplated litigation. Counsel for the defendant concedes that communications between solicitor and client are privileged whenever they were made, but argues that this does not extend to communications between client and foreign lawyers where such communications are not privileged by the municipal law of the forum of the foreign lawyer. In other words, if the foreign lawyer's own court insists on disclosure of communications between him and his client in litigation in that country, this court will not regard such communications as privileged in litigation in this country.

In stating the proposition in this loose form, I trust that I do no injustice to the argument of counsel for the defendants. He cited no authority in support of it, and, in my judgment, it is inconsistent with the tenor of the judgment of SIR RICHARD KINDERSLEY, V.-C., in *Lawrence v. Campbell* (1). In that case, SIR RICHARD KINDERSLEY held that communications between the defendant, a Scotsman living in Scotland, and his Scots solicitors, practising in London, about debts due to him in England, were privileged in subsequent litigation in England. At the conclusion of his judgment, he said (2):

"A question has been raised as to whether the privilege in the present case is an English or a Scotch privilege; but sitting in an English court, I can only apply the English rule as to privilege, and I think that the English rule as to privilege applies to a Scotch solicitor and law agent practising in London, and therefore the letters in question are privileged from production."

The mere fact that the Scots lawyers were practising in England was clearly not a relevant consideration and SIR RICHARD KINDERSLEY expressly rejected the suggestion that the Scots law of privilege had any bearing on his decision. The essence of the judgment is that privilege attaches to communications between professional legal advisers and their clients. In *Wheeler v. Le Marchant* (3), BRETT, L.J., in the course of argument said: "Scotch legal advisers stand on the same footing as English legal advisers." In *Bunbury v. Bunbury* (4) it was held that a case prepared for submission to counsel in Holland for his opinion, was privileged. In this case, it is true that the document was prepared after the institution of the proceedings in England, but it is to be remembered that, formerly, communications between client and English solicitor, ante litem motam, were not privileged; see *Lawrence v. Campbell* (5). The basis on which this head of privilege rests was stated by LORD COTTENHAM, L.C., in *Reid v. Langlois* (6) in these words:

"... the object is to protect the party who wishes to take the advice of professional men, and he would be prevented from taking such advice if there was the hazard of having it revealed on entering into a contest with an opponent."

In *Anderson v. Bank of British Columbia* (7), SIR GEORGE JESSEL, M.R., adopted this statement of principle with the gloss that, by "professional men", LORD COTTENHAM meant members of the legal profession, a phrase which he uses interchangeably with "professional lawyers".

There is nothing in these judgments to suggest that either learned judge intended to limit the rule to legal advisers whose names appear on the Roll of

(1) (1859), 4 Drew. 485.

(3) (1881), 17 Ch.D. 675 at p. 679.

(5) (1859), 4 Drew at p. 490.

(2) (1859), 4 Drew. at p. 491.

(4) (1839), 2 Beav. 173.

(6) (1849), 1 Mac. & G. 627 at p. 638.

(7) (1876), 2 Ch.D. 644 at p. 650.



A Solicitors to the Supreme Court or who are members of the English Bar. The basis of the privilege is just as apt to cover foreign legal advisers as English lawyers, provided only that the relationship of lawyer and client subsists between them. Any other conclusion would lead to an impossible position for, if this court were required to investigate the position of such communications in foreign law, it must first determine the foreign law, but what law governs the relationship of English client and foreign lawyer, at any rate when no proceedings are in contemplation? There is no forum and, therefore, no *lex fori*. The nationality of the foreign lawyer is as irrelevant as his address for this purpose.

C It only remains to consider the position where proceedings are already on foot in a foreign court. If disclosure is required by the law of such a court, the other side will see the documents in dispute and so gain an advantage. Is that a reason for making an exception to our *lex fori*? In my judgment, it is not. These matters are matters to be decided according to the practice of this court. I, therefore, hold that all the documents which are communications passing between the plaintiff and his foreign legal advisers are privileged, whether or not proceedings in this or any other court were or were not contemplated when they came into existence.

D I now turn to counsel for the plaintiff's second head of privilege, namely, that which comes into operation post litem motam. Here the question is whether documents prepared in connexion with litigation in a foreign court, but before proceedings in this country were contemplated, are privileged or not. On this point there is, as I have already said, no direct authority. My decision must, therefore rest on principle. At the risk of over-simplifying, the position may be

E stated quite briefly. Discovery was the invention of the courts of equity as part of their historic function of ensuring that justice was done inter parties. To achieve this, it was considered necessary to mitigate the rigours of the adversary system which was operated by the courts of common law, in order to prevent a party from concealing documents which might impeach his own case or assist his opponent in proving his case. It could not, however, be carried to the extreme length of insisting on disclosure of all relevant documents, because the ends of justice might be defeated in other ways. From this consideration the traditional categories of privilege have developed. The category which comprises communications between client and lawyer has been dealt with. The second category consists of documents prepared for the purpose of litigation. The principle is summarised by JAMES, L.J., in *Anderson v. Bank of British Columbia* (8):

G "Looking at the dicta and the judgments cited, they might require to be fully considered, but I think they may possibly all be based upon this, which is an intelligible principle, that as you have no right to see your adversary's brief, you have no right to see that which comes into existence merely as the materials for the brief."

H It is stated in a different way in *Re Strachan* (9), by LINDLEY, L.J.:

I "In England it is considered contrary to the interests of justice to compel a litigant to disclose to his opponent before trial the evidence to be adduced against him . . . It is considered that so to do would give undue advantages for cross-examination and lead to endless side issues; and would enable witnesses to be tampered with, and give unfair advantage to the unscrupulous. It is very true that an honest and fair-dealing litigant, on seeing how strong a case his opponent had, might at once withdraw from further litigation. But our rules of evidence and of discovery are not based upon the theory that it is advantageous to let each side know what the other can prove, but rather the reverse."

(8) (1876), 2 Ch.D. at p. 656; [1874-80] All E.R. Rep. 396 at p. 399.

(9) [1895] 1 Ch. 439 at p. 445.

And by A. L. SMITH, L.J. (10):

"... to allow one side to see the parol evidence about to be given by the other, and who his witnesses are and where they reside, is not, in my opinion, the means by which the real truth will ordinarily be arrived at at nisi prius, or in any other hostile litigation. To give one side the opportunity of knowing what the other side's witnesses are about to say, and who they are, will give an advantage to that side which, from experience, I say would be most unjust to the other side. If each side, before trial, were to see the evidence of his opponent, and each side were to be told who the witnesses on the other side were to be, and where they resided, well and good, for in such a case, each side would at any rate be upon an equality of advantage; but that is not our practice, and I need not discuss its advisability..."

Many other variants on these statements of the principle could be cited, but they all come to the same thing, namely, that a party is not obliged to disclose to the other side names, addresses and statements of witnesses or potential witnesses or other documents coming into existence as part of his preparation for trial. In nearly every case, the crucial test of the proper categorisation of such documents is the date on which each came into existence and the date on which it can properly be said that the litigation was first contemplated. Where more than one form of litigation is in process or in contemplation, the test is not so simple. In my judgment, the correct approach to this problem is to look at the substance or reality of the matter and not to allow oneself to sink into formalism. If a party prepares his case for one type of litigation but proposes to use it in another, it is no less his case, and he will be no less damnified by its disclosure. Here, the defendant is plainly attempting to see the whole of the case which the plaintiff will put before the court at the hearing. It is mere chance that proceedings on the continent were first in contemplation. If the order of the various proceedings had been reversed, all these documents would have been privileged. In my judgment, if they were prepared in connexion with proposed or actual litigation in a foreign court or courts, they are just as entitled to privilege in the present action as if they had been prepared for it.

This conclusion is the converse of such cases as *Goldstone v. Williams, Deacon & Co.* (11), which illustrates the rule "once privileged, always privileged", i.e., documents which were privileged in a previous action are privileged in subsequent proceedings. It is also consonant with cases like *U.S.A. v. Macrae* (12), where privilege was allowed under the heading of risk of incrimination or forfeiture although the risk lay not in this country but in the United States. In my judgment, territoriality has little or nothing to do with the matter which I have to consider in this case. Had it been necessary to do so, I would have been inclined to apply the principle of cases such as *Minet v. Morgan* (13) and *Brooks v. Prescott* (14) and refuse to order discovery on the ground that the plaintiff had sworn that the documents related to his own case and did not in any way impeach it. In the circumstances, it is unnecessary to examine the extent of the residual discretion of the court to refuse to order production even when all the categories of privilege have been exhausted.

The conclusion is that I hold that the privilege claimed in respect to documents under para. 3 succeeds.

Order accordingly.

Solicitors: *Herbert Oppenheimer, Nathan & Vandyk* (for the plaintiff); *Herbert Smith & Co.* (for the defendant).

[Reported by ALICE BLOOMFIELD, Barrister-at-Law.]

(10) [1895] 1 Ch. at pp. 447, 448.

(12) (1867), 3 Ch. App. 79.

(11) [1899] 1 Ch. 47.

(13) [1873] 8 Ch. App. 361.

(14) [1948] 1 All E.R. 907; [1948] 2 K.B. 133.

A LONDON BOROUGH OF ENFIELD v. LAVENDER GARDEN PROPERTIES, LTD.

[COURT OF APPEAL, CIVIL DIVISION (Danckwerts and Diplock, L.J.J., Cairns, J.),  
March 21, 22, 1968.]

B *Compulsory Purchase — Compensation — Purchase notice — Permission for additional development — Permission within five years of acquisition — Additional compensation — Land possessing certificate for residential development — Development at fifty-five habitable rooms per acre — Acquiring authority obtaining permission for one hundred rooms per acre — Increase constituting additional development — Land Compensation Act, 1961 (9 & 10 Eliz. 2 c. 33), s. 23 (1), (2), s. 29 (1).*

C After several unsuccessful attempts to obtain planning permission for residential development of their 12.2 acres of land zoned for allotment purposes, the claimants were given in July, 1963, a certificate of alternative development by the Minister of Housing and Local Government under s. 17 of the Land Compensation Act, 1961. The certificate was to the effect that "planning permission for the class of development specified in the . . . [a schedule thereto] might reasonably have been expected to be granted in respect of the said land if the land were not proposed to be acquired by any authority", and the development specified was "residential development at a density comparable with that of neighbouring development". That density was agreed to be fifty-five habitable rooms per acre. The claimants made a further application for planning permission in respect of the land and on its refusal served a purchase notice on the council in December, 1963. The purchase notice was accepted by the council and a price of £240,000 was agreed in respect of the acquisition. The council resolved to develop the land for residential purposes and were given planning permission on Nov. 1, 1965, by the Minister of Housing and Local Government for its development with twelve-storey tower blocks at a density of one hundred habitable rooms per acre. The claimants made a claim for further compensation under s. 23 (1) of the Land Compensation Act, 1961, in respect of "permission for the carrying out of additional development" of the land granted within five years of the date of completion of the council's acquisition. The Lands Tribunal upheld the claim and assessed the compensation at £60,000. On appeal,

G **Held:** (i) the development authorised by the Minister's decision of Nov. 1, 1965, constituted additional development because the permission of Nov. 1, 1965, extended to a density of one hundred habitable rooms per acre whereas the development permitted by the Minister's certificate of July, 1963 (permission being assumed pursuant to s. 15 (5) of the Act of 1961) was limited to fifty-five habitable rooms per acre (see p. 405, letters G and I, and p. 407, letter A, post).

H (ii) it was a question of fact for the Lands Tribunal whether a buyer of land in the open market after the Minister's decision of Nov. 1, 1965, would have estimated that his chances of getting planning permission at the most economical density above fifty-five habitable rooms per acre were higher than before the Minister's decision; the tribunal concluded that a buyer would have taken that view, and accordingly the claimants were entitled to additional compensation (by virtue of s. 5, r. (2)\* and s. 14 (3)† of the Act of 1961) attributable to the estimated improvement (see p. 405, letter G, p. 406, letter I, to p. 407, letter A, and p. 407, letter A, post).

I Appeal dismissed.

[ **Editorial Note.** In relation to notices to treat served on or after Jan. 1,

\* For s. 5, r. (2), see p. 406, letter A, post.

† For s. 14 (3), see p. 404, footnote \*, post.



1967, Part 4 of the Land Compensation Act, 1961, which includes s. 23, is repealed by the Land Commission Act 1967, ss. 86, 101 and Sch. 17. Claims under notices to treat served before that date in respect of decisions giving permission for additional development within five years from the date of completion of the acquisition remain unaffected. A

As to additional compensation for new planning permission after acquisition, see SUPPLEMENT to 10 HALSBURY'S LAWS (3rd Edn.), para. 212F. B

For the Land Compensation Act, 1961, s. 5, s. 14, s. 15 (5), s. 23 (1), (2) and s. 29 (1), see 41 HALSBURY'S STATUTES (2nd Edn.) 49, 57, 59, 68 and 74.]

### Case Stated.

The London Borough of Enfield (herein called "the council") appealed to the Court of Appeal by way of Case Stated against a decision of the Lands Tribunal (SIR MICHAEL E. ROWE, Q.C., President, and JOHN WATSON, Esq.) given on Apr. 4, 1967, whereby the tribunal decided that the respondents, Lavender Garden Properties, Ltd. (herein called "the claimants") were entitled to compensation (£60,000) under s. 23 of the Land Compensation Act, 1961, in respect of permission for carrying out additional development, such permission being given by a decision of the Minister of Housing and Local Government dated Nov. 1, 1965. The piece of land concerned was at Lavender Hill in the borough of Enfield; its area was 12.2 acres, and it was owned originally by the churchwardens of the parish and let to the council for the purposes of allotments. The land was purchased by the claimants for the sum of £7,500 in July, 1961. It was zoned in the Middlesex County development plan for allotment purposes, with a school symbol. On July 4, 1963, the claimants obtained from the Minister of Housing and Local Government under s. 17 of the Land Compensation Act, 1961, a certificate in the following terms: C

"The Minister of Housing and Local Government in pursuance of his powers under s. 17 of the Land Compensation Act 1961, (i) cancels the certificate of appropriate development issued by the Middlesex County Council on Nov. 15, 1962, in respect of the land described in Sch. 1; (ii) certifies that planning permission for the class of development specified in Part 1 of Sch. 2 hereto subject to the condition set out in Part 2 of the said schedule might reasonably have been expected to be granted in respect of the said land if that land were not proposed to be acquired by any authority to whom the Acquisition of Land (Assessment of Compensation) Act, 1919 applies. Schedule 1: Land situate on the north side of Lavender Hill fronting also on Cedar Road and Brigadier Hill, Enfield, Middlesex, being approximately twelve acres. Schedule 2: Part 1: Residential development at a density comparable with that of neighbouring residential development. Part 2: The siting, design, number of dwelling units, external appearance of the buildings and the means of access from the site to the highway shall be as may be agreed with the local planning authority, or, in default of agreement, as shall be determined by the Minister." D

Paragraphs 11 to 19 of the Case Stated included the following: E

"11. On Dec. 20, 1963, the [claimants] served a purchase notice\* on the council under s. 129 of the Town and Country Planning Act, 1962, based on the refusal of planning consent dated Dec. 13, 1963. F

"12. The council eventually decided to purchase the appeal site and by notice dated Mar. 5, 1964, served upon the [claimants] under s. 130 (1) of the Town and Country Planning Act, 1962, the council indicated its willingness to comply with the purchase notice which had been served. G

"13. Thereafter lengthy negotiations took place between the valuers and eventually agreement was reached at a figure of £240,000 plus proper legal H

\* The claimants had made several attempts to obtain planning permission for residential purposes in respect of the land, and had been refused permission. I

A costs and surveyors' fees for the appeal site. For the purpose of the negotiations the valuers agreed that the density referred to in the Minister's previous certificate could be assumed to be fifty-five habitable rooms per acre. The price of £240,000\* was approved by the district valuer and the council completed its purchase at that figure on June 24, 1964.

B "18. On Nov. 30, 1965, the [claimants] served notice on the council under s. 23 of the Land Compensation Act 1961, claiming compensation from the council as the acquiring authority in respect of the increased value of the additional planning consent granted to the council.

"19. The council did not accept that the [claimants] had any such claim and were not prepared to negotiate any figure as a result of which on Mar. 30, 1966, the [claimants] made the present reference to the Lands Tribunal."

C The letter of Nov. 1, 1965, from the Ministry, which is referred to in para. 17 of the Case Stated, was in the following terms:

"I am directed by the Minister of Housing and Local Government to refer to your letter of Oct. 8, 1965, concerning the council's application of that date for planning permission for the development described in the heading of this letter, and to say that he has decided to approve the proposal.

D Accordingly he hereby grants planning permission for residential development on land at Lavender Hill, Enfield, in accordance with [a drawing No. 6, a copy of which was before the Court of Appeal] which accompanied the application dated Oct. 8, 1965, subject to the following conditions: (i) that the design and external appearance of the building shall be as may be agreed with the local planning authority or, in default of agreement, as shall be determined by the Minister; (ii) facilities for the parking and turning of vehicles shall be provided within the site, as may be agreed with the local planning authority, or, in default of agreement, as shall be determined by the Minister."

E At the hearing before the Lands Tribunal the contention of the council that there was not additional development was rejected. The tribunal stated the contentions as follows:

"First, the acquiring authority contended that no additional compensation at all was payable because as a matter of law the planning decision contained in the Minister's certificate of Nov. 1, 1965, did not grant permission for any 'additional development'. Second, the authority further contended that upon the proper construction of s. 23 (2) the valuation to be made in accordance with the requirements of that subsection must represent the value of the land for development in accordance, and only in accordance, with the Minister's letter of Nov. 1, 1965. The claimants' contention was that the land should be valued at the price which it would have commanded in the market in the light of that decision. Third, what was the additional value of the land (if any) on either of these bases?"

H At the hearing the claim put forward by the claimants was for about an additional £332,000. The tribunal held that there was additional development, and that the additional payment should be £60,000. From that decision the council appealed to the Court of Appeal by notice of appeal seeking that the decision of the tribunal should be quashed and dismissing the claimants' claim to additional compensation. The grounds of appeal were as follows: (i) that the tribunal erred on both points mentioned in the last paragraph of its decision, and that on a correct direction in law on either point it would have held that no compensation was payable (the points referred to in the decision were the tribunal's holding that the Minister's second certificate (or decision) did grant permission for

\* By reason of some additional payments the price actually paid by the council amounted to over £253,000.

"additional development", and that the tribunal was not restricted to a consideration of any additional value which would accrue from a development by reference to a particular drawing which had accompanied the claimants' application to the Minister); (ii) that the Minister's decision of Nov. 1, 1965, did not grant permission for additional development; (iii) that the tribunal misinterpreted s. 29 of the Act of 1961, and misdirected itself in so far as it accepted the claimants' contentions on the purpose and effect of the section; (iv) that the permission of Nov. 1, 1965, did not add to the value of the land and would not have done so if in force on the relevant date in 1964; (v) that the tribunal should have held that the amount referred to in s. 23 (2) of the Act did not exceed £240,000 (the amount of compensation originally agreed) and the council relied on the alternative finding to that effect in the last sentence of the decision; and (vi) that the valuation from which the tribunal derived its award of £60,000 additional compensation was not in accordance with s. 23 (2), but was based on a supposed permission, which had not been granted, at a density between sixty and eighty persons or habitable rooms per acre.

*D. P. Kerrigan, Q.C., and J. D. James, for the council.*

*H. Marnham, Q.C., and J. A. R. Grove, for the claimants.*

**DANCKWERTS, L.J.**, stated the nature of the appeal and, having read the passages from the Case Stated set out at p. 402, letter H, to p. 403, letters C and G, ante, and the Ministry's letter dated Nov. 1, 1965, having stated the amount of the claimants' claim and the decision of the Lands Tribunal, read s. 14 (3) (\*) and s. 23 (†) of the Land Compensation Act, 1961, and continued: The contentions on behalf of the council are, first, that this was not a case of an additional development, because it was simply a case where some variation of the planning permission already received was allowed, and, secondly, that in any case, if it did come within s. 23 and there was an additional development, there was no additional value which had been gained by the permission in question.

It is necessary, of course, first of all to ascertain what is additional development and, indeed, what is development. The meaning of "development" for present purposes is contained in the general definition section of the Land Compensation Act, 1961, s. 39. That takes one, by reference, to s. 12 of the Town and Country Planning Act, 1947, which is now to be found in s. 12 (1) of the Town and Country Planning Act, 1962. What it comes to is this, that "development" means the provision of buildings, engineering works, and that sort of thing. For present

(\*) Section 14 (3) provides: "Nothing in those provisions shall be construed as requiring it to be assumed that planning permission would necessarily be refused for any development which is not development for which, in accordance with those provisions, the granting of planning permission is to be assumed; but, in determining whether planning permission for any development could in any particular circumstances reasonably have been expected to be granted in respect of any land, regard shall be had to any contrary opinion expressed in relation to that land in any certificate issued under Part 3 of this Act."

(†) Section 23, to which the marginal note is "Compensation for new planning permission granted after acquisition of land" provides, so far as relevant, as follows—(1) Where (a) any interest in land is compulsorily acquired or is sold to an authority possessing compulsory purchase powers and, before the end of the period of five years beginning with the date of completion, a planning decision is made granting permission for the carrying out of additional development of any of the land; and (b) the principal amount of the compensation which was payable in respect of the compulsory acquisition or, in the case of a sale by agreement, the amount of the purchase price, was less than the amount specified in sub-s. (2) of this section, then subject to the following provisions of this section, the person to whom the compensation or purchase price was payable shall be entitled, on a claim duly made by him, to compensation from the acquiring authority of an amount equal to the difference. (2) The amount referred to in para. (b) of sub-s. (1) of this section is the principal amount of the compensation which would have been payable in respect of a compulsory acquisition of the said interest by the acquiring authority, in pursuance of a notice to treat served on the relevant date, if the planning decision mentioned in para. (a) of the said sub-s. (1) had been made before that date and the permission granted thereby had been in force on that date."



A purposes, therefore, it is simply a question of buildings. In the Land Compensation Act, 1961, the definition of "additional development" is contained in s. 29 (1) and is as follows:

B "In this Part of this Act: 'additional development', in relation to an acquisition or sale of an interest in land, means any development of the land other than the following, that is to say:—(a) where the acquiring authority are a local authority, and acquired the interest for the purposes of any of their functions, development for the purposes of the functions for which they acquired it; (b) where the acquiring authority are not a local authority, development for the purposes of the project in connexion with which they acquired the interest."

C It is plain that the present case does not fall within either (a) or (b); (c), only, was regarded as a matter of some interest. Paragraph (c) reads "development for which planning permission was in force on the relevant date". The relevant date is the date of the notice to treat, as is provided in the definition of "relevant date" in s. 29 (1). Paragraph (d) of the definition of "additional development" is the one on which I think counsel for the council really rely. That provides as follows:

D " (d) development for which—(i) in the case of compulsory acquisition, it was, for the purpose of assessing compensation in respect thereof, assumed (in accordance with the provisions of ss. 14 to 16 of this Act) that planning permission would be granted, or (ii) in the case of a sale by agreement it would have been so assumed that planning permission would be granted if the interest (instead of being sold by agreement) had been compulsorily acquired by the acquiring authority in pursuance of a notice to treat served on the relevant date."

E Both counsel for the council relied on that provision for the argument which they put before this court. It is also said, with regard to para. (c) that, unless it was of some relevance to the issue which we had to decide, it would be otiose. It may be that it is otiose, but I do not find that it has any compelling force merely by reason of that. The Lands Tribunal came to the conclusion that para. (d) did not help the council, and, of course, if the council are not able to bring themselves within any of these exceptions then it becomes additional development under the definition. In my view, the tribunal reached the right conclusion, and I do not think that any of the exceptions contained in s. 29 apply. Therefore, so it seems to me, there was additional development in the present case. Accordingly, the question whether there was any additional value arises for consideration. I think that the conclusion reached by the tribunal on that point, also, was correct, and accordingly I would dismiss the appeal from its decision.

H DIPLOCK, L.J.: I agree. So far as the first point is concerned, viz., whether the development authorised by the Minister's decision of Nov. 1, 1965, was additional development, it seems to me that under the definition of additional development contained in s. 29 (1) of the Act, so far as is relevant to this case, the test was: would the development authorised by the Minister's decision of Nov. 1, 1965, have been permitted under planning permission granted in the terms set out in the Minister's certificate of July 4, 1964? The development authorised I by the Minister's decision of Nov. 1, 1965, was a specific development relating to the buildings allowed to be erected on the land and provided for a density of one hundred habitable rooms per acre. The development referred to in the Minister's certificate of July 4, 1963, was limited to development providing for fifty-five habitable rooms per acre. Therefore it seems to me to be plain that the development permitted by the decision of Nov. 1, 1965, was additional development. I agree, therefore, with the tribunal's decision on that point.

The second point raised by counsel for the council is whether or not that additional development entitled the claimants to further compensation on top

of that which they had already received. The general principle on which compensation is to be assessed is to be found in s. 5, r. (2) of the Land Compensation Act, 1961: A

“(2) The value of land shall, subject as hereinafter provided, be taken to be the amount which the land if sold in the open market by a willing seller might be expected to realise.” B

In the ordinary way if land is sold on the open market by a willing seller the price which the buyer is prepared to pay depends on the use which he thinks he will be able to make of it. If the land is already the subject of planning permission he knows that he will be able, if he wishes, to make use of it in accordance with that permission. He may also have an expectation that he may be able to get planning permission for a more profitable use and in so far as that expectation is a serious one then the price which he is prepared to give for the land will be increased in order to allow for the chance, though not the certainty, of his being able to make the more profitable use of it. C

That is what the position would be apart from the provisions of s. 14 to s. 17 of the Act of 1961. What those provisions do is to say that in valuing the land it may be assumed in certain circumstances that planning permission will in fact be granted for some development other than that for which planning permission already exists, i.e., that what would otherwise be no more than a chance may be treated as a certainty. One of those circumstances is set out in s. 15 (5) of the Act of 1961 and provides that in valuing the land one may assume that planning permission would be granted for any development which is set out in a certificate obtained from the planning authority, or the Minister, under Part 3 of the Act of 1961. D E

At the time that this land was originally valued the position therefore was that the buyer of the land, for the purposes of compensation, was entitled to assume that he could use it either for its then present purpose, which, I think, was as allotments, or for housing development subject to the conditions set out in the Minister's certificate of July 4, 1963, i.e., housing development at a density of fifty-five habitable rooms per acre. He would also be entitled to take into consideration the chance that he might be able to use the land for housing development at a higher density, but at that time the chance would no doubt have been treated as small having regard to the fact that the Minister had already set out in the certificate the limit of density which it is common ground was for fifty-five habitable rooms per acre. F G

What happened when the Minister's decision of Nov. 1, 1965, was given was this: a revaluation on the assumption that that decision was already in existence involved making the assumption, first, that the land could be used for the particular development, the subject of the Minister's decision; secondly, that planning permission would be obtained for the development at a density of fifty-five habitable rooms per acre; and, thirdly, the chance, whatever it might be, that a permission could be obtained for a density between fifty-five and one hundred per acre, which would be the most economical development for the site. That one has to take into consideration the chance of getting permission for development, for which planning permission has neither been granted nor is to be assumed, is made clear from s. 5 (1) of the Act to which I have referred, and s. 14 (3) of the Act to which my lord has referred. H I

It therefore follows that, if the Lands Tribunal—and this was a question of fact for it—came to the conclusion that a buyer of the land, after the Minister's decision enabling specific development involving one hundred habitable rooms to the acre had been granted, would estimate his chances of getting a planning permission for a development at the most economical density more than fifty-five to the acre as being higher than before that planning permission was given, then the claimants were entitled to the added sum due to the estimated improvement of that chance in the mind of the intending buyer. The tribunal came to the

- A conclusion that a buyer on the open market would take that view. It was a question of fact for it and I, not without some regret, agree that this appeal must be dismissed.

CAIRNS, J.: I agree.

*Appeal dismissed. Leave to appeal to the House of Lords refused.*

- B Solicitors: *Town Clerk, Enfield (for the council); H. B. Wedlake, Saint & Co. (for the claimants).*

[*Reported by F. A. AMIES, ESQ., Barrister-at-Law.*]

## COHEN v. DAILY TELEGRAPH, LTD.

- C [COURT OF APPEAL, CIVIL DIVISION (Lord Denning, M.R., Davies and Russell, L.JJ.), April 2, 1968.]

*Libel—Fair comment—Facts relied on to support plea must be facts existing at date of publication—Particulars pleaded in support of defence of fair comment included events occurring after publication of alleged libel—Particulars struck out.*

- D In an action brought for alleged libel in a newspaper article the defendants pleaded fair comment on a matter of public interest. The particulars of facts on which the comment was based included two paragraphs that related to events which occurred after the article was published. On appeal from an order striking out the two paragraphs,

- E **Held:** the facts on which a plea of fair comment was based must be facts existing at the time when the comment was made; and accordingly the two paragraphs relating to events that occurred after publication of the alleged libel had been rightly struck out (see p. 409, letters E, H and I, and p. 410, letter E, post).

*Appeal dismissed.*

- F [ **Editorial Note.** The matters stated in the particulars that were struck out might nevertheless be admissible in evidence at the trial, as tending to support an inference that the comment had been fair, but that did not justify their being pleaded, as evidence should not be pleaded (see p. 409, letter G, and p. 410, letter G, post). Moreover, particulars of matters that did not exist until after the comment was made might, presumably, be required by R.S.C., Ord. 82, r. 7 to be furnished to the plaintiff in an appropriate case.

- G As to particulars of facts on which fair comment is based, see 24 HALSBURY'S LAWS (3rd Edn.) 95, 96, para. 170; and for cases on the subject, see 32 DIGEST (Repl.) 182, 183, 1955-1964.]

Cases referred to:

- H *Cunningham-Howie v. F. W. Dimpleby & Sons, Ltd.*, [1950] 2 All E.R. 882; [1951] 1 K.B. 360; 32 Digest (Repl.) 183, 1964.  
*Godman v. Times Publishing Co., Ltd.*, [1926] 2 K.B. 273; 95 L.J.K.B. 747; 135 L.T. 291; 32 Digest (Repl.) 116, 1380.  
*Maisel v. Financial Times, Ltd.*, [1914-15] All E.R. Rep. 671; [1915] 3 K.B. 336; 84 L.J.K.B. 2145; 112 L.T. 953; 32 Digest (Repl.) 77, 993.  
*Wheatley v. Anderson and Miller*, 1927 S.C. 133; 32 Digest (Repl.) 183, \*787.

- I **Interlocutory Appeal.**

By writ issued on June 12, 1967, the plaintiff, Mr. Benjamin Cohen, claimed from the defendants, The Daily Telegraph, Ltd., damages for alleged libel contained in an article entitled "The sad state of Dr. Benjamin Cohen's other patient" published in the issue of the Daily Telegraph newspaper for May 19, 1967, and an injunction to restrain the defendants from publishing further the alleged libel. By their defence, served on Aug. 25, 1967, the defendants, among other matters, admitted publication in the newspaper, but pleaded that the



words were not defamatory and, in the alternative, pleaded by para. 6 that, if and in so far as the words were defamatory of the plaintiff, they were fair comment made in good faith and without malice on a matter of public interest, namely the schemes of arrangement instituted and operated by the plaintiff in relation to two public companies, Pinnock Finance Co. (Great Britain), Ltd. and Federal Consolidated Investments, Ltd. In para. 6 of the defence particulars were given of the facts on which the words were alleged to be fair comment. These particulars, which extended to thirty-one sub-paragraphs, included the sub-para. (5) and the sub-para. (6), the relevant parts of which are set out at letter I, *infra*, and p. 409, letters A and B, *post*. By order of Master ELTON, dated Jan. 15, 1968, that part of the particulars contained in para. 6 (v), which is set out at p. 409, letter A, *post*, and the whole of sub-para. (vi) were ordered to be struck out pursuant to R.S.C., Ord. 18, r. 19 (a) and (c). The defendants appealed from this order and on Feb. 26, 1968, BLAIN, J., dismissed their appeal. The plaintiffs appealed to the Court of Appeal, the grounds of appeal being that the particulars struck out were valid in law and that in any event there was no sufficient ground for striking them out.

*H. M. Davidson* for the defendants.

*Michael Kempster* for the plaintiff.

**LORD DENNING, M.R.:** The plaintiff, Dr. Benjamin Cohen, brings a libel action against the defendants, the Daily Telegraph, Ltd. He is skilled in mending companies which are in difficulties. He has been called a "company doctor". In 1960 he sought to rescue a company called Federal Consolidated Investments which crashed owing nearly £2 million to five thousand depositors. In 1967 another company called Pinnock Finance, Ltd., got into difficulties owing £9 million to nine thousand depositors. The plaintiff had a scheme for saving that company from liquidation. On May 19, 1967, the Daily Telegraph in their financial columns published the article which the plaintiff says was a libel on him. It ran thus:

"The sad state of Dr. Benjamin Cohen's other patient. Initial support for Dr. Benjamin Cohen's scheme to save Pinnock Finance from liquidation was strong. Since then a growing number of depositors have changed their minds. They doubt his ability to deliver the goods . . . [After going through many details, the article concluded] Pinnock depositors should take the Federal Consolidated to heart. It does not inspire confidence in Dr. Cohen's remedial powers."

The statement of claim set out the article in full. The defendants pleaded by way of defence that it was fair comment made in good faith on a matter of public interest. In addition, in accordance with *Cunningham-Howie v. F. W. Dimpleby & Sons, Ltd.* (1), they gave particulars of the facts on which they said that the comment was based. They set out many facts in several pages. Most of the facts pleaded took place before this article was published on May 19, 1967, but in two of the paragraphs the pleader set out matters which took place after the article was published. Thereupon the plaintiffs took out a summons to strike out those parts. They said that on a plea of fair comment, the comment must be on existing facts, not on future events. No ordinary human person can look into the future and comment on facts which have not yet happened.

The article, it will be remembered, was published on May 19, 1967. The first part of sub-para. (v) deals with matters before that date:

"At a meeting of the Pinnock Depositors Association held at Caxton Hall, London, on May 4, 1967, opposition to the said scheme of arrangement was voiced by members. There was also opposition to the scheme on the part of the said committee of creditors, a majority of whom were in favour of liquidation."

(1) [1950] 2 All E.R. 882; [1951] 1 K.B. 360.

A But then the paragraph goes on to deal with matters which happened after May 19, 1967. It reads:

“ On June 13, 1967, the said committee by a majority of four to three voted in favour of liquidation, and again on July 14, 1967, by a majority of five to two voted in favour of liquidation. On July 14, 1967, the said committee handed to the board of directors of Pinnock a circular and requested the board to send the circular to depositors and creditors.”

B The next sub-para. (vi) also refers to matters after May 19. It reads:

“ Early in June 1967 the plaintiff, following a visit to overseas interests of Pinnock, presented a report to the board of Pinnock and the said committee of creditors. The report showed that [then it gives the details of the report] the total realistic value of Pinnocks’ assets was now put at only £1,250,000 as against the previous estimate of £2,500,000, and it stated that the position was ‘grimly serious’ . . . ”

C Counsel for the defendants sought to support those particulars. He says that on a plea of justification the pleader can rely on facts which happened subsequently; and that a similar rule should apply to a plea of fair comment. He drew our attention to *Maisel v. Financial Times, Ltd.* (2), and *Godman v. Times Publishing Co., Ltd.* (3). Those cases show that, in order to prove that the words are true, particulars can be given of subsequent facts which go to support the charge. Thus, if a libel accuses a man of being a “ scoundrel ”, the particulars of justification can include facts which show him to be a scoundrel, whether they occurred before or after the publication. Such particulars are admissible because they enable him to know the case he has to meet and open the way to discovery.

E The judge thought that those cases had no application to a plea of fair comment. I agree with him. In order to make good a plea of fair comment, it must be a comment on facts *existing* at the time. No man can comment on facts which may happen in the future. There is a passage in GATLEY ON LIBEL AND SLANDER (6th Edn.) para. 724, which goes further. It states:

F “ The facts which the defendant seeks to prove as the basis of his comment must have been known to him when he made the comment.”

I do not know that I would go quite so far as that. A man may comment on existing facts without having them all in the forefront of his mind at the time. Nevertheless it must be a comment on existing facts. I think that the matters stated in those particulars may well be admissible in evidence at the trial, but that does not mean that they should be pleaded. It is a settled rule of pleading that evidence is not to be pleaded. R.S.C., Ord. 18, r. 7 (1) provides:

G “ . . . every pleading must contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which those facts are to be proved . . . ”

H The facts pleaded in these two paragraphs are at most evidence. They are not material facts which needed to be pleaded. It was erroneous to include them. The master and the judge were right in striking them out. I would dismiss the appeal accordingly.

I DAVIES, L.J.: I agree. It seems to me quite clear that the plea of fair comment must be one of fair comment on existing facts. It is said in FRASER ON LIBEL AND SLANDER LAW AND PRACTICE (7th Edn.), p. 110 note (s):

“ Semble the comment must be upon facts which were present to the mind of the commentator at the time it was made not upon facts which were subsequently discovered.”

(2) [1914-15] All E.R. Rep. 671; [1915] 3 K.B. 336.

(3) [1926] 2 K.B. 273.

That note is supported by a reference to a Scottish case, *Wheatley v. Anderson and Miller* (4), and the relevant passage in the judgment of LORD ANDERSON stated (5):

“The jury are entitled to know what was in a defender’s mind at the time he made the comment, otherwise they will not be properly equipped for the discharge of their duty. It seems to me, however, to be quite incompetent for a defender, in support of a plea of fair comment, to aver and substantiate facts which were not in his mind at the time the comment was made, but which were discovered at a later date.”

For the purposes of this case it is not necessary to go quite as far as that. For what was sought to be done by the particulars delivered in the defence by the defendants here was to set out facts which were not merely unknown to the commentator at the time when he wrote the article but which had not yet happened. If it is necessary for the man making the comment to know the facts at the time he makes it, it follows as the night follows the day that it is impossible for him to rely on events which at that time had not happened. There is a singular absence of English authority on this point, and it may be that the reason for that is that it is so obvious that authority is not required. Justification of course, as was pointed out by counsel for the plaintiff in his argument, is quite different. A person raising the plea of justification is entitled to rely on facts subsequent to the publication of the libel. That is entirely different from the position in regard to fair comment.

I agree with LORD DENNING, M.R., that the decision of the judge and the master was quite right and the appeal should be dismissed.

**RUSSELL, L.J.:** I too agree. It is not disputed by counsel for the defendants that the facts on which the defence of fair comment is based can only be those known at the time of the publication. Nor does he dispute that the facts struck out from the particulars are in terms events that took place after the publication and ex hypothesi were not known at the time of publication. The best that can be said of these struck-out facts is that they may be evidence of the existence of a state of affairs or a trend at the time of the publication, e.g., the then attitude of relevant people to the proposed scheme for the avoiding of a liquidation. What is mere evidence from which the relevant fact may be inferred or proved, however, is not proper to be pleaded. Counsel for the defendants says that he is entitled to plead such matters as being, as he describes it, “evidential”, and he relies on two cases relating to a plea of justification. I can only say that I am not prepared to extend those cases to cover a departure from the ordinary rules as is suggested in the present case. I too would dismiss the appeal.

*Appeal dismissed.*

Solicitors: *Simmons & Simmons* (for the defendants); *M. A. Jacobs & Sons* (for the plaintiff).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

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(4) 1927 S.C. 133;

(5) 1927 S.C. at pp. 147, 148.



## A FOX AND OTHERS v. ADAMSON.

[HOUSE OF LORDS (Viscount Dilhorne, Lord Hodson, Lord Guest, Lord Devlin and Lord Upjohn), March 27, May 9, 1968.]

B Gaming—Amusements with prizes—Permit obtained under s. 49 (1) of, and Sch. 6, to the Betting, Gaming and Lotteries Act 1963 for installation of gaming machines—These gaming machines complied with the conditions of s. 49 (3)—Previously existing activities, lawful under s. 32 and s. 33, comprising bingo, French boule and two gaming machines were continued—Whether these previously existing activities were “amusements with prizes” and whether their continuance contravened s. 49 (2)—Betting, Gaming and Lotteries Act 1963 (c. 2) s. 32, s. 33, s. 49—Betting, Gaming and Lotteries Act 1964 (c. 78) s. 2.

C Gaming activities were carried on at a club. These comprised bingo, French boule and two fruit machines. The activities were lawful under s. 32 and s. 33 of the Betting, Gaming and Lotteries Act 1963. The club introduced additionally six Gold Award machines under a permit granted under s. 49 (1)\* of, and Sch. 6 to, the Act of 1963. Taken in isolation D these machines satisfied the conditions under s. 49 (3) of the Act of 1963 as amended. The previously existing activities, however, which were continued, did not come within the conditions under s. 49 (3). On appeal from a decision upholding convictions under s. 49 (2) for contravening the provisions of s. 49 (3), as amended†,

E Held: the justices’ finding that the provision of the bingo, French boule and two fruit machines, constituted the provision of amusements with prizes was a finding of fact; and accordingly, as the conditions under s. 49 (3) of the Betting, Gaming and Lotteries Act 1963 were not complied with in respect of those amusements, the convictions under s. 49 (2) of contravening those conditions should stand, for the offence enacted by s. 49 (2) applied to amusements notwithstanding that they had been lawful F before the grant of a permit under s. 49 (1) and Sch. 6 for other amusements (see p. 414, letter E, p. 416, letter I, to p. 417, letter A, and p. 417, letters A and B, post).

Decision of the Divisional Court ([1967] 3 All E.R. 902) affirmed, but on grounds put somewhat differently.

G [As to gaming with gaming machines, and as to licence duty, see SUPPLEMENT to 18 HALSBURY’S LAWS (3rd Edn.) para. 369B.

For the Betting, Gaming and Lotteries Act 1963 s. 32, s. 33 and s. 49, see 43 HALSBURY’S STATUTES (2nd Edn.) 343, 345, 361; and for the Betting, Gaming and Lotteries Act 1964 s. 2, see 44 HALSBURY’S STATUTES (2nd Edn.) 296.]

Case referred to:

H *McCollom v. Wrightson*, [1968] 1 All E.R. 514; [1968] 2 W.L.R. 578.

### Appeal.

I This was an appeal by the appellants, Colin Edward Fox, Sandra Madeline Gillett, Leslie Gillett and Kent and Thanet Casinos, Ltd., from the judgment of the Divisional Court (LORD PARKER, C.J., SALMON, L.J., and WIDGERY, J.) dated Oct. 24, 1967, and reported [1967] 3 All E.R. 902, dismissing their appeal against their conviction by the justices for the petty sessional division of Edmonton, in the Middlesex area of Greater London, on Dec. 30, 1966, at the hearing of informations laid on June 24, 1966, by the respondent, Louis Joseph Adamson, a superintendent of the Metropolitan Police Force that on Mar. 9, Mar. 10, Apr. 29, May 3, May 4 at the Legalite Casino Club, 18, Station Road, London, N.22, the appellants were concerned in the provision, on premises in respect of

\* Section 49 is set out at p. 414, letter H, to p. 415, letter E, post.

† Viz., as amended by the Licensing Act 1964 s. 2. Section 2 came into operation on Oct. 31, 1965 (ibid., s. 4 (3)).

which a permit under s. 49 (1) of, and Sch. 6 to, the Betting, Gaming and Lotteries Act 1963, had been granted, of amusements with money prizes in excess of 1s. (five separate offences being alleged against each of the appellants) contrary to s. 49 (2) of the Act of 1963. The Divisional Court refused leave to appeal but certified that points of law of general public importance were involved:—(i) whether games of bingo, French boule and the two fruit machines, were amusements with prizes within the meaning of s. 49 of the Betting, Gaming and Lotteries Act 1963; (ii) whether the effect of s. 49 (2) of the Betting, Gaming and Lotteries Act 1963 was to establish a separate code in respect of the provision of amusements on premises in respect to which a permit under Sch. 6 to the Act of 1963 had been granted and was for the time being in force, or whether on its true construction the subsection did not in any way affect gaming or gaming machines on such premises which was or were being conducted or used lawfully in compliance with s. 32 and s. 33 of the Act.

*D. Weitzman, Q.C., and R. R. Russell* for the appellants.

*J. H. Buzzard and J. W. Rogers* for the respondent.

Their lordships took time for consideration.

May 9. The following opinions were delivered.

**VISCOUNT DILHORNE:** My Lords, the appellants, Kent and Thanet Casinos, Ltd. were in 1966 the owners and occupiers of 18, Station Road, London, N.22, and there managed a club called the Legalite Casino Club. The appellant, Leslie Gillett, was a director and the chairman of Kent and Thanet Casinos, Ltd. The appellant, Sandra Gillett, was also a director of that company and she had been nominated to hold the justices' licence and the excise licence for the club premises. The appellant, Fox, was a manager employed by Kent and Thanet Casinos, Ltd. and was responsible for running the club.

On Aug. 26, 1964, Kent and Thanet Casinos, Ltd. applied to the Wood Green Borough Council for a permit under s. 49 of, and Sch. 6 to, the Betting, Gaming and Lotteries Act 1963 (hereafter referred to as "the Act") for the provision at the club of amusements with prizes. On Oct. 26, 1964, they were given a permit to do so for the period ending on Sept. 30, 1967. On June 24, 1966, informations were laid charging the appellants with breaches of s. 49 of the Act of 1963 by providing at the club on Mar. 9 and 10, Apr. 29, and May 3 and 4, 1966, amusements with prizes at which money prizes in excess of 1s. were offered. The appellants were convicted. They appealed to the Divisional Court (1). Their appeal was dismissed but that court, while refusing leave to appeal, certified (2) that there was a point of law of general public importance. They now appeal with the leave of this House.

Section 49 of the Act of 1963, so far as material, reads as follows:

"49 (1). The provisions of this section shall have effect for the purpose of permitting the provisions of amusements with prizes—(a) on any premises in respect of which a permit for the provision thereon of such amusements has been granted by the local authority, and is for the time being in force, under Sch. 6 to this Act: and . . . (b) . . .

"(2) Nothing in ss. 32, 33, 34, 41 or 42 of this Act shall apply in relation to amusements with prizes provided on such premises as are mentioned in sub-s. (1) (a) or . . . but, in relation to any such amusement to which any of those sections would apply but for this subsection, the conditions set out in sub-s. (3) of this section shall be observed, and if any of those conditions is contravened every person concerned in the provision or conduct of that amusement shall be guilty of an offence unless he proves that the contravention occurred without his consent or connivance and that he exercised all due diligence to prevent it.

(1) [1967] 3 All E.R. 902.

(2) [1967] 3 All E.R. at p. 907.

- A “(3) The conditions referred to in the last foregoing subsection are . . .  
 (c) that no money prize is distributed or offered which exceeds 1s. . .”

The justices found as a fact that on the dates in question bingo was played at the club “at which the prizes ranged from £5 to £18” and also French boule, a game, they said, resembling roulette, at which “the prizes were at times about 10s. or £1”. They also found that there were on the club premises two fruit machines “on which the prizes ranged up to 9s. and on which there was also a jackpot prize of a sum possibly of about £4”; and six “Gold Award” machines on which the maximum prize in money was one shilling. The fruit machines and the “Gold Award” machines were gaming machines within the definition in s. 33 (3) (a) of the Act of 1963. The justices assumed, and the Case Stated says, that it was conceded by the respondent that the playing of bingo and French boule complied with s. 32 of the Act and that the fruit machines complied with s. 33. They held, however, that the bingo, the French boule and the two fruit machines were amusements with prizes within the meaning of s. 49 and that all the conditions prescribed by s. 49 (3) were not complied with.

- The first point certified by the Divisional Court (3) as a point of law of general public importance was whether “the games of bingo, French boule and the two fruit machines . . . were amusements with prizes within the meaning of s. 49” of the Act. The words “amusements with prizes” are not defined in s. 49 or elsewhere in the Act. In my opinion, they must be given their ordinary natural meaning. Whether the playing of a particular game or the use of a particular machine is or is not an amusement with a prize is a question of fact. There is nothing in the Case Stated to indicate that the justices did not give the ordinary and natural meaning to these words. Counsel for the respondent, during the argument in this House was prepared to concede that the game of French boule was not an amusement with a prize, as the playing of the game did not result in the winning of a prize. However this may be, the justices found that on the dates in question it was played for a prize, and one must proceed on that basis.

- F The second point certified by the Divisional Court (3) was:

- “Whether the effect of s. 49 (2) of the . . . Act was to establish a separate code in respect of the provision of amusements with prizes including games and gaming machines on premises in respect to which a permit under Sch. 6 to the Act of 1963 had been granted and was for the time being in force, or whether on its true construction the said subsection did not in any way affect gaming or gaming machines on such premises which was or were being conducted or used lawfully in compliance with s. 32 and s. 33 of the Act of 1963.”

- Section 49 (2) begins with the words “Nothing in ss. 32, 33, 34, 41 or 42 of this Act shall apply in relation to amusements with prizes provided on” premises in relation to which such a permit has been granted and was in force.

- Section 32 provides that gaming shall be lawful if, but only if, it is conducted in accordance with the conditions prescribed in the section. Section 33 provides that s. 32 shall not apply to gaming machines. It distinguishes between the use of those machines on premises to which the public have access or which are used wholly and mainly by persons under eighteen and use on other premises. Use of the machines on those other premises must comply with the conditions laid down in s. 33 (2).

Section 41 provides that subject to the provisions of the Act all lotteries are unlawful; and s. 42 makes participation in the running of a lottery an offence. It also provides that it shall be a defence to proceedings under that section to prove that the lottery was one declared not to be unlawful by ss. 43, 44, 45 and 46 of the Act, and that the person charged believed and had reasonable cause for



believing that none of the conditions required to be observed in respect of those lotteries had been broken. A

If the provision of an amusement with a prize could not involve gaming, the use of gaming machines or a lottery, this part of s. 49 would serve no useful purpose. The statute recognises that an amusement with a prize may do so by the insertion of these words in s. 49. If there are amusements with prizes which involve gaming the use of gaming machines or a lottery and which are provided on premises in respect of which such a permit is in force, there can be no prosecution for an offence under the gaming sections or in respect of the running of a lottery. B

In the Legalite Casino Club there were no less than eight gaming machines. It is a breach of a condition imposed by s. 33 (2) to have more than two available for play in any one building such as a club, but if the provision of those gaming machines amounted to the provision of amusements with prizes, as the justices found, then there could be no prosecution for an offence under s. 33. The exclusion of the operation of ss. 32, 33, 34, 41 and 42 only applies in relation to amusements with prizes on premises in respect of which such a permit is in force. If on such premises there was gaming, or the use of gaming machines or a lottery which did not constitute the provision of amusements with prizes, these sections would continue to operate. Section 49 (2) goes on to provide that in relation to an amusement with a prize to which any of those sections would apply but for s. 49 (2), the conditions set out in s. 49 (3) must be observed. C D

So the answer to the question posed by the Divisional Court (4) appears to me to depend on the answer to the question, did what was provided on such premises amount to the provision of an amusement with a prize? If it did not, then ss. 32, 33, 34, 41 and 42 continue to operate and the legality of any gaming, use of gaming machines and of a lottery will depend on the provisions of those sections. If it did, then the conditions prescribed in s. 49 (3) apply. E

In this case there was a permit in force in relation to the premises in which the Legalite Casino Club was run. The justices found as a fact that amusements with prizes were provided. So, in my opinion, they were right in holding that s. 49 (3) applied. It was not disputed that if that subsection applied, one of the conditions prescribed was not complied with. F

In my opinion, the justices came to the right conclusion and this appeal should be dismissed.

**LORD HODSON:** My Lords, the appellants were each and all convicted as being concerned in the provision of premises (in respect of which a permit under Sch. 6 to the Betting, Gaming and Lotteries Act 1963, had been granted) where amusements with prizes were provided in respect of which money prizes were offered contrary to s. 49 (2) of the Act. Section 49 of the Act provides: G

“ 49.—(1) The provisions of this section shall have effect for the purpose of permitting the provision of amusements with prizes: H

“ (a) on any premises in respect of which a permit for the provision thereon of such amusements has been granted by the local authority, and is for the time being in force, under Sch. 6 to this Act; and

“ (b) at any pleasure fair consisting wholly or mainly of amusements provided by travelling showmen which is held on any day of a year on premises not previously used in that year on more than twenty-seven days for the holding of such a pleasure fair. I

“ (2) Nothing in ss. 32, 33, 34, 41 or 42 of this Act shall apply in relation to amusements with prizes provided on such premises as are mentioned in sub-s. (1) (a) or at such a pleasure fair as is mentioned in sub-s. (1) (b) of this section; but, in relation to any such amusement to which any of those sections would apply but for this subsection, the conditions set out in

- A sub-s. (3) of this section shall be observed, and if any of those conditions is contravened every person concerned in the provision or conduct of that amusement shall be guilty of an offence unless he proves that the contravention occurred without his consent or connivance and that he exercised all due diligence to prevent it.
- B “(3) The conditions referred to in the last foregoing subsection are—  
 “(a) that the amount paid by any person for any one chance to win a prize does not exceed 1s.;  
 “(b) that the aggregate amount taken by way of the sale of chances in any one determination of winners, if any, of prizes does not exceed 50s., and that the sale of those chances and the declaration of the result take place on the same day and on the premises on which, and during the time when, the amusement is provided;  
 “(c) that no money prize is distributed or offered which exceeds 1s.;  
 “(d) that the winning of, or the purchase of a chance to win, a prize does not entitle any person, whether or not subject to a further payment by him, to any further opportunity to win money or money's worth by taking part in any amusement with prizes or in any gaming or lottery;  
 “(e) in the case of such a pleasure fair as is mentioned in sub-s. (1) (b) of this section, that the opportunity to win prizes at amusements to which this subsection applies is not the only, or the only substantial, inducement to persons to attend the fair.  
 “(4) Where any amusement with prizes takes the form of a game played by means of a machine, being a game which is made playable by the insertion of a coin or coins into the machine, then, notwithstanding that, in addition to a money prize, a successful player receives the opportunity to play the game again without the insertion of another coin, the condition set out in sub-s. (3) (d) of this section shall not be deemed to be contravened if the aggregate amount which can be won by the player without inserting another coin does not exceed 1s.”
- E
- F A permit was issued pursuant to the provisions of Sch. 6 to the Act on Oct. 26, 1964, by the council of the Borough of Wood Green, being the relevant local authority, to the appellant Kent and Thanet Casinos, Ltd. This was to provide amusements with prizes at the Legalite Casino Club, 18, Station Road, London, N.22, and had been applied for in order that six Gold Award machines might be used lawfully on the premises. A licence had been granted to the club as from
- G Oct. 1, 1966, under the provisions of the Finance Act 1966, for the use of the premises for gaming otherwise than by gaming machines. This licence expired on Sept. 30, 1967, and cost £500. Two licences effective between the same dates had been granted to this club under the provisions of the same Act in order to permit a gaming machine appropriate to the rate of duty paid to be made available for play on the premises. £75 was paid for each of these licences. The
- H gaming or amusements with prizes as found in the Case Stated were: (i) bingo with prizes ranging from £5 to £18; (ii) French boule with stakes ranging from 2s. to 10s. and prizes either about 10s. or £1; (iii) two fruit machines operated on insertion of 6d. on which prizes varied up to 9s. and on which there was a jackpot prize of about £1; (iv) six Gold Award machines operated on insertion of a 6d. on which the maximum prize was 1s. and in money's worth 5s.
- I The first point taken by the appellants is that the above mentioned activities were not amusements with prizes. As LORD PARKER, C.J., pointed out (5), there is no definition of amusements with prizes (which are the subject of Part 4 of the Act) but Part 2 of the Act which deals with “gaming”, contains the three sections, ss. 32, 33, 34, which are among those expressly excluded from the operation of s. 49. This is an indication that there is no reason to limit the activities which are covered by the words “amusements with prizes” to any narrow field,

and I see no ground for saying that the justices erred in law in finding that they were amusements with prizes. A

The main point argued on the appeal before your lordships depends on the construction of s. 49 itself. The appellants appear to have applied for the permit in order that they might acquire the six Gold Award machines in addition to the machines they already used lawfully under s. 33 of the Act of 1963 which permitted not more than two gaming machines available for play in any one building. B

The six Gold Award machines satisfy the conditions of s. 49 (3) as amended by s. 2 of the Betting, Gaming and Lotteries Act 1964. The appellants contended that they could continue lawfully to carry on their former activities in compliance with the earlier sections of the Act and that s. 49 was only relevant so far as the six Gold Award machines were concerned. Since these complied with the conditions they argued that no offence had been committed. C

The contention of the respondent, on the other hand, was, and is, that if an occupier of premises obtains a permit under s. 49 (1) (a) of the Act, that introduces a new code of rules in relation to the premises. The opening words of s. 49 (2) are these:

“ Nothing in ss. 32, 33, 34, 41 or 42 of this Act shall apply in relation to amusements with prizes provided on such premises as are mentioned in sub-s. (1) (a) [i.e., premises in respect of which a permit has been granted] or at such a pleasure fair as is mentioned in sub-s. (1) (b) . . . ” D

Sections 32, 33 and 34 are contained in Part 2 of the Act which deals with gaming and s. 41 and s. 42 are contained in Part 3 of the Act which deals with lotteries and offences in connexion with lotteries. E

If the opening words of s. 49 (2) exclude the sections enumerated above so that they do not apply to amusements with prizes carried on at the premises the offences are made out for the activities, apart from those of the Gold Award machines, which were not within and could not come within the conditions in s. 49 (3). F

The appellants can only succeed if they are right in saying that s. 49 is directed to allowing something which is otherwise illegal. They rely first on the word “permitting” which appears in the opening sentence. Little weight can, however, be given to the use of the word “permitting” which appears in this section as also in the preceding s. 48 as introducing provisions irrespective of legality or illegality. I think that the corresponding phrase in s. 49 is introductory also and no more. Reliance was placed on an argument that s. 49 (2) which contains the words excluding the enumerated sections is itself only concerned to exclude cases where there has been a breach of these sections. It is said that the conditions in s. 49 are to be imposed only when there is an activity which would fall foul of s. 32 and s. 33 and requires to be saved by some other provision. This is to give a limited meaning to the word “apply” in the subsection, so that it relates not to the sections in relation to their content and subject matter but only to their operation when breached. It is said that “apply” is to be read as meaning “apply so as to make unlawful”. G H

This is a tortuous approach to the words of the section which seems to me to be impossible to accept, and I see no escape from the plain meaning of the word “apply” in the context as relating to the subject matter of the enumerated sections. True that the section might have been differently drafted by referring simply to amusements with prizes in relation to gaming lotteries instead of referring, by their numbers, to the sections dealing with these subjects; but the result is the same for the sections are identified so that by reference to them their subject matter can be ascertained. If these sections would apply but for s. 49 (2), the conditions set out in s. 49 (3) must be observed. These conditions were not observed and could not be observed in relation to the activities on the premises apart from those relating to the Gold Award machines. Accordingly, I agree I



A with the Divisional Court (6) that the justices came to the right conclusion and I would dismiss the appeal.

LORD GUEST: My Lords, I have read the opinion of my noble and learned friend, VISCOUNT DILHORNE, and I agree with it. I would dismiss the appeal.

B LORD DEVLIN: My Lords, I concur.

LORD UPJOHN: My Lords, the appellants, Kent and Thanet Casinos, Ltd., were at all material times the owners and occupiers of certain premises in North London on which was established the Legalite Casino Club organised and managed by the individual appellants. Various playing activities (to use  
C a neutral phrase) were carried on in the club, namely, bingo, French boule and two fruit machines. The justices found that substantial rewards were obtainable by the players, up to £18 at bingo, up to £1 at French boule and the jackpot on the fruit machines was about £4. All these playing activities were organised and conducted in accordance with s. 32 and s. 33 of the Betting, Gaming and Lotteries Act 1963 (the Act) and were perfectly legal.

D The appellants applied for and obtained from the local authority in October, 1964, a permit under s. 49 (1) (a) of the Act to provide "amusements with prizes", and they then installed six "Gold Award" machines, a type of fruit machine which complied in every relevant respect with the conditions laid down in s. 49 (3) as amended by the Betting, Gaming and Lotteries Act 1964, namely,  
E no prize could lawfully exceed 1s. in money or 5s. in kind. So that playing activity was also perfectly lawful. However, the appellants were prosecuted before the Edmonton magistrates for an offence under s. 49 (2) in respect of the playing activities, perfectly legal under s. 32 and s. 33, which I have previously mentioned. They were convicted and the conviction was upheld by the Divisional Court (7) on a Case Stated by the magistrates.

F At first sight it may seem strange that if two closely related playing activities can lawfully be carried on in isolation one becomes unlawful when carried on in combination with the others, but it was argued that this was not surprising for while Part 2 of the Act, which includes s. 32 and s. 33, deals with gaming where high rewards are permitted to the players who in general will be over eighteen years of age, Part 4 dealing with amusements with prizes, is concerned only with small prizes up to 5s. in kind at pleasure fairs or amusement parks authorised  
G by the local authority which may be attended by those of tender years. The truth is, however, that these general considerations form no sound guide to the interpretation of the provisions of an Act of Parliament which must depend on the exact wording that Parliament has used. Furthermore, the Act creates offences and provides heavy penalties for contravention of its provisions and the appellants naturally rely on the well-known principle that in such cases, if the  
H Act is ambiguous, the ambiguity should be resolved in favour of the subject.

I My lords, the question in the end turns on the true construction of a few words in s. 49 (2), but before I consider that section I propose to review briefly the general scheme of the relevant parts of the Act. Part 2 of the Act (ss. 32-40) is entitled "Gaming", that is a playing activity defined in s. 55 of the Act as the playing of a game of chance for winnings in money or money's worth. By s. 32 gaming is made lawful provided it is conducted in accordance with the provisions of the Act.

No limit is placed on the rewards that may be gained by gaming but there are stringent provisions to ensure that all odds are equally favourable to all the players and that all money paid by way of stakes must be returned by way of winnings. There are other stringent conditions which I need not set out. Section 33 exempts the provisions of s. 32 from gaming machines defined in language

(6) [1967] 3 All E.R. 907.

(7) [1967] 3 All E.R. 902.

familiar to your lordships and means "fruit machines", but there is no limit to the rewards of playing, though not more than 6d. may be hazarded on any one game and all stakes must be applied in payment of winnings to a player or applied otherwise than for the purpose of private gain. Section 34 prohibits gaming in a street or place to which the public have access. Part 3 of the Act (ss. 41-47) is entitled "Lotteries and Prize Competitions" and makes all lotteries unlawful, but makes exceptions, in ss. 43, 44 and 45 respectively, for certain small, private and charitable lotteries.

Part 4 (ss. 48-50) is entitled "Amusements with Prizes", a phrase nowhere defined, and as the decision in this case depends on the construction of s. 49 I must set out sub-s. (1) and sub-s. (2). [HIS LORDSHIP read s. 49 (1) and (2), which have been printed at p. 414, letter H, to p. 415, letter A, ante, and continued:] I have already summarised sufficiently the conditions prescribed by sub-s. (3). All that need be said is that while the "Gold Award" machines plainly complied with the prescribed conditions, the other playing activities carried on on the premises equally plainly did not. It is to be noted that the permit to be granted is in respect of "premises".

The question of construction may be very shortly stated. Subsection (2) makes it clear that in respect of a playing activity properly described as "amusements with prizes" carried on on the premises in respect of which a permit is granted the provisions and conditions set out in ss. 32, 33, 34, 41 and 42 do not apply; they may be ignored, but in their place "in relation to any such amusement to which any of those sections would apply but for this subsection" then sub-s. (3) applies. The question is whether those words refer to amusements with prizes the legality of which would fall to be considered as gaming under Part 2 or as a lottery under Part 3 but for the opening words of s. 49 (2), or whether the section is directed only to those amusements with prizes which would contravene one or more of the sections mentioned and so be unlawful thereunder. That has been the question to which both sides have addressed their arguments before this House, though it does not precisely fit the questions of law as formulated by the Divisional Court (8).

My lords, I have not found this an easy question to answer. On the whole I have reached the conclusion that the Divisional Court (9) were right. I think that the natural meaning of the words "would apply" is "fall to be considered" rather than "contravene" or "fall foul of" to use the words of WIDGERY, J., in the Divisional Court (10). This view is supported by the very similar wording in s. 48 where it seems to me reasonably plain that the words "would apply" have that meaning. Furthermore, it would be unusual, to say the least of it, but it is a necessary consequence of the appellants' argument that to establish an offence under s. 49 it would be necessary to prove not only a contravention of sub-s. (3) of that section as amended but also a contravention of one of the sections mentioned at the beginning of sub-s. (2).

My lords, this appeal lies in a very small compass depending as it does substantially on the meaning of the words "would apply" in s. 49 (2). But the success of the prosecution in my opinion depends entirely on the view of the justices expressed in para. 6 (b) of the Case Stated that "the said bingo, the said French boule and the two said fruit machines were amusements with prizes within the meaning of s. 49". That finding was not challenged in the Divisional Court (9) or before your lordships.

Whether such a finding is a question of fact for the justices to determine, or whether it is a question of mixed fact and law and so open to review may one day have to be determined. Your lordships have recently had to determine the meaning of the words "gaming" and "winnings" in the Act (see *McCullom v. Wrightson* (11)), and I would think that what are "amusements with prizes"

(8) [1967] 3 All E.R. at p. 907.

(10) [1967] 3 All E.R. at p. 906, letter C.

(9) [1967] 3 All E.R. 902.

(11) [1968] 1 All E.R. 514.

A must involve the proper interpretation of the words "amusements" and "prizes" in the Act.

Thus counsel for the respondent conceded that games of chemin de fer or roulette could not properly be described as amusements with prizes. As a matter of colloquial language that is clearly right and it may also be true of parliamentary language. Then I would think that according to the circumstances in which it is played bingo may be an amusement with prizes or not, as the case may be. Of course, by the use of its language in s. 49 (2) Parliament recognises that amusements with prizes may also involve gaming or a lottery; it is a question to be determined, as it at present seems to me, on the facts of each case on a proper interpretation of the Act whether a given playing activity is properly described as an amusement with prizes; that is essential for the commission of an offence under s. 49. None of those questions arise in the present appeal for, as I have already said, the justices' finding in para. 6 (b) has not been challenged, so my observations are entirely tentative.

My lords, for the reasons I have given earlier, I would dismiss the appeal.

*Appeal dismissed.*

D Solicitors: *Gale & Phelps* (for the appellants); *Solicitor, Metropolitan Police* (for the respondent).

[*Reported by S. A. HATTEEA, Esq., Barrister-at-Law.*]

### NOTE.

E THOMPSON v. ANDREWS.

[COURT OF APPEAL, CIVIL DIVISION (Harman, Salmon and Winn, L.JJ.), March 22, 1968.]

F *Court of Appeal—Judge's note—Substitution of note taken by solicitors—Appeal from official referee—Official referee's note available—Fuller note taken by appellant's solicitors—Application by appellant to substitute solicitors' note for official referee's—Agreement by official referee but objection by respondent—Discretion—In absence of agreement official referee's note should be the note used by the Court of Appeal—R.S.C., Ord. 59, r. 12 (1)\*.*

G [As to bringing evidence taken in the court below before the Court of Appeal, see 30 HALSBURY'S LAWS 472, 473, para. 887; and for cases on the subject, see DIGEST (Practice) 817, 3729-3737.

For R.S.C., Ord. 59, r. 12, see SUPREME COURT PRACTICE 1967, p. 769.]

#### **Application.**

H On the hearing of an appeal by the defendant, Edward Andrews (trading as Birchwood Boatcentre), from the decision of His Honour PERCY LAMB, Q.C., Official Referee, given on Dec. 12, 1967, in an action brought by the plaintiff, Phyllis Mary Thompson (trading as Newark Caravans), the defendant applied to substitute his solicitors' note of the evidence given before the official referee for the official referee's own shorter note of the evidence. This application was opposed by the plaintiff.

I W. C. Woodward for the defendant.  
R. L. Johnson for the plaintiff.

HARMAN, L.J.: This is an appeal from an official referee, and of course an appeal from that official is only on questions of law: he enjoys that privilege. The appeal, therefore, must rest on this, that there was no evidence to justify the official referee in the findings to which he came. He came to various conclusions for damages, for this item and that. It is not in accordance with the

\* R.S.C., Ord. 59, r. 12 (1), so far as material, is set out at p. 420, letter D, post.



practice, as I understand it, in the official referee's court to take a shorthand note, and there was not a shorthand note taken on this occasion. The official referee had been asked for his note: that he has produced, and I have it before me; but it is said on behalf of the defendant that it is a wholly inadequate note, and he has produced a note by a member of the firm of solicitors instructing him, taken in court, so he says, which, instead of being twenty-five pages long, is seventy pages long, and we are asked to substitute the solicitors' note for that of the official referee. He was communicated with on the subject and was asked to approve of that procedure. He wrote on the bottom of the letter asking him to do so "I agree to this proposal". The proposal was that the solicitors' note should be substituted for his own. On the front of the note as sent him he wrote the words "I certify these", or words to that effect. What that meant I do not know at all. Whether he really had looked through them, how much recollection he had, and so on, is unknown to me. An important feature seems to me, however, to be this, that the other side, being told of this project, objected to it and would not agree; but the official referee was not told that. What his reaction would have been if he had known there was a contest over this is left in doubt.

Now that being the position, one looks at R.S.C., Ord. 59, r. 12 (1):

"Where any question of fact is involved in an appeal, the evidence taken in the court below shall . . . subject to any direction of the Court of Appeal, be brought before that court as follows: . . . (b) in the case of evidence given orally, by a copy of so much of the transcript of the official shorthand note as is relevant or by a copy of the judge's note, where he has intimated that in the event of an appeal his note will be sufficient, or by such other means as the Court of Appeal may direct."

There was no shorthand note: the judge has not certified or intimated that his note will be sufficient: but I think the last words would give jurisdiction to this court to direct otherwise, namely, to direct that the solicitors' note should be substituted for the judge's note. In this case that is not a course we ought to take. It would produce very strange results, or may do, in future cases before official referees where there would be presumably a competition of notes taken by the solicitors on each side and either side objecting to the other. It seems to me that in the absence of agreement we must stick to what we have got and abide by the judge's note so far as it goes. It may be that if counsel had taken a note there might be something to be said for looking at that, but apparently they did not, or anyway no note that would help us.

I am against admitting the solicitors' note as a substitute for the judge's note and would rule accordingly.

**SALMON, L.J.:** I agree. I go still further. If the note had been counsel's note and was not agreed between counsel as being accurate and it was different from the note taken by the judge, I would even in those circumstances be inclined to stick to the judge's note. The normal practice is that, save in the most exceptional circumstances, if this court is asked to look at something other than the shorthand note or the judge's note, it usually will only look at an agreed note of the evidence. Whether it be taken by solicitor or counsel seems to me to be immaterial.

**WINN, L.J.:** I agree with both judgments which my lords have delivered.

*Application refused.*

Solicitors: *Denton, Hall & Burgin*, agents for *Shacklock, Bosworth & Hooton*, Kirkby-in-Ashfield, Notts. (for the defendant); *Collyer-Bristow & Co.*, agents for *Larken & Co.*, Newark (for the plaintiff).

[Reported by HENRY SUMMERFIELD, Esq., Barrister-at-Law.]

## PARTRIDGE v. CRITTENDEN.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Ashworth and Blain, J.J.), April 5, 1968.]

*Animal—Bird—Protection—Advertisement of Bramblefinch hens, at 25s. each, in periodical under classified advertisements—No words saying offer for sale—Whether the advertisement constituted an “offer for sale”—Bird's ring could be removed without breaking or damaging it—Inference that bird not close-ringed and bred in captivity—Protection of Birds Act, 1954 (2 & 3 Eliz. 2 c. 30), s. 6 (1), Sch. 4.*

The appellant inserted an advertisement in the issue for Apr. 13, 1967, of a periodical “Cage and Aviary Birds” containing the words “Quality British A.B.C.R. . . . Bramblefinch cocks, Bramblefinch hens, 25s. each”. It was inserted under the general heading “Classified Advertisements”. In no place was there any direct use of the words “offer for sale”. T., having seen the advertisement, wrote for a hen, which was sent to him and arrived on May 2, 1967, wearing a closed-ring. T. was able to remove the ring without injury to the bird. The appellant was charged with unlawfully offering for sale a certain wild live bird, viz., a brambling, other than a close-ringed specimen bred in captivity, contrary to s. 6 (1)\* of, and Sch. 4 to, the Protection of Birds Act, 1954. The justices were of opinion that the advertisement was an offer for sale, and that the brambling was not a close-ringed specimen bred in captivity because it was possible to remove the bird's ring. On appeal against conviction,

**Held:** the advertisement in the present case constituted in law an invitation to treat, not an offer for sale, and the offence which was charged against the appellant was not, therefore, established (see p. 424, letters D and G, post).

*Fisher v. Bell* ([1960] 3 All E.R. 731) applied.

Per CURIAM: if the only issue were whether the bird was a close-ringed specimen, the justices inference from the evidence that it was not would have been upheld (see p. 423, letter I, post).

Appeal allowed.

[As to the protection of wild birds, see SUPPLEMENT to 1 HALSBURY'S LAWS (3rd Edn.) para. 1340.

As to the meaning of offer in the law of contract, see 8 HALSBURY'S LAWS (3rd Edn.) 69, para. 119; and for cases on the subject, see 12 DIGEST (Repl.) 57, 314-316, 59-62, 323-337.

For the Protection of Birds Act, 1954, s. 6, Sch. 4, see 34 HALSBURY'S STATUTES (2nd Edn.) 30, 41.]

Cases referred to:

*Fisher v. Bell*, [1960] 3 All E.R. 731; [1961] 1 Q.B. 394; [1960] 3 W.L.R. 919; 125 J.P. 101; Digest (Cont. Vol. A) 409, 7358c.

*Grainger & Son v. Gough* (*Surveyor of Taxes*), [1896] A.C. 325; 65 L.J.Q.B. 410; 74 L.T. 435; 60 J.P. 692; 45 Digest (Repl.) 382, 8.

*Mella v. Monahan*, [1961] Crim. L.R. 175.

### Case Stated.

This was a Case Stated by justices for the county of Chester acting in and for the petty sessional division of Chester Castle and Ellesmere Port in respect of their adjudication as a magistrates' court sitting at the Castle, Chester, on July 19, 1967.

\* Section 6, so far as material, provides: “(1) If . . . any person sells, offers for sale . . . (a) any live wild bird . . . included in Sch. 4 to this Act of a species which is resident in or visits the British Isles in a wild state, other than a close-ringed specimen bred in captivity; . . . he shall be guilty of an offence . . .” Schedule 4 has the heading: “Wild birds which may not be sold alive unless close-ringed and bred in captivity” and amongst the names in the schedule is “brambling”.

On June 19, 1967, an information was preferred by the respondent, Anthony Ian Crittenden, on behalf of the R.S.P.C.A. against the appellant, Arthur Robert Partridge, charging that the appellant did unlawfully offer for sale a certain live wild bird, to wit a brambling, being a bird included in Sch. 4 to the Protection of Birds Act, 1954, of a species which was resident in or visited the British Isles in a wild state, other than a close-ringed specimen bred in captivity, contrary to s. 6 (1) of the Act of 1954.

The following facts, so far as it is necessary to state them in this report, were found: (a) on Apr. 13, 1967, there appeared in the periodical "Cage and Aviary Birds" an advertisement inserted by the appellant containing, inter alia, the words "Quality British A.B.C.R. . . . Bramblefinch cocks, Bramblefinch hens 25s. each"; (b) by letter to the appellant dated Apr. 22, 1967, Thomas Shaw Thompson, of 16, Long Lane, Hoole, Chester requested the dispatch to himself of an A.B.C.R. bramblefinch hen as advertised in "Cage and Aviary Birds" and enclosed a cheque for 30s.; (c) on May 1, 1967, the appellant dispatched a bramblefinch hen which was wearing a closed-ring to Mr. Thompson in a box by British Rail. Mr. Thompson received the said bird on May 2, 1967; the box was opened by Mr. Thompson in the presence of the respondent. Mr. Thompson attempted to and was, in fact, able to remove the said ring without injury to the bird. Even taking into account that the bird had travelled from Leicester in a box on British Rail its condition was rough, it was extremely nervous, had no perching sense at all and its plumage was rough.

It was contended before the justices by the appellant (a) that there was no offer for sale in the county of Chester as alleged since the advertisement in "Cage and Aviary Birds" was merely an invitation to treat; and (b) that an offence was not committed under the aforesaid section merely because it was possible to remove the ring from the bird's leg.

It was contended before the justices by the respondent (a) that the said advertisement was an offer for sale in Chester; and (b) that a bird was not a close-ringed specimen bred in captivity if it was possible to remove the ring from its leg.

The justices were of opinion that the said advertisement was an offer for sale in Chester on Apr. 22, 1967, and that the brambling so offered for sale by the appellant was not a close-ringed specimen bred in captivity because it was possible to remove the ring. They, accordingly, found the case proved and fined the appellant £5 and ordered him to pay £5 5s. advocate's fee and £4 9s. 6d. witnesses' expenses. The appellant appealed.

The question for the opinion of the High Court was whether the justices were right in law in holding that the advertisement was an offer for sale in Chester on May 1, 1967, and that a bird was not a close-ringed specimen bred in captivity within the meaning of the Act of 1954 if it were possible to remove the ring from its leg.

The cases noted below\* were cited during the argument in addition to those referred to in the judgments.

*C. J. Pitchers* for the appellant.

*R. M. D. Havers, Q.C.*, and *D. J. Lloyd-Jones* for the respondent.

**ASHWORTH, J.:** The case arose because in the issue for Apr. 13, 1967, of a periodical known as "Cage and Aviary Birds", there appeared an advertisement inserted by the appellant containing, inter alia, the words "Quality British A.B.C.R. . . . Bramblefinch cocks, Bramblefinch hens 25s. each". In the Case Stated the full advertisement is not set out, but by the agreement of counsel this court has seen a copy of the issue in question, and what is perhaps to be noted in passing is that on the page there is a whole list of different birds under the general heading of "Classified Advertisements". In no place, so far as I

\* *Spencer v. Harding*, (1870), L.R. 5 C.P. 561; *Harris v. Nickerson*, (1873), L.R. 8 Q.B. 286; *Rooke v. Dawson*, [1895] 1 Ch. 480.



A can see, is there any direct use of the words "offers for sale". I ought to say I am not for my part deciding that that would have the result of making this judgment any different, but at least it strengthens the case for the appellant that there is no such expression on the page. Having seen that advertisement, Mr. Thompson wrote to the appellant and asked for a hen and enclosed a cheque for 30s. A hen, according to the Case, was sent to him on May 1, which was  
B wearing a closed-ring, and he received it on May 2. The box was opened by Mr. Thompson in the presence of the respondent, and the Case finds that Mr. Thompson was able to remove the ring without injury to the bird, and, even taking into account that the bird had travelled from Leicester in a box on the railway, its condition was rough, it was extremely nervous, it had no perching sense at all and its plumage was rough. Stopping there, the inference from that  
C finding is that the justices were taking the view, or could take the view, that from its appearance, at any rate, this was not such a bird as a person can legitimately sell within the Act of 1954. The Case goes on to find:

"The expression 'close-ringed' is nowhere defined nor is there any universally recommended size ring for a brambling; (g) The ring is placed on the bird's leg at the age of three to ten days at which time it is  
D not possible to determine what the eventual girth of the bird's leg will be."

Having been referred to the decision of this court in *Fisher v. Bell* (1) the justices nonetheless took the view that the advertisement did constitute an offer for sale; they went on further to find that the bird was not a close-ringed specimen bred  
E in captivity, because it was possible to remove the ring. Before this court counsel for the appellant, has taken two points, first that this was not an offer for sale, and secondly that the justices' reason for finding that it was not a close-ringed bird was plainly wrong, because the fact that one could remove the ring did not render it a non-close-ringed bird.

It is convenient, perhaps, to deal with the question of the ring first. For my  
F part I confess that I was in ignorance, and in some state of confusion, as to the real meaning and effect of this particular phrase in the section, and I express my indebtedness to counsel for the respondent, for having made the matter, as far as I am concerned, perfectly clear. I would say, if one was looking for a definition of the phrase "close-ringed", that it means ringed by a complete ring, which is not capable of being forced apart or broken except, of course, with the  
G intention of damaging it. I contrast a closed-ring of that sort—it might take the form, I suppose, of an elastic band or of a metal circle ring—with the type of ring which sometimes exists which is made into a ring when a tongue is placed through a slot and then drawn back; that is a ring which can be undone and is not close-ringed. In this case what is contemplated, according to counsel, and I accept it, is that with a young bird of this sort between three and ten days after  
H hatching a closed-ring of the type described is forced over its claws, which are obviously brought together so as to admit the passage of the ring, and it is then permanently on or around the bird's leg, and as it grows, it would be impossible to take that ring off, because the claws and the like would have rendered a repetition of the earlier manoeuvre impossible.

Therefore, approaching the matter this way, I can well understand how the  
I justices came to the conclusion that this was not a close-ringed specimen, because they could take the ring off. If that were the only issue, I should not find any difficulty in upholding their decision. But the real point of substance in this case arose from the words "offer for sale", and it is to be noted in s. 6 of the Act of 1954 that the operative words are "any person sells, offers for sale or has in his possession for sale". For some reason which counsel for the respondent has not been able to explain, those responsible for the prosecution in this case chose, out of the trio of possible offences, the one which could not succeed. There was a sale here, in

my view, because Mr. Thompson sent his cheque and the bird was sent in reply; and a completed sale. On the evidence there was also a plain case of the appellant having in possession for sale this particular bird; but they chose to prosecute him for offering for sale, and they relied on the advertisement.

A similar point arose before this court in 1960 dealing, it is true, with a different statute but with the same words, that is *Fisher v. Bell* (2). The relevant words of the Act (3) in that case were: "Any person who offers for sale any knife." LORD PARKER, C.J., in giving judgment said this (4):

"The sole question is whether the exhibition of that knife in the window with the ticket constituted an offer for sale within the statute. I think that most lay people would be inclined to the view (as, indeed, I was myself when I first read these papers), that if a knife were displayed in a window like that with a price attached to it, it was nonsense to say that that was not offering it for sale. The knife is there inviting people to buy it, and in ordinary language it is for sale; but any statute must be looked at in the light of the general law of the country . . ."

The words are the same here "offer for sale", and in my judgment the law of the country is equally plain as it was in regard to articles in a shop window, namely that the insertion of an advertisement in the form adopted here under the title "Classified Advertisements" is simply an invitation to treat. That is really sufficient to dispose of this case. I should perhaps in passing observe that the editors of the publication Criminal Law Review had an article dealing with *Fisher v. Bell* (5) in which a way round that decision was at least contemplated, suggesting that, while there might be one meaning of the phrase "offer for sale" in the law of contract, a criminal court might take a stricter view, particularly having in mind the purpose of the Act, which in *Fisher v. Bell* (2) was directed to the stocking of flick knives, and in this case is directed to the selling of wild birds. For my part, however, that is met entirely by the quotation which appears in LORD PARKER, C.J.'s judgment in *Fisher v. Bell* (6), that (7): "It appears to me to be a naked usurpation of the legislative function under the thin disguise of interpretation . . .". For my part I would allow this appeal and quash the conviction.

BLAIN, J.: I agree.

LORD PARKER, C.J.: I agree and with less reluctance than in *Fisher v. Bell* (2), to which ASHWORTH, J., has referred, and the case of *Mella v. Monahan* (8). I say "with less reluctance" because I think that when one is dealing with advertisements and circulars, unless they indeed come from manufacturers, there is business sense in their being construed as invitations to treat and not offers for sale. In a very different context LORD HERSCHELL in *Grainger & Son v. Gough* (*Surveyor of Taxes*) (9), said this in dealing with a price-list (9):

"The transmission of such a price-list does not amount to an offer to supply an unlimited quantity of the wine described at the price named, so that as soon as an order is given there is a binding contract to supply that quantity. If it were so, the merchant might find himself involved in any number of contractual obligations to supply wine of a particular description which

(2) [1960] 3 All E.R. 731; [1961] 1 Q.B. 394.

(3) Restriction of Offensive Weapons Act, 1959, s. 1 (1); 39 HALSBURY'S STATUTES (2nd Edn.) 260.

(4) [1960] 3 All E.R. at pp. 732, 733; [1961] 1 Q.B. at p. 399.

(5) [1960] 3 All E.R. 731; [1961] 1 Q.B. 394; see [1961] Crim. L.R. at pp. 181-182.

(6) [1960] 3 All E.R. at p. 733; [1961] 1 Q.B. at p. 400.

(7) Quoting LORD SIMONDS in *Magor and St. Mellons Rural District Council v. Newport Corpn.*, [1951] 2 All E.R. 839 at p. 841; [1952] A.C. 189 at p. 191.

(8) [1961] Crim. L.R. 175.

(9) [1896] A.C. 325 at p. 334.

A he would be quite unable to carry out, his stock of wine of that description being necessarily limited."

It seems to me accordingly that not only is that the law, but common sense supports it.

*Appeal allowed. Conviction quashed.*

B Solicitors: *Peacock & Goddard*, agents for *R. G. Frisby & Small*, Leicester (for the appellant); *Rex Taylor & Meadows*, West Kirby (for the respondent).

[*Reported by N. P. METCALFE, ESQ., Barrister-at-Law.*]

C  
Re A DEBTOR (No. 12 OF 1958). *Ex parte* THE TRUSTEE OF THE PROPERTY OF THE DEBTOR v. CLEGG AND OTHERS.

[CHANCERY DIVISION (Stamp and Goff, J.J.), February 12, 13, 14, 1968.]

D *Bankruptcy—Inquiry as to debtor's dealings and property—Summons to persons deemed capable of giving information—Discharged bankrupt—Summons to his personal representatives after his death—Executors were former partner of bankrupt, his accountant and his solicitor—Statement rendered by discharged bankrupt in his lifetime containing material for inquiry—Whether jurisdiction to make order against executors—Bankruptcy Act, 1914 (4 & 5 Geo. 5 c. 59), s. 25 (1)—Bankruptcy Rules, 1952 (S.I. 1952 No. 2113), r. 236.*

E T. was adjudicated bankrupt on his own petition on July, 1958. He obtained his discharge on Nov. 10, 1961, on condition of judgment being entered against him for £5,000 and costs. By Nov. 10, 1965, T. had satisfied the judgment. On Dec. 21, 1965, he filed a statement or account at the request of the Official Receiver (cf., r. 236 (2) of the Bankruptcy Rules, 1952). This showed that on Nov. 4, 1965, T. had assets amounting at cost to £81,000 and liabilities of £34,900; his disclosed receipts during the four years succeeding his discharge were also remarkable in comparison with his disclosed position prior to discharge. The trustee in his bankruptcy wrote to T. making further enquiry, but T. did not reply. The trustee applied under s. 25\* of the Bankruptcy Act, 1914, for the examination of T. but, on Nov. 18, 1966, before the summons was served, T. died. There were three executors of his will, who were his surveyor (a partner of T.), his accountant and his solicitor. In May, 1967, the trustee applied *ex parte* to the county court where the bankruptcy proceedings had taken place for the examination of T.'s executors. Most of the matters sought to be investigated related to conduct after T.'s discharge. The registrar made an order on June 7, 1967, that the executors be summoned to attend for examination under s. 25. On motion to discharge the order, the registrar on Oct. 11, 1967 discharged it. On appeal by the trustee,

H **Held:** (i) the power of the court under s. 25 of the Bankruptcy Act, 1914, survived the discharge of the bankrupt, and was not limited to cases within s. 26 (9) (see p. 428, letters C and H, and p. 435, letter H, post).

I *Re F. A. Coulson, Ex parte Official Receiver (Trustee in Bankruptcy)* ([1933] All E. R. Rep. 544) explained and followed.

Dictum of SIR WILFRID GREENE, M.R., in *Re A Debtor* (No. 946 of 1926) ([1939] 1 All E.R. at p. 742) applied.

(ii) the statement or account rendered by T. in December, 1965, provided good ground for supposing that the information sought by the trustee might lead to recovery of assets or income which T. should have disclosed on making his application for discharge, and, as the executors were persons whom the

\* Section 25 (1) is printed at p. 427, letter I, to p. 428, letter A, post.



court deemed capable of giving information about T.'s property and as none of the executors had deposed that he had no such records as those of which the trustee sought production, an order under s. 25 for their examination should be made (see p. 433, letter I, p. 435, letters C and D, and p. 437, letters B and H, post).

*Re Maundy Gregory, Ex p. Norton v. Trustee* ([1934] All E.R. Rep. 429) distinguished.

Appeal allowed.

[As to the private examination of the debtor and others, see 2 HALSBURY'S LAWS (3rd Edn.) 405, 406, para. 814; and for cases on the subject, see 5 DIGEST (Repl.) 662-665, 5806-5843.]

For the Bankruptcy Act, 1914, s. 25 (1) see 2 HALSBURY'S STATUTES (2nd Edn.) 352.

For the Bankruptcy Rules, 1952, r. 236, see 3 HALSBURY'S STATUTORY INSTRUMENTS (Second Re-Issue) 251.]

Cases referred to:

*Coulson (F. A.), Re, Ex p. Official Receiver (Trustee in Bankruptcy)*, [1933] All E.R. Rep. 544; [1934] Ch. 45; 103 L.J.Ch. 31; 150 L.T. 5; 5 Digest (Repl.) 663, 5813.

*Debtor, A, Re, (No. 3 of 1909), Ex p. Goldstein*, [1917] 1 K.B. 558; 86 L.J.K.B. 705; 116 L.T. 379; 5 Digest (Repl.) 664, 5833.

*Debtor, A, Re, (No. 946 of 1926), The Debtor v. Official Receiver*, [1939] 1 All E.R. 735; [1939] Ch. 489; 108 L.J.Ch. 225; 160 L.T. 349; 4 Digest (Repl.) 628, 5598.

*Gold, Co., Re, (1879)*, 12 Ch.D. 77; 48 L.J.Ch. 650; 90 L.T. 865; 10 Digest (Repl.) 936, 6403.

*Gregory (Maundy) Re, Ex p. Norton v. Trustee*, [1934] All E.R. Rep. 429; [1935] Ch. 65; 104 L.J.Ch. 1; 152 L.T. 58; 5 Digest (Repl.) 667, 5855.

### Appeal.

This was an appeal by notice dated Oct. 31, 1967, by Richard Alfred Coleman Mordant, the trustee of the property of Kenneth Thorne, a debtor. The appeal was from an order of Mr. Registrar RIEU made on Oct. 11, 1967, setting aside an order previously made by him on June 7, 1967, on the application of the trustee, for the examination under s. 25 of the Bankruptcy Act, 1914, and/or under r. 236 (2) of the Bankruptcy Rules, 1952, of the respondents, the executors. The trustee sought that the order dated Oct. 11, 1967, should be set aside or varied, and that the executors John Armitage Clegg, Eric Thomas George Terrell and Allan Edward Moxham Janes should be ordered to attend the St. Albans county court in bankruptcy to be examined under s. 25 and r. 236. The grounds of appeal were (i) that the registrar was wrong in law in holding that there was no jurisdiction to order an examination under s. 25 of the Act of 1914 and/or r. 236 (2) of the Bankruptcy Rules, 1952, in relation to the affairs of a debtor after he had obtained his discharge; (ii) that the registrar was wrong in law in holding that there was no jurisdiction to order the said examination in relation to the affairs of a debtor who had obtained his discharge and thereafter had died; and (iii) that the registrar misdirected himself in ruling that even if he was wrong on the two above mentioned points he would, in the exercise of his discretion, arrive at the conclusion that the trustee was not entitled to an order for the examination for the reason that an executor was not a person capable of giving information relating to a debtor's dealings or property. The facts are set out in the judgment of STAMP, J.

*Allan Heyman* for the trustee in bankruptcy.

*Muir Hunter, Q.C.*, and *A. L. Figgis* for the executors.

**STAMP, J.:** The late Mr. Kenneth Thorne was a bankrupt who obtained his discharge (subject to a condition, which, shortly afterwards, was complied

A with) on Nov. 10, 1961. Subsequently to the discharge, the trustee in bankruptcy obtained information from the bankrupt, in circumstances which I shall have to relate, leading him to suspect that the bankrupt had concealed assets to which he, the trustee in bankruptcy, was entitled. He thereupon set in motion an application under s. 25 of the Bankruptcy Act, 1914, for the examination of the bankrupt. Before the summons was served the bankrupt died. His  
B executors are the present respondents to this appeal, namely, Mr. John Armitage Clegg, who is described in the bankrupt's will as his surveyor, Mr. Eric Thomas George Torrell, who is described in the bankrupt's will as his accountant, and Mr. Allan Edward Moxham Jones, who was at the time of his death and at the time of the will his solicitor.

C Following the death, on an ex parte application to the St. Albans county court, where the bankruptcy proceedings had taken place, the registrar made an order, on June 7, 1967, ordering that the three executors be severally summoned to attend for examination under s. 25 of the Bankruptcy Act, 1914, and under r. 236 (2) of the Bankruptcy Rules, 1952 (1). On the same day, the three  
D executors were summoned to attend and give evidence and produce documents, in terms to which I will refer later in this judgment. Before the date fixed for the examination, a motion was launched to discharge the registrar's order, and on Oct. 11 last, the registrar did discharge the order. This is an appeal by the trustee in bankruptcy against the order of Oct. 11.

It is, I think, convenient that I should say at once that before this court the point was taken that the executors had no locus standi on their motion to set aside the registrar's order of June 7 to do more than object to the jurisdiction  
E to make the order, it being said that they could not, assuming there was jurisdiction to make it, object to the propriety of making it on the facts of this particular case. In my view, that point is, on the authority of *Re A Debtor (No. 3 of 1909)*, *Ex p. Goldstein* (2), and the case on which it is founded, not well taken.

The remaining issues on this appeal are, as I say, first, whether the registrar was right in holding, as he did, that he had no jurisdiction to make an order  
F under s. 25 against the executors of the bankrupt, who had obtained his discharge before his death, except in limited circumstances; secondly, whether, on the facts of this case, the executors of the deceased are persons who, on the true construction of s. 25, are persons against whom an order under that section can be made; thirdly, whether the registrar, on the view which he took when  
G the motion came before him ought to have made the order which the trustee sought—the view referred to being his view, whether he had jurisdiction and whether the executors were persons falling within s. 25. That question can perhaps be put in another way, by asking whether, in expressing his opinion why he ought not in any event to exercise the discretion sought by the trustee, he took a wrong view of the facts, or the law, or acted upon wrong principles.

A further issue was raised by the executors' notice. The order of June 7, 1967,  
H as I have already indicated, was made not only under s. 25, but also under r. 236 (2) of the Bankruptcy Rules, 1952. The executors before the registrar objected that he had no power to make an order under that rule against anyone except the bankrupt himself. In this court the trustee does not pursue the claim for relief under r. 236 and the court is not concerned with it except that, speaking for myself, it appears to me that the rule has been something of a red herring  
I which, I think, may have coloured the registrar's views on the application in other respects.

Section 25 (1) is in these terms:

“The court may, on the application of the official receiver or trustee, at any time after a receiving order has been made against a debtor, summon before it the debtor or his wife, or any person known or suspected to have in

(1) S.I. 1952 No. 2113.

(2) [1917] 1 K.B. 558.

his possession any of the estate or effects belonging to the debtor, or supposed to be indebted to the debtor, or any person whom the court may deem capable of giving information respecting the debtor, his dealings or property, and the court may require any such person to produce any documents in his custody or power relating to the debtor, his dealings or property.”

It was held, in *Re F. A. Coulson, Ex p. Official Receiver (Trustee in Bankruptcy)* (3) that the power under that section survived the discharge of the debtor from his bankruptcy. A duty still remains on the trustee to collect, realise and distribute such of the debtor's assets as were vested, before the discharge, in the trustee. In coming to that conclusion, the Court of Appeal derived assistance from s. 26 (9) of the Act of 1914, and the registrar in the present case thought that *Re Coulson* (3) was limited to cases to which s. 26 (9) applied. I do not think that this view of the matter is well founded.

Counsel for the executors, in seeking to escape from the effect of *Re Coulson* (3) brought attention to the fact that the case was decided on an appeal ex parte, but it is binding on this court and is, in my judgment, a clear decision that s. 25 survived the discharge of the bankrupt and can properly be invoked to assist the trustee to collect, realise and distribute such of the debtor's assets as are vested in the trustee before the discharge.

What the registrar said about this, after following the red herring which had been drawn across his path, was this. He obviously did not at all approve of the decision in *Re Coulson* (3). He said:

“With regard to the court's power under s. 25, the first question is can it be invoked after discharge. In this respect I am bound by *Re Coulson* (3), although it surprises me that this extension was given. However, in *Re Coulson* (3) the Court of Appeal did allow an order for examination after discharge; but the facts in *Re Coulson* (3) fell within s. 26 (9) in that examination was directed to property which had vested in the trustee. That is the only case in which it has been decided that an order for examination could be made after discharge and it is limited, in my opinion, to a case which falls under s. 26 (9). It would be quite wrong for this court to extend it still further. It is clear in this case that the subject matter does not fall within s. 26 (9). This, in my view, is quite clear as to its limits—the realisation and distribution of property vested in the trustee. There is no question in this case of the personal representatives giving assistance to the trustee as to property vested in the trustee. In my view *Re Coulson* (3) does not fit in with the facts of this case. I am quite satisfied that the court had no power to make an order for examination of the bankrupt, or the subsequent order for the examination of his executors.”

As I have already indicated, in my view *Re Coulson* (3) is clear authority for the proposition that s. 25 is not limited to the period before the debtor is discharged from his bankruptcy. If, however, it was the fact that there was no question of the executors giving assistance to the trustee as to property vested in the trustee, then I will accept that it might not be right to bring s. 25 into operation. What the trustee said, however, in the report which he made to the registrar at the time when he was asking for an order against the bankrupt, was that he had reason to believe, on grounds which he advanced, that the answers to the questions which he wished to have put at that time to the bankrupt might disclose assets or income which the bankrupt should have included in the statement made by him in support of his application for his discharge. Whether that submission is well founded goes to the question, not whether the registrar had jurisdiction, but whether a case had been made out for its exercise in this case; and, in my view, the registrar, in dealing with the question of jurisdiction, misdirected himself as to the case which was being put. As I shall



A indicate when I come to that part of his judgment where he decides that in any event he would not, if he could, exercise his discretion in favour of the trustee, I think that the same misconception remains.

I turn to consider whether, on the facts of this case, an order under s. 25 against the three executors ought to have been made. First, however, I must consider the principles to be applied. As has been pointed out, the power under s. 25 is a very extraordinary power, which ought to be very carefully exercised and the court must deem a witness who has to be summoned, capable of giving information, within the meaning of the section, on some grounds which have a foundation. It ought not to be exercised for the purpose of "fishing out" a case (see *Re Maundy Gregory, Ex p. Norton v. Trustee* (4)), but that does not mean that before an order can be made under s. 25 one must decide that the enquiry which is sought will lead almost certainly, or even most probably, to obtaining information to prove a case of which you are really aware. So to construe the section would, in my view, be to stultify its purpose. It cannot be required of a section which speaks of suspicion and supposition, that it requires proof. *Re Maundy Gregory* (5) itself was something of an extreme case, because what was sought there was information which might impugn a transaction D which there was no ground for supposing was otherwise than a proper one, and as was pointed out by LORD HANWORTH, M.R., in that case it would not be wise to attempt a definition of the limits within which an order for examination can be made or an answer compelled under s. 25. I would add this; that in this field, nothing can, in my judgment, be more dangerous than to take dicta of judges out of their context and to seek to apply such dicta to the widely E different facts of other cases.

The facts which appear to me to be relevant for the purposes of the present case are these. The receiving order was made on July 7, 1958, on the bankrupt's own petition and he was adjudged bankrupt on the same day. According to the official receiver's report, made on Oct. 31, 1961, the bankrupt, who started life in a rather simple way, had, prior to his bankruptcy, become associated F with a number of family companies. There was a company called Provis Thorne, Ltd., who, I think, are builders. The bankrupt had been employed by that firm, prior to 1944, for a number of years, and then, in that year, he became a shareholder. By November, 1946, he was bound as a guarantor of the bank overdraft of that company. Unfortunately, in March, 1958, the company went into voluntary liquidation with liabilities of £13,210 and assets of £5,314 and the bankrupt's liability under his guarantee was nearly £9,000. G

Then there is a company called Thorne's Sawmills, Ltd., formed in April, 1941, by the bankrupt's father and another person. The bankrupt became a shareholder in that company. In 1941 he became a director and he received remuneration which rose to £1,000 a year, plus expenses. That company's trading was at first successful, but, again, unfortunately, on Feb. 3, 1958, a compulsory winding-up order was made against the company on the petition H of a finance company to which it was indebted. According to the statement of affairs in the liquidation, the liabilities were £233,000 and the assets just a little over £5,000. Again, the bankrupt had entered into guarantees of the company's indebtedness and on those guarantees the deceased became liable to the tune of over £120,000.

I In January, 1946, the bankrupt and another formed a company called Thorne and Grant, Ltd., and then, on Apr. 21, 1958, it was compulsorily wound up with liabilities amounting to £56,000 and assets of only £10,000. Again, the bankrupt was liable on guarantees of the company's bank account. There were a number of other companies, which play no significant part in the bankrupt's history. According to the bankrupt's statement of affairs, his gross liabilities were estimated at about £131,000. The assets at the time of the official receiver's report

(4) [1934] All E.R. Rep. 429 at p. 433; [1936] Ch. 65 at p. 74.

(5) [1934] All E.R. Rep. 429; [1935] Ch. 65.

had realised about £1,100 and there were some debts due of an insignificant kind. At the end of the official receiver's report he said this. A

"According to the bankrupt, from July, 1958, to December, 1960, he was employed as a sawmill manager at a salary of £1,092 a year to March, 1959, and thereafter at £546 a year. At the same time he has carried on business as a valuer and negotiator of woodlands and property and estimates his profit at £2,600 a year." B

Some ten days after the date of that report, namely, on Nov. 10, 1961, the bankrupt obtained his discharge, on the terms set out in the order of that date. The order was in these terms.

"It is ordered that the bankrupt be discharged subject to the following condition to be fulfilled before his discharge takes effect—namely: he shall, before the signing of this order, consent to judgment being entered against him in the St. Albans County Court by the trustee for the sum of £5,000, being part of the balance of the debts provable in the bankruptcy which is not satisfied at the date of this order, and for £1 10s. costs of judgment. C

"And it is further ordered, without prejudice and subject to any execution which may be issued on the said judgment with the leave of the court, that the said sum of £5,000, and £1 10s. costs be paid out of the future earnings or after-acquired property of the bankrupt in manner following: payable as to £1,000 and £1 10s. costs in three months and the balance by payments of £75 a month, first payment of £75 to be paid on Mar. 10, 1962, thereafter payments on the 10th of each succeeding month." D

The £75 a month was no doubt fixed with regard to the fact that the bankrupt was understood to be earning something over £3,000 a year. The condition on which the bankrupt was discharged was fulfilled on Dec. 1, 1961, when judgment was entered in the sum of £5,000, and costs. Four years later, on Nov. 10, 1965, the bankrupt had fully satisfied the judgment. E

Under r. 236 (1), it is provided that F

"Where a bankrupt is discharged conditionally upon consenting to judgment being entered against him, or upon payments being made out of his future earnings or after-acquired property, he shall, until the judgment or condition is satisfied, give the official receiver such information as he may from time to time require with respect to his earnings and after-acquired property and income, and not less than once a year file in court a statement, verified by affidavit, showing particulars of any property or income acquired by him after his discharge." G

The bankrupt did not in fact file a statement once a year verified by affidavit, in the terms of r. 236, and counsel for the executors indicated in this court that if necessary he would have submitted an argument that the rule did not apply in the particular circumstances of this case to require him to do so. In view of the fact, however, that that rule is not now relied on, it is unnecessary for us to express any view about it. H

In point of fact the bankrupt did, on being requested so to do by the official receiver, file an account on Dec. 20, 1965. That account revealed a remarkable state of affairs. It showed that on Nov. 4, 1965, the bankrupt had assets put in at cost amounting to no less than £81,000. Those assets included shares in and loans to about a dozen family or private companies, brought in at cost at a figure of about £45,000. Also included were two houses and a share in a farm, which together amounted to £21,000. These were miscellaneous assets, making up a total of over £80,000. Against these assets, the bankrupt stated that there were liabilities of £34,900. As remarkable were the particulars of the bankrupt's receipts during the four years immediately succeeding the discharge. He claimed to have received income from professional activities as a land agent, valuer and I

- A negotiator from Nov. 10, 1961, to Dec. 18, 1963, when those activities, he said, ceased, a period, that is to say, of just over two years, amounting to £32,050. The account also showed income from employment with Kenneth Thorne, Ltd. during the four years, amounting to no less than £17,700. The account showed a sum of £18,963 as received on the sale of part of the mineral rights in a concern called Bramshill Gravel Trust. The account had other less remarkable features.
- B Not unnaturally, the trustee in bankruptcy opened his eyes rather widely when he saw those details. How could so much capital wealth have been acquired in so short a time and was it credible that a man who had been carrying on a business as valuer and negotiator in woodland property at £2,600 a year immediately before his discharge, immediately afterwards start receiving remuneration which produced £16,000 a year. Were the statements which he made
- C regarding his income true, or were they made up in order to account for the ownership of capital assets which belonged to the trustee at the time of the discharge? If, on the other hand the debtor had, in truth, during the years immediately succeeding the bankruptcy, earned the enormous sums which he had, were there no grounds for thinking that he might have misled the official receiver as to his earlier comparatively modest income? There were, in my
- D judgment, grounds for suspecting that the bankrupt had concealed assets and I do not doubt that the trustee was right to make further enquiries. The position was made stronger by the fact that the bankrupt, who took advice about the matter, refused to answer the trustee's enquiries, and so have the executors.

In a letter dated June 27, 1966, the trustee wrote to the bankrupt—the letter is in evidence and I will read some extracts. He refers to the affidavit to which I

E have just referred and asks for the following additional information.

- “ 1. In question No. 1 of the statement in support of your application for discharge you stated that your present means of livelihood and the amount of your income as at July 31, 1961, were as follows: ‘ Valuer and negotiator of woodlands property. Profit since July, 1958, as far as ascertainable average about £2,600 per annum.’ In the statement exhibited to your affidavit
- F you state that details of receipts from Nov. 10, 1961 to Nov. 4, 1965, amounted to £32,200, an average of £8,000 per year. It appears that your income from your professional activities as a land agent ceased on Dec. 18, 1963, and one is therefore left with an income of something over £16,000 per annum during the two years immediately succeeding the date of your discharge. Would you please let me have full accounts, together with all
- G documents and a full description of your income from all your activities during this period resulting in this income. Would you also let me know the date from which the income started to accrue.

- “ 2. Your statement shows that your income from Kenneth Thorne, Ltd. subsequent to Nov. 10, 1961, as being £16,750. Would you please let me have a sight of the accounts of this company to date together with details
- H of the various years into which the income falls.

- “ 3. Your statement shows income from investments of £1,564, would you please let me have schedules showing the date and the amount of each of the loans which were made, together with any repayments. The dates and amounts of any deposits with the building societies together with dates of repayments and the dates of purchase and the costs of the shares on
- I which you received dividends, together with any movements on those shares.

“ 4. Your statement shows profits of a capital nature would you please let me have details of the money advanced or cost of shares, together with any movements and the appropriate dates in each case. Would you also let me have details of the individual amount of realisations and dates.

“ 5. Your statement shows capital receipts of £22,963 would you please let me have the date of the acquisition of the mineral rights and the date of the acquisition of the shares in Greenwoods (St. Ives), Ltd. together with any movements of shares, the source from which you found the money to pay



for these acquisitions and the amounts and dates received, together with full particulars of the transactions.” A

Then the trustee in bankruptcy asks for particulars of the bankrupt's shareholding in various companies, and he asks for details of the purchase of certain properties and information as to the length of time for which the bankrupt had held those properties. The bankrupt refused to answer any of those enquiries. No reply was made to the trustee to explain the discrepancies or dates to which the trustee drew attention, and if now it is said that the enquiry which is being made is of an excessively wide character, I can only say that the bankrupt brought this on himself and his executors. B

A report dated Jan. 4, 1967, was made when the trustee was unaware of the death of the deceased, pursuant to s. 25 and in support of the application to summon the bankrupt to give the required information. The report was before the registrar on the subsequent hearing when he gave the judgment now under appeal, and it is a report to which I think far too little attention has been paid. In that report the trustee in bankruptcy summed-up his case as follows. C

“I have reason to believe that the answers to the questions so put to the [bankrupt] . . . [at that point it refers to the letter which I have just read] may disclose or lead to the disclosure of information leading to the recovery of further assets or income which the [bankrupt] should have included in the statement made by him in connexion with and in support of his application for discharge on July 31, 1961.” D

That is the basis on which, as I understand it, the present application is made, and I do not think that the grounds of the application could be put very much more clearly. Is there reason to believe that the answers to the questions which the trustee seeks to put to the executors may disclose or lead to disclosure of information leading to the recovery of further assets or income which the bankrupt should have included in the statement made by him in support of his application for discharge? The report then goes on to say why the trustee thinks the answer to be in the affirmative. He says this: E

“An instance of a matter which in my opinion calls for further information from the [bankrupt] is that in his statement of July 31, 1961, he declared that his then means of livelihood was as a valuer and negotiator of woodlands and property which had since July, 1958, the date of the receiving order produced ‘so far as was then ascertainable’ about £2,600 per annum; whereas in his statement as at Nov. 4, 1965, income from this source is stated by the debtor to have been £32,050 for the period Nov. 10, 1961, to Dec. 18, 1963, that is to say at a rate of about £16,000 per annum.” G

He then gives other examples of matters on which, in his submission, information should be provided. The report ends

“I therefore ask that an order be made for the examination of the [bankrupt] under s. 25 of the Bankruptcy Act, 1914, and or alternatively under r. 236 (2) of the Bankruptcy Rules, 1952, he being in my submission capable of giving information, which may lead to the discovery of further assets for his creditors.” H

The bankrupt in fact died on Nov. 18, 1966. According to the inland revenue affidavit, leading to the grant of probate, the gross value of the estate was £81,132, but the net value amounted to as little as £5,251. Whereas between the date of discharge, in November, 1961, and November, 1965, the bankrupt, if he was to be believed, had accumulated assets of the value of £81,000 odd and debts of £34,000, giving a net estate of over £45,000, by the time of his death a year later, the net estate had dwindled to about £5,000. A satisfactory explanation of the appearance and disappearance of the bankrupt's capital there may well be, but in the absence of some explanation the mystery is reminiscent I

A of that of the Cheshire cat, and one cannot help suspecting that it may have been there all the time.

On May 30, 1967, the trustee in bankruptcy made application ex parte for examination of the three executors, under s. 25 and/or r. 236. On June 7, 1967, the registrar made an order on that application, and at the same time the summonses were issued against each of the executors. They were all in similar form and

B I will refer only to one of them. Mr. Clegg was called on to attend, on a date specified,

“ to give evidence and to produce all ledgers and books of account, invoices, statements of account, letters, books, papers and documents of every kind, in any manner relating to: (a) the partnership of [the bankrupt] in the  
C firm of Clegg & Co., and (b) the income of the [bankrupt] from professional activities as a land agent and valuer and negotiator, and (c) all the several dealings of the [bankrupt] from Nov. 10, 1961 to Nov. 4, 1965, and (d) all the several transactions referred to in the exhibit to the affidavit of the (bankrupt] sworn on Dec. 20, 1965, and (e) the livelihood of the [bankrupt] as a valuer and negotiator of woodland and property between July, 1958,  
D and Nov. 10, 1961, and (f) the returns for income tax and assessments for income tax and surtax made by and against the [bankrupt] from the date of the receiving order until Nov. 4, 1965, and (g) a copy of the inland revenue affidavit and accompanying schedules deposed to by you as an executor for the purpose of obtaining a grant of probate of the will of the [bankrupt].”

I am bound to say that when my attention was called to the details for which  
E the trustee was asking in that summons, it seemed to me that some of the heads of enquiry might be open to some objection, but that is not the ground which the executors, as I understand it, put before the registrar, which would go only to the summons and not to the order made under s. 25. It may be that the summonses are too wide, but on that I shall express no view. If, when the time comes, any of the executors takes objection to a particular question under  
F a particular head, that matter can be dealt with. It is not a matter which is at present before this court.

What is said in the evidence filed on behalf of the executors is that most of the matters sought to be investigated relate to conduct of the bankrupt's affairs after he obtained his discharge. As a matter of language, this is no doubt true, but the enquiries are nevertheless directed to establishing whether in truth the  
G assets which the bankrupt had were acquired out of income or profits earned or made after his discharge, or whether they, or some of them, represented income or are assets concealed from the trustee at the time of the discharge.

It is said that none of the executors is a person that the court can deem capable of giving information respecting the bankrupt, his dealings or property. I will assume, in considering this question, as I think to be the case that the reference to the property of the bankrupt is a reference, in the case of a bankrupt who  
H has been adjudicated, to the property of the bankrupt which vested in the trustee, and does not include property acquired after the discharge. I have, however, confessed to having failed to appreciate how the executors, one of whom was the bankrupt's accountant, another was his solicitor and the third a partner with him, can be said to be persons whom the court cannot deem capable  
I of giving information about the property which may or may not have been vested in the trustee in bankruptcy.

The enquiry, however, goes wider than that, because one is not limited to enquire whether the executors have knowledge of the property itself but of the dealings by the debtor with that property. Moreover, the executors, it seems to me, are persons who must be deemed to be fully aware of the dealings with such property as the bankrupt may have had at the moment of his discharge. There must be income tax returns and records of all kinds in the hands of the

executors going back to the time of the discharge and before that date and none of the executors has come before the court to say that he has no such records. A

Then it is said that the executors were not party or privy to the bankrupt's dealings at the relevant time. This was one of the grounds on which the registrar was persuaded that he ought not to exercise his discretion to make the order for which the trustee asked. It is not, in my judgment, a requirement of s. 25 that the person sought to be questioned should have been party or privy to the bankrupt's dealings at the relevant time. All that is required is that he should be, in the wording of the section, one "whom the court may deem capable of giving information respecting the debtor, his dealings or property". B

Then it is said that the court ought not to interfere with the discretion of the registrar. It is on this point that I must, I think, refer to the note of the registrar's judgment—pausing to observe that whatever degree of deference this court ought to show to the views of a registrar of a county court, who has so much greater knowledge of the practice in bankruptcy than the judges in this court can be expected to have, this court, if it comes to the conclusion that the registrar has acted on a wrong principle or has misunderstood the case, must in my judgment act accordingly and express its own views about the matter. C

I have already drawn attention to the remark which the registrar made when discussing the effect of *Re Coulson* (6). There is no question in this case of the executors giving assistance to the trustee as to property vested in the trustee. I also emphasize again, whether on grounds good, bad or indifferent the information which is required, is information which could lead to the recovery of assets or income which the bankrupt should have disclosed in the bankruptcy and on his application for his discharge. The registrar, after expressing the view that *Re Coulson* (6) was wrongly decided, went on as follows: D

"In case I should be held to be wrong in this view, I should have to consider whether I should exercise my discretion in favour of making the order. Here I have to consider a number of different matters. First I will consider the object of such examination and what might be achieved by it—in this case it could only be rescission of the discharge and reopening of the matter. It seems to me at this time that rescission is out of the question; there would have to be strong evidence of fraud which there is not. This discharge was made on a consent basis—the [bankrupt] consented to judgment and the condition was satisfied. This is not an adequate reason for ordering an examination. I have to consider whether the [executors] can give information concerning the debtor, his dealings or property (see *Re Maundy Gregory* (7). The executors do not seem to me to have been party or privy to the [bankrupt's] dealings. They take over where he left off—at death. They can not, as executors, be party or privy to the dealings of the [bankrupt]."

In the first part of the paragraph which I have read the fallacy to which I have already referred is again, I think, repeated, and it is a fallacy which has been repeated in the submissions advanced on behalf of the executors in this court. The argument confuses the purpose of requiring the information from the executors and the possible results of obtaining it. Of course, on the facts at present known an order could not be made rescinding the discharge or amending its conditions. Of course, there is no strong evidence of fraud and, of course, counsel for the executors is right when he said that on the facts at present known it would be oppressive for the trustee to claim the whole of the bankrupt's estate. If one accepts the submission, however, that there is solid ground for thinking that the information sought may lead to discovery of assets which ought to have been disclosed, and if the information does in the event disclose such assets, that will be the moment to decide whether the non-disclosure was H

(6) [1933] All E.R. Rep. 544; [1934] Ch. 45.

(7) [1934] All E.R. Rep. 429; [1935] Ch. 65. I



A fraudulent or not, or whether, in the circumstances, some further order ought to be made. It is, moreover in my judgment, wrong to pre-judge that question. It is only at the point of time when the information has been ascertained that the question arises whether it would or would not be oppressive or unjust to proceed further in the matter. Again it is, in my judgment, quite impossible to say in advance whether that will or will not be so. With all respect to counsel's argument, it is putting the cart before the horse to say that an order under s. 25 should not be made unless the trustee in bankruptcy is prepared to swear that he verily believes the bankrupt in this case to have fraudulently concealed assets.

In my judgment, the learned registrar, in coming to the conclusion that he ought not in any event to allow the enquiry, misdirected himself as to the purpose of the enquiry and exercised his discretion on a wrong principle. The accounts delivered by the bankrupt of his income and additions to capital in the four years succeeding his discharge as compared with the situation as described to the trustee before his discharge, impose so great a strain on one's credulity that it leads to the prima facie inference that at some point he has not told the truth and is solid ground for the view that the information sought may lead to recovery of assets or income which the bankrupt should have disclosed on making his application for discharge.

There is one other matter. Counsel for the executors submitted that whatever order might have been made against the bankrupt before his death, it would be oppressive to make an order under s. 25 against his executors. Of this, I can only say that I cannot follow why the trustee or the unpaid creditors of the bankrupt should be in any worse position, in making this application, by reason of the death of the bankrupt. I would allow the appeal.

GOFF, J.: STAMP, J., has dealt with this matter very fully and I do not think that it would be right for me to cover the ground again at length. I would probably only say, in less felicitous language, what he has said already and I entirely agree with his conclusion and his reasoning.

I would, however, just like to express my reasons, briefly, in my own words. In my judgment, it is quite clear that the fact that the bankrupt had obtained his discharge does not prevent an order being made under s. 25 of the Bankruptcy Act 1914. In the first place, it was decided in *Re A Debtor (No. 946 of 1926)*, *The Debtor v. Official Receiver* (8), that the discharge does not put an end to the bankruptcy for all purposes. There, SIR WILFRID GREENE, M.R., said (8):

"The court had jurisdiction in bankruptcy under the Act. The order of discharge did not take away the jurisdiction of the Court in Bankruptcy, because admittedly the discharge of the bankrupt does not put an end to the bankruptcy regarded as a series of judicial and administrative acts and rights and powers."

In the second place, it was expressly decided by the Court of Appeal in *Re F. A. Coulson, Ex p. Official Receiver (Trustee to Bankruptcy)* (9) that an order may be made under that very section after the discharge of the bankrupt. I cannot accept the view that that was a decision limited in its application to cases falling within s. 26 (9). The Court of Appeal referred to that sub-section by way of emphasis, but the decision was, in my judgment, quite general. Nor is jurisdiction excluded, in my view, by the fact that the bankrupt has died, since that matter is covered by s. 112 of the Act of 1914, which provides that

"If a debtor by or against whom a bankruptcy petition has been presented dies, the proceedings in the matter shall, unless the court otherwise orders, be continued as if he were alive."

Then it is said that there is here no property within the meaning of s. 25 and, I suppose, no dealings either, and that, in any event, the executors cannot be

(8) [1939] 1 All E.R. 735 at p. 742; [1939] Ch. 489 at p. 501.

(9) [1933] All E.R. Rep. 544; [1934] Ch. 45.

deemed capable of giving information respecting the bankrupt, his dealings or property. It is argued that the only relevant property is the net assets at the bankrupt's death, which is not property vesting in the trustee in bankruptcy and is outside the ambit of s. 25. If, in the result, the order of discharge can be and is rescinded or varied, then those net assets would in themselves be property within the meaning of the section. In my judgment, however, it is not necessary to go that far, because there is a clear suspicion that there was property of the bankrupt at the time of his discharge which he failed to disclose to the court and the trustee, and that is property within the meaning of the section on any showing. Moreover, the executors are not mere third parties; they stand in the shoes of the bankrupt; they are his personal representatives and they have his documents and papers. Not only so, but these particular executors are his solicitor, his accountant and his partner. I think it is quite impossible to say that they are persons who cannot be deemed capable of giving information respecting the bankrupt, his dealings or property. A

Counsel for the executors relied on *Re Maundy Gregory, Ex p. Norton v. Trustee* (10) which appears also largely to have influenced the registrar, but that case, in my judgment, is plainly distinguishable. There, one had a compromise and no reasonable ground for supposing it could be set aside. Moreover, the persons to be examined were not personal representatives of the debtor. It is true that in that case the court pointed out that they were not parties or privy to the dealings, but, in my judgment, that was only significant having regard to the facts of the particular case, and the enquiry in those circumstances and on those facts was properly characterised as "fishing." B

The present case is entirely different, in that there are strong grounds for suspicion based on the bankrupt's own affidavit of Dec. 20, 1965, a suspicion by no means allayed by his failure to afford any explanation when called on in his lifetime to do so and by the resistance of his executors. One has only to look at that affidavit and the statement to find one's credulity at once strained to the limit. There is the very remarkable and almost fantastic increase in the bankrupt's earnings as valuer and negotiator of woodlands, in addition to some £16,000 earned over four years from his employment with Kenneth Thorne, Ltd. There is the incredibly large acquisition of capital assets, even allowing for the £34,000 odd liabilities, and there is further the question of the sale of the mineral rights in the Bramshill Gravel Trust, which was in fact another matter to which the trustee adverted in para. 6 of his report. I do not, of course, overlook the fact that the power under s. 25 is one which is not to be lightly used and one must consider carefully that the case is a proper one for its exercise. On the other hand, it was pointed out in *Re Gold Co.* (11), that it is not necessary, in order to invoke the assistance of the court under s. 25, to show a *prima facie* case. SIR GEORGE JESSEL, M.R., in that case, said (11): C

"We must recollect also that it is not necessary to make out a *prima facie* case—the probability of a case is enough. A fair suspicion may be well worthy of further investigation, and it may well be worth the expense and trouble of examining witnesses to see whether it is well founded." D

There is also the further somewhat remarkable feature, which may be capable of explanation but at the moment stands as a surprising factor, that between Dec. 20, 1965, and the death of the bankrupt, whilst his assets remained virtually at the same amount, within, I think, about £100, the liabilities so very largely increased that the net estate was reduced to the order of something like £5,000. there may be an explanation of these matters and the bankrupt had the opportunity of producing it, of which he declined to avail himself, but on the information as it stands I have no doubt that the trustee was perfectly justified in saying, as he did, in his report, E

(10) [1934] All E.R. Rep. 429; [1935] Ch. 65.

(11) (1879), 12 Ch.D. 77 at p. 84.

- A "I have reason to believe that the answers to the questions so put to the [bankrupt] may disclose or lead to the disclosure of information leading to the recovery of further assets or income which the [bankrupt] should have included in the statement made by him in connexion with and in support of his application for discharge on the July 31, 1961."
- B In my judgment, therefore, there was both jurisdiction to make an order and it was a proper case for making it. The registrar, however, having decided that he had no jurisdiction, did not leave the matter there, but went on to say what he would have done if he had thought that he had jurisdiction. Therefore, he has, in a sense, exercised his discretion and it is said that this court cannot or ought not to interfere with it. Now, of course, it is well settled that an appellate court will not ordinarily interfere with the discretion of the judge below, but
- C it can and ought to do so if it appears that the judge below has in fact exercised his discretion on wrong principles; and I agree with STAMP, J., that the reasons which the registrar gave do show that he had in fact acted on wrong principles. He said, as STAMP, J., pointed out when he was dealing with jurisdiction, that there was no question in the case of the executors giving assistance to the trustee as to property vested in the trustee. Then, on discretion, he said,
- D

"First I will consider the object of such examination and what might be achieved by it—in this case it could only be rescission of the discharge and reopening of the matter."

- In my judgment, it was wrong to say that that could be the only object of the examination. The object of the examination was clearly stated to be, in para. 6,
- E that it might "disclose or lead to the disclosure of information leading to the recovery of further assets or income which the [bankrupt] should have included in the statement . . ." What consequences will follow if, in the result, it does so lead, is a matter to be considered hereafter; but the registrar, in my judgment, failed properly to direct his mind to the real object of the exercise, and in that he was acting on a wrong principle.

- F Then he went on further to consider the position of the executors and he said:

"I have to consider whether the executors can give information concerning the [bankrupt], his dealings or property (see *Re Maundy Gregory* (12)). The executors do not seem to me to have been party or privy to the debtor's dealings. They take over where he left off—at death. They can not, as executors, be party or privy to the dealings of the [bankrupt]."

- G With great respect, that seems to me to be clearly directing one's mind to the wrong point. As I have said, the question of the executors being party or privy was relevant on the facts of *Re Maundy Gregory* (12), but the question which the registrar had to consider, and which we have to consider, is whether these executors may be deemed to be capable of giving information respecting the bankrupt, his dealings or property. On the facts of this case and for the reasons
- H which I have already given, I cannot have the slightest doubt that they can be and ought to be so deemed.

I agree, therefore, for the reasons given by STAMP, J., and for the reasons which I have shortly stated, that this appeal ought to be allowed.

*Appeal allowed.*

- I Solicitors: *Sidney Pearlman* (for the trustee in bankruptcy); *Allan James, Britnell & Co.*, High Wycombe (for the executors).

[Reported by JENIFER SANDELL, Barrister-at-Law.]



## Re BALL'S SETTLEMENT.

[CHANCERY DIVISION (Megarry, J.), March 4, 5, 1968.]

*Trust and Trustee—Variation of trusts by the court—Revocation of beneficial trusts and rescission—Rescission of clauses declaring beneficial interests and substitution of new clauses—Settlor's life interest—Testamentary power of appointment and interests in default of appointment removed—Whether arrangement leaving a substratum but effecting the purpose of the original trusts by other means was an arrangement "varying" the original trusts—Variation of Trusts Act, 1958 (6 & 7 Eliz. 2 c. 53), s. 1 (1).*

If an arrangement proposed for the approval of the court under s. 1 (1)\* of the Variation of Trusts Act, 1958, changes the whole substratum of the trust, then it may well be that it cannot be regarded merely as "varying" that trust; but if the arrangement, while leaving the substratum, effectuates the purpose of the original trust by other means, it may still be possible to regard that arrangement as merely varying the original trust, even though the means employed are wholly different and even though the form is completely changed (see p. 442, letter G, post).

Dictum of MARTIN, J., in *Re Dyer*, ([1935] V.L.R. at p. 290) adopted.

Under a settlement of personalty dated Feb. 6, 1958, the settlor had a life interest; the trust fund was subject to a testamentary power for the settlor to appoint to each of two named sons, or to the wife of any such son, or to his children or grandchildren whether by adoption or otherwise. Not more than half the fund was to be appointed to either family. In default of appointment the fund was to go in equal moieties to the two sons absolutely with a proviso, if a son predeceased the settlor, in favour of his issue stirpically. An arrangement proposed for approval of the court under s. 1 of the Variation of Trusts Act, 1958, would rescind all beneficial and administrative trusts of the settlement, substituting new clauses. The new beneficial trusts would divide the trust fund into two halves, each for one son for life, and subject thereto in equal shares for such of his children as were alive on, or born before, a certain date. Provision was to be made by insurance policies for certain persons who might, but for the proposed arrangement, have taken an interest under the settlement in default of appointment. The settlor's life interest, the power of appointment, and the provisions in default of appointment would disappear. The proposal, as initially put before the court, was revised by releasing the power of appointment†. The application, which originally was for the approval of the arrangement as revoking the trusts and re-settling the trust fund, was amended so as to omit the word "re-settling" (which did not occur in s. 1 of the Act of 1958) and by substituting "varying" for "revoking". In effect all that would remain of the old trusts was that a moiety of the trust fund was to be held on certain trusts for each son and his issue, with defined interests for the sons and their children in place of the power of appointment and the interests in default of appointment.

**Held:** in the events likely to happen the difference between the provisions of the settlement and those of the revised arrangement lay in detail rather than in substance, and in accordance with the principle stated at letter C, above, the revised arrangement could properly be regarded as "varying" the trust settlement; accordingly the court would approve the revised arrangement under s. 1 (1) of the Variation of Trusts Act, 1958 (see p. 443, letter B, post).

*Re Holt's Settlement* ([1968] 1 All E.R. 470) considered.

*Re Towler's Settlement Trusts* ([1963] 3 All E.R. 759) distinguished.

\* Section 1 (1), so far as material, is set out at p. 441, letter A, post.

† See p. 440, letters F and H, post.

- A [As to the jurisdiction of the court to vary trusts under the Variation of Trusts Act, 1958, see 38 HALSBURY'S LAWS (3rd Edn.) 1029, 1030, para. 1772; and for cases on the subject, see 47 DIGEST (Repl.) 332-338, 2993-3018.

For the Variation of Trusts Act, 1958, s. 1, see 38 HALSBURY'S STATUTES (2nd Edn.) 1130.]

Cases referred to:

- B *Courtauld's Settlement, Re, Courtauld v. Farrer*, [1965] 2 All E.R. 544, n.; [1965] 1 W.L.R. 1385; 47 Digest (Repl.) 338, 3018.  
*Dyer, Re, Dyer v. Trustees, Executors and Agency Co., Ltd.*, [1935] V.L.R. 273; 8 Digest (Repl.) 438, \*455.  
*Holmden's Settlement Trusts, Re, Inland Revenue Comrs. v. Holmden*, [1968] 1 All E.R. 148; [1968] 2 W.L.R. 300.
- C *Holt's Settlement, Re, Wilson v. Holt*, [1968] 1 All E.R. 470; [1968] 2 W.L.R. 653.  
*Towler's Settlement Trusts, Re*, [1963] 3 All E.R. 759; sub nom., *Re T.'s Settlement Trusts*, [1964] Ch. 158; [1963] 3 W.L.R. 987; 47 Digest (Repl.) 337, 3014.

#### D Adjourned Summons.

By originating summons dated May 23, 1967, the plaintiff, James Ball, the settlor and tenant for life under a settlement dated Feb. 6, 1958, made between the plaintiff and the first and second defendants, James Maurice Ball and Norman Leonard Ball, applied to the court, pursuant to s. 1 of the Variation of Trusts Act, 1958, for approval of an arrangement revoking the trusts of the settlement and re-settling the subject matter thereof, such approval being sought on behalf of the three infant defendants and of all persons unknown or unascertained who might thereafter become beneficially interested under the trusts of the settlement. In addition to the first and second defendants, who were both trustees and beneficiaries under the settlement, there were five other defendants of whom the last three, the fifth to seventh defendants, were infants. At the hearing the summons was amended so as to substitute "varying" for "revoking" and by deleting the reference to re-settling the subject matter of the settlement.

*C. Drake* for the plaintiff settlor.

*L. J. M. Smith* for the first and second defendants.

*O. R. Smith* for the third to seventh defendants.

- G MEGARRY, J.: This is a summons under the Variation of Trusts Act, 1958. It previously came before UNGOED-THOMAS, J., who raised certain points on insurance policies involved in the proposed arrangement and also on the investment clause. These points have been dealt with and the restored summons now comes before me. The settlement is a settlement of pure personalty, made on Feb. 6, 1958. It is notable for its brevity.

- H In essence, the trusts are as follows. By cl. 2 the settlor is given a life interest. He is still living, but is some seventy-six years of age. By cl. 3 the property is subject to a testamentary power for the settlor to appoint to each of his two named sons or to the wife of any such son "or to his children or to his grandchildren whether by adoption or otherwise"; and it is provided that not more than half of the fund may be appointed to either family. By cl. 4 in default of appointment the fund is to go in equal moieties to the two sons absolutely, with a proviso that if either or both shall predecease the settlor "his or their share shall be transferred to such of their respective issue as shall survive the settlor and if more than one equally between them per stirpes". Clauses 5, 6 and 7 contain certain administrative provisions.

I The proposed arrangement leaves standing cl. 1 of the settlement, which merely contains the declaration of trust. It rescinds all the remaining clauses of the settlement, thus putting an end to the beneficial and the administrative provisions

alike. For them it substitutes new clauses numbered 2 to 4. Under these, the settlor's life interest disappears and so do the power of appointment and the provisions for the persons entitled in default of appointment. Instead, the trust fund is divided into two halves. Each half is to be held in trust for one of the sons for life, and subject thereto in equal shares for such of his children as were alive on Oct. 1, 1967, or are born before Oct. 1, 1977. The arrangement provides for certain insurance policies which will meet estate duty on the settlor's death, and for two other insurance policies, each securing the payment of £5,000 if there is any "excluded person" among the issue of each son. The "excluded persons" are, in effect, defined as being those who take no interest in the trust fund under the arrangement but would otherwise in default of appointment have taken part of the trust fund, as in certain circumstances a child of a son might have done if born after Oct. 1, 1977.

Two questions arise on this arrangement. First, there are certain objects of the power of appointment for whom the arrangement provides no benefit. Thus, the objects include the wife of each son and also his grandchildren by adoption; but the arrangement makes no provision for them. The present wives of the sons are not parties to these proceedings, and I am asked by the summons to approve the arrangement "on behalf of all persons unknown or unascertained who may hereafter become beneficially interested under the trusts of the said settlement". By the proviso to s. 1 (1) of the Act of 1958, however, I am prohibited from approving any arrangement on behalf of any person "unless the carrying out thereof would be for the benefit of that person". On the facts as they stand, the prospects of any such appointment being made to any particular object may indeed be remote; but I cannot see how it could be said that it is for the benefit of a person to destroy even the smallest hope of receiving a beneficial interest if nothing is put in its place.

The difficulty, of course, would be readily surmounted if the power of appointment were to be released. No question of a fraud on a power can arise on a mere release, and in any case the settlor here will obtain no benefit from the arrangement. At one stage it was suggested that the arrangement met the difficulty in that, by revoking the power, the arrangement thereby released it. Plainly, such a revocation could not amount to an express release, because for an express release, the Law of Property Act, 1925, s. 155, makes a deed requisite. The arrangement is clearly not a deed; it is not worded like a deed, nor does it make any provision for execution like a deed. It is, however, possible to release a power by implication; and for this it suffices if there is any dealing with the property by the donee of the power which is inconsistent with the exercise of the power. Thus in *Re Courtauld's Settlement*, *Courtauld v. Farrer* (1), PLOWMAN, J., had before him a case in which there was an arrangement which he held would extinguish the power. The difficulty in such cases may be, however, that an implied release will not, as in *Re Courtauld's Settlement* (1), necessarily bind all persons. It seemed to me plainly preferable that the power should be expressly released so as to be effective for all purposes in putting an end to the existence of the power; and the arrangement has now been revised so as to make provision for the execution of an express release before the arrangement takes effect. Accordingly, there will now be no question of the arrangement taking away from any person the possibility of benefit without providing compensation for him. Instead, by deleting the power of appointment, the arrangement will now merely remove dead wood, in that the power will have already ceased to exist for all purposes by the execution of the deed of release. In this way, it seems to me, all difficulties will be avoided.

The second point in this case concerns the jurisdiction of the court. The originating summons asks for the approval of the court to an arrangement "revoking the trusts of the above-mentioned settlement and resettling the

(1) [1965] 2 All E.R. 544n.



A subject matter of the above-mentioned settlement". What s. 1 (1) of the Act of 1958 authorises the court to approve is

"any arrangement . . . varying or revoking all or any of the trusts, or enlarging the powers of the trustees of managing or administering any of the property subject to the trusts."

B The word "resettling" or its equivalent nowhere appears. Accordingly, while there is plainly jurisdiction to approve the arrangement insofar as it revokes the trusts, in my view there is equally plainly no jurisdiction to approve the arrangement as regards "resettling" the property, at any rate *eo nomine*. In this connexion, I bear in mind the words of WILBERFORCE, J., in *Re Towler's Settlement Trusts* (2). He there said:

C "... I have no desire to cut down the very useful jurisdiction which this Act has conferred on the court, but I am satisfied that the proposal as originally made to me falls outside it. Though presented as 'a variation' it is in truth a complete new re-settlement. The former trust funds were to be got in from the former trustee and held on totally new trusts such as might be made by an absolute owner of the funds. I do not think that the court can approve this."

D It seems to me that the originating summons correctly describes what is sought to be done in this case, and as so described there is clearly no jurisdiction for the court to approve the arrangement. But it does not follow that merely because an arrangement can correctly be described as effecting a revocation and resettlement, it cannot also be correctly described as effecting a variation of the trusts. E The question then is whether the arrangement in this case can be so described. In the course of argument I indicated that it seemed desirable for the summons to be amended by substituting the word "varying" for the word "revoking" and deleting the reference to "resettling", and that I would give leave for this amendment to be made. On the summons as so amended the question is thus whether the arrangement can fairly be said to be covered by the word F "varying" so that the court has power to approve it.

There was some discussion of the ambit of this word in *Re Holt's Settlement, Wilson v. Holt* (3). It was there held that if in substance the new trusts were recognisable as the former trusts, though with variations, the change was comprehended within the word "varying", even if it had been achieved by a process of revocation and new declaration. In that case, the new trusts were plainly G recognisable as the old trusts with variations. In the present case, the new trusts are very different from the old. The settlor's life interest vanishes; so does the power of appointment, though that will now be released. In place of the provision in default of appointment for absolute interests for the two sons if they survived the settlor, and if not, for their issue stirpically, there is now a life interest for each son, and vested absolute interests for the children of the H sons born before Oct. 1, 1977. There is a clean sweep of the somewhat exiguous administrative provisions and an equally exiguous new set in their place. The arrangement also makes altogether new provisions for insurance policies, both those which provide for death duties and are to be added to the trust fund, and those which provide for the excluded persons and are to be held on separate trusts; but these portions of the arrangement, I should say, are not made part I of the settlement as revised, but are to operate independently and outside its terms. All that remains of the old trusts are what I may call the general drift or purport, namely that a moiety of the trust fund is to be held on certain trusts for each son and certain of his issue. Is the word "varying" wide enough to embrace so categorical a change?

In answering this question I have derived some assistance from an Australian

(2) [1963] 3 All E.R. 759 at p. 762; [1964] Ch. 158 at p. 162.

(3) [1968] 1 All E.R. 470.

case, *Re Dyer, Dyer v. Trustees, Executors and Agency Co., Ltd.* (4), to which I referred counsel. This was decided by a full court of the Supreme Court of Victoria. It concerned a trust deed settling £10,000 in trust to establish and maintain a permanent orchestra in Victoria. The trust deed provided that the settlor might, from time to time and at any time or times, by deed "vary all or any part of the trusts and powers hereinbefore declared and created". The trust fund proved inadequate for the purposes stated, and so the settlor executed a deed purporting to vary the trusts so that accumulated income and future income should be paid to certain named musical societies. The question was whether this variation was effective. There was a similar question concerning another variation of this nature. The full court, affirming MACFARLAN, J., held that the variations were ineffective. SIR WILLIAM IRVINE, C.J., and GAVAN DUFFY, J., said this (5)

" 'Vary', itself, is apt enough to describe the substitution of one trust for another. The deed, however, has to be read as a whole, and on consideration we agree with the views expressed by MACFARLAN, J."

MARTIN, J., said (6):

"It would be strange if the donor who desired to help in founding a fund for a particular purpose, and who expected others to contribute to that fund, attempted to reserve to himself a power to change the whole substratum of the gift, not only as regards his own donation, but also the donations of others who subscribed money for the particular purpose. A power to revoke is common in deeds of this nature, and I cannot believe that the draftsman would not have included such a power had it been intended that the donor was to be entitled to benefit an object other than the one nominated in the deed. What are the limits of the power to vary is a very difficult question, which does not call for determination here, but I consider none of the draft deeds submitted falls within those limits, and that MACFARLAN, J., was right in holding that 'it was impossible to use the moneys in such a way as will depart from the original purpose of the gift'."

That case, of course, is very different from this. No question arises here of other people subscribing to the trust funds, nor is there here present the form of wording on which MACFARLAN, J., to some extent depended. But I borrow with gratitude from the language of MARTIN, J. If an arrangement changes the whole substratum of the trust, then it may well be that it cannot be regarded merely as varying that trust. But if an arrangement, while leaving the substratum, effectuates the purpose of the original trust by other means, it may still be possible to regard that arrangement as merely varying the original trusts, even though the means employed are wholly different and even though the form is completely changed.

I am, of course, well aware that this view carries me a good deal farther than I went in *Re Holt* (7). I have felt some hesitation in the matter, but on the whole I consider that this is a proper step to take. The jurisdiction of the Act of 1958 is beneficial and, in my judgment, the court should construe it widely and not be astute to confine its beneficent operation. I must remember that in essence the court is merely contributing on behalf of infants and unborn and unascertained persons the binding assents to the arrangement which they, unlike an adult beneficiary, cannot give. So far as is proper, the power of the court to give that assent should be assimilated to the wide powers which the ascertained adults have.

In this case, it seems to me that the substratum of the original trusts remains. True, the settlor's life interest disappears; but the remaining trusts are still in

(4) [1935] V.L.R. 273.

(5) [1935] V.L.R. at p. 287.

(6) [1935] V.L.R. at p. 290.

(7) [1968] 1 All E.R. 470.

- A essence trusts of half of the fund for each of the two named sons and their families, with defined interests for the sons and their children in place of the former provisions for a power of appointment among the sons and their children and grandchildren and for the sons to take absolutely in default of appointment. In the events which are likely to occur, the differences between the old provisions and the new may, I think, fairly be said to lie in detail rather than in substance.
- B Accordingly, in my judgment, the arrangement here proposed, with the various revisions to it made in the course of argument, can properly be described as varying the trusts of the settlement. Subject to the summons being duly amended, I therefore approve the revised arrangement. I may add that since the hearing of this case I have considered the speeches of their lordships in *Re Holmden's Settlement Trusts, Inland Revenue Comrs. v. Holmden* (8), but
- C although these suggest certain questions of interest and difficulty, I find in them nothing to make me resile from the views that I have expressed.

*Arrangement (set forth in the schedule to the order) approved on behalf of the infant defendants and of all persons unknown or unascertained who might thereafter become beneficially interested under the trusts of the settlement.*

- D Solicitors: *Jaques & Co.*, agents for *Robinson, Jarvis & Rolf*, Ryde, Isle of Wight (for the plaintiff settlor); *Jaques & Co.* (for the defendants).

[Reported by R. W. FARRIN, Esq., Barrister-at-Law.]

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F

### PRACTICE DIRECTION.

#### PROBATE, DIVORCE AND ADMIRALTY DIVISION (DIVORCE).

- G *Legal Aid—Costs—Taxation—Judgment or final order must include direction for taxation of costs of assisted person unless otherwise directed—Matrimonial causes—Legal Aid (General) Regulations, 1962 (S.I. 1962 No. 148), reg. 19 (3).*

Attention is drawn to reg. 19 (3) of the Legal Aid (General) Regulations, 1962 (1).

- H A direction that the costs of any assisted person shall be taxed in accordance with the provisions of Sch. 3 to the Legal Aid and Advice Act, 1949, must be included in any judgment or final order in a matrimonial cause in which the assisted person is a party, unless the judge or registrar who gave the judgment or made the order otherwise directs. It is the responsibility of the officer drawing the decree or order to include such a direction.

Direction issued with the concurrence of the Lord Chancellor and the President.

- I May 9, 1968.

COMPTON MILLER,  
Senior Registrar.

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(8) [1968] 1 All E.R. 148.

(1) S.I. 1962 No. 148; 5 HALSBURY'S STATUTORY INSTRUMENTS (First Re-Issue) 246.



HENRY KENDALL & SONS (a firm) v. WILLIAM LILICO & SONS, LTD. AND OTHERS. A

HOLLAND COLOMBO TRADING SOCIETY, LTD.  
v. GRIMSDALE & SONS, LTD.

[CONSOLIDATED APPEALS.]

GRIMSDALE & SONS, LTD. v. SUFFOLK AGRICULTURAL AND  
POULTRY PRODUCERS ASSOCIATION, LTD. B

[HOUSE OF LORDS (Lord Reid, Lord Morris of Borth-y-Gest, Lord Guest, Lord Pearce and Lord Wilberforce), January 15, 16, 17, 18, 22, 23, 24, 25, 29, 30, 31, February 1, 5, 6, 7, May 8, 1968.]

*Agriculture—Feeding stuffs—Sale for use as an ingredient in poultry food—Imported ground nut extractions unfit for purpose—Compound meal fed to young pheasants which were poisoned thereby—C.i.f. contracts by wholesalers for importing ground nut extractions—Sale by transfer of c.i.f. documents—Whether pheasants were “poultry”—Whether warranty of feeding stuffs applied—Fertilisers and Feeding Stuffs Act, 1926 (16 & 17 Geo. 5 c. 45), s. 2 (2).* C

*Sale of Goods—Implied condition of fitness—Merchantable quality—Exception clause for latent defects—Incorporation of such clause inferred from course of bargaining—Buyers and sellers members of London Cattle Food Association—Whether inference that buyers relied on sellers’ skill and judgment should be made—Condition of fitness of ground nut extracts for re-sale for use for food for cattle or poultry—Unfit for food for poultry—Whether implied condition broken—Compounded food fed to pheasants—Remoteness of damage—Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 14 (1), (2).* D

K., Ltd., who were wholesale dealers and members of the London Cattle Food Trade Association, bought ground nuts early in 1960, their description being “Brazilian ground nut extractions”, on c.i.f. contracts with shipment from Brazilian ports. At that time the purchase of these goods from Brazil was purchase from a new source. Some of the ground nut extractions were sold to G., Ltd. (who were also members of the same trade association), sales being effected on contract form No. 6 of the association, being a form for the purchase of imported supplies on c.i.f. contract. Form No. 6 provided that the goods were not warranted free from defects rendering them unmerchantable which would not be apparent on reasonable examination. The purpose for which G., Ltd. required the goods, viz., re-sale in smaller quantities for compounding as food for cattle and poultry, was known to K., Ltd. The goods imported were in fact affected by a toxic condition and were unfit for use as food for poultry, though a proportion of five per cent. or so could be compounded (as became well-known by the date of the trial) in cattle food without rendering the compound unfit for cattle. G., Ltd. sold some of the goods to S., Ltd., by oral bargain followed by sold notes which bore on the back the condition that the buyer took responsibility for latent defects. There had been a long course of dealing between G., Ltd. and S., Ltd. by such bargains followed by sold notes containing this condition. S., Ltd. made known to G., Ltd. that the goods were required for compounding into food for pigs and poultry. S., Ltd. compounded the ground nut extraction so bought into food for birds and sold it to H., proprietors of a game farm, who fed it to pheasants, many of which died in consequence of the poison in the ground nut extraction. S., Ltd. admitted liability under s. 14\* of the Sale of Goods Act, 1893, to H. and negotiated a settlement at a sum accepted by all persons as reasonable. S., Ltd. sued their suppliers, G., Ltd., who sued their suppliers, K., Ltd., the claim being for breach of implied E F G H I

\* Section 14 (1), (2), is set out at p. 449, letters E to G, post.

A condition of fitness under s. 14 (1), or of unmerchable quality on the sale of goods by description (s. 14 (2)), and for breach of warranty under s. 2 (2)\* of the Fertilisers and Feeding Stuffs Act, 1926. G., Ltd., contested, in particular, liability to S., Ltd. unless G., Ltd. could recover from K., Ltd. There was evidence at the trial that contamination of goods to the extent to which these goods were contaminated was not then usually regarded commercially as a ground for rejecting the goods, though a claim for rebate in price might be based on it. On ultimate appeal,

**Held:** (i) in regard to the position between G., Ltd. and S., Ltd.—

(a) G., Ltd. was liable to S., Ltd., whether or not G., Ltd. could recover from K., Ltd. for breach of condition of fitness implied by virtue of s. 14 (1) of the Sale of Goods Act, 1893, in the contracts for sale to S., Ltd., because the purpose for which the goods were required, viz., for use in compounding into pig and poultry food, was a “particular purpose” (see (ii) (a) below) and because it was to be inferred in the circumstances that S., Ltd. relied on G., Ltd.’s skill or judgment (see p. 463, letter F, p. 474, letter C, p. 481, letter E, and p. 496, letter D, post, LORD REID not deciding this ground of liability, cf., however (ii) (a) below).

(b) (LORD REID not deciding this) the latent defect condition in the sold notes did not exempt G., Ltd. from liability (see p. 463, letters A and F, p. 475, letter A, p. 482, letter E, and p. 496, letter E, post).

(c) the statutory warranty under s. 2 (2) of the Fertilisers and Feeding Stuffs Act, 1926, applied to the sale by G., Ltd. to S., Ltd. and breach of the warranty was established, because the ground nut extraction was not suitable for the purpose of being fed to poultry, and thus was unsuitable for use when delivered to S., Ltd., and the facts that the compounded meal was fed to pheasants and that pheasants were not poultry did not render the damage to the pheasants too remote (see p. 459, letters C, E and F, p. 461, letter C, p. 469, letter G, p. 473, letter I, p. 489, letter D, and p. 493, letter I, post; and cf. (ii) (b) below).

(ii) in regard to the position between K., Ltd. and G., Ltd.—

(a) K., Ltd. was liable to G., Ltd. for breach of condition of fitness implied by s. 14 (1) of the Sale of Goods Act, 1893, because the purpose for which the goods were required, viz., for compounding into food for cattle and poultry, of which purpose K., Ltd. knew, was a sufficient particular purpose (per LORD REID a sufficient particular purpose in the year 1960 (see p. 457, letter C, post)), and in the circumstances (per LORD REID, the evidence showing that K., Ltd. were recommending the goods) G., Ltd. had relied on K., Ltd.’s skill and judgment (LORD GUEST dissenting from this finding) notwithstanding that they were both members of the same trade association, that some of the goods were bought when afloat, and that the defect was latent (see p. 457, letters G and I, p. 458, letter B, p. 461, letter B, p. 465, letter D, p. 466, letter D, p. 467, letter G, p. 473, letter I, p. 482, letter I, p. 484, letter F, post; cf. p. 476, letter G, p. 484, letter F, and p. 492, letters E and I, post).

(b) the statutory warranty under s. 2 (2) of the Fertilisers and Feeding Stuffs Act, 1926, applied to a sale of goods for the purpose of re-sale as ingredients for use in compounding food for cattle or poultry (see p. 458, letter F, p. 470, letter D, p. 487, letter F, and p. 493, letter H, post); and (LORD REID and LORD GUEST dissenting) applied to the sales by K., Ltd. to G., Ltd., even though the contracts were for the sale of goods on c.i.f. terms and although goods were sold afloat (see p. 472, letter H, p. 489, letter D, p. 496, letter B, post; cf. p. 461, letter B, and p. 479, letter H, post); and K., Ltd. was in breach of the statutory warranty as the goods were not fit for poultry food and was liable in damages notwithstanding that the compounded meal was ultimately fed to pheasants, which were not poultry (see

\* Section 2 (2) is set out at p. 469, letter F, post.

p. 458, letter G, p. 473, letters E and H, p. 480, letters F and H, p. 485, letter B, p. 487, letter F, p. 493, letter A, and p. 493, letters D and G, post).

Per LORD REID, LORD MORRIS OF BORTH-Y-GEST and LORD GUEST, LORD PEARCE and LORD WILBERFORCE not concurring: the ground nut extractions, sold under the ordinary description quoted at p. 444, letter F, ante, were of merchantable quality for the purposes of s. 14 (2) of the Sale of Goods Act, 1893, though contaminated, the question whether contaminated quality was merchantable quality being determined as at the date of trial (see p. 450, letter I, p. 453, letter F, p. 469, letter D, and p. 478, letter D, post; cf., p. 487, letter E, and p. 493, letter C, post).

Decision of the COURT OF APPEAL (sub nom. *Hardwick Game Farm v. Suffolk Agricultural and Poultry Producers Association, Ltd.*, [1966] 1 All E.R. 309) affirmed in the result, but reversed on (ii) (b), p. 445, ante, except as to the meaning of poultry.

[As to the statutory warranty on a sale of an article for use as food for cattle or poultry, see 1 HALSBURY'S LAWS (3rd Edn.) 453, para. 887; and for cases on the subject, see 2 DIGEST (Repl.) 159, 1164-1166. As to the meaning of poultry, see 1 HALSBURY'S LAWS (3rd Edn.) 452, para. 886, note (t).

As to the implied condition as to fitness on a sale of goods, see 34 HALSBURY'S LAWS (3rd Edn.) 51-54, para. 77; and for cases on this subject, see 39 DIGEST (Repl.) 573-575, 988-1001.

For the Fertilisers and Feeding Stuffs Act, 1926, s. 2, see 1 HALSBURY'S STATUTES (2nd Edn.) 492.

For the Sale of Goods Act, 1893, s. 14, s. 16, see 22 HALSBURY'S STATUTES (2nd Edn.) 993, 995.]

#### Cases referred to:

*Adamasto Shipping Co., Ltd. v. Anglo-Saxon Petroleum Co., Ltd.*, [1958] 1 All E.R. 725; [1959] A.C. 133; [1958] 2 W.L.R. 688; [1958] 1 Lloyd's Rep. 73, *reversing* sub nom. *Anglo-Saxon Petroleum Co., Ltd. v. Adamastos Shipping Co., Ltd.*, [1957] 2 All E.R. 311; [1957] 2 Q.B. at p. 255; [1957] 2 W.L.R. 968; [1957] 1 Lloyd's Rep. 271; 41 Digest (Repl.) 315, 1198.

*Baldry v. Marshall*, [1924] All E.R. Rep. 155; [1925] 1 K.B. 260; 94 L.J.K.B. 208; 132 L.T. 326; 39 Digest (Repl.) 551, 827.

*Barker (William) (Junior) & Co., Ltd. v. Ed. T. Agius, Ltd.*, (1927), 43 T.L.R. 751; 33 Com. Cas. 120; 28 Lloyd L.R. 282; 39 Digest (Repl.) 576, 1011.

*Bartlett v. Sidney Marcus, Ltd.*, [1965] 2 All E.R. 753; [1965] 1 W.L.R. 1013; Digest (Cont. Vol. B) 630, 781a.

*Beecham (H.) & Co. Pty., Ltd. v. Francis Howard & Co. Pty., Ltd.*, [1921] V.L.R. 428; 27 Argus L.R. 275; 39 Digest (Repl.) 555, \*446.

*Biddell Brothers v. E. Clemens Horst Co.*, [1911] 1 K.B. 214; *on appeal*, [1911-13] All E.R. Rep. 93; [1911] 1 K.B. 934; *reversing*, H.L., sub nom. *Clemens (E.) Horst & Co. v. Biddell Bros.*, [1911-13] All E.R. Rep. 93; [1912] A.C. 18; 81 L.J.K.B. 42; 105 L.T. 563; 12 Asp. M.L.C. 90; 39 Digest (Repl.) 704, 1945.

*Bigge v. Parkinson*, (1862), 7 H. & N. 955; 31 L.J.Ex. 301; 158 E.R. 758; sub nom. *Smith v. Parkinson*, 7 L.T. 92; 39 Digest (Repl.) 574, 992.

*Bristol Tramways, etc. Carriage Co., Ltd. v. Fiat Motors, Ltd.*, [1908-10] All E.R. Rep. 113; [1910] 2 K.B. 831; 79 L.J.K.B. 1107; 103 L.T. 443; 39 Digest (Repl.) 511, 541.

*Cammell Laird & Co., Ltd. v. Manganese Bronze and Brass Co., Ltd.*, [1934] All E.R. Rep. 1; [1934] A.C. 402; 103 L.J.K.B. 289; 151 L.T. 142; 39 Digest (Repl.) 544, 784.

*Canada Atlantic Grain Export Co., Inc. v. Eilers*, (1929), 35 Lloyd L.R. 206; 35 Com. Cas. 90; 39 Digest (Repl.) 574, 1001.



- A *Clarke v. Army & Navy Co-operative Society*, [1903] 1 K.B. 155; 72 L.J.K.B. 153; 88 L.T. 1; 39 Digest (Repl.) 563, 923.  
*Comptoir D'Achat et de Vente du Boerenbond Belge S/A. v. Luis de Ridder, Limitado*, [1949] 1 All E.R. 269; [1949] A.C. 293; [1949] L.J.K.B. 513; 39 Digest (Repl.) 640, 1488.
- B *Dobell (G. C.) & Co., Ltd. v. Barber and Garratt*, [1931] 1 K.B. 219; 100 L.J.K.B. 65; 144 L.T. 266; 2 Digest (Repl.) 159, 1164.  
*Draper (C. E. B.) & Son, Ltd. v. Edward Turner & Son, Ltd.*, [1964] 3 All E.R. 148; [1965] 1 Q.B. 424; [1964] 3 W.L.R. 783; [1964] 2 Lloyd's Rep. 91; *revsg.*, [1964] 1 Lloyd's Rep. 169; 44 Digest (Repl.) 277, 1054.  
*Drummond v. Van Ingen*, (1887), 12 App. Cas. 284; 56 L.J.Q.B. 563; 57 L.T. 1; 39 Digest (Repl.) 559, 885.
- C *Flynn v. Scott*, 1949 S.C. 442; 39 Digest (Repl.) 546, \*379.  
*Gardiner v. Gray*, (1815), 4 Camp. 144; 171 E.R. 46; 39 Digest (Repl.) 556, 861.  
*Grant v. Australian Knitting Mills, Ltd.*, (1933), 50 C.L.R. 387; *on appeal*, [1935] All E.R. Rep. 209; [1936] A.C. 85; 105 L.J.P.C. 6; 154 L.T. 18; 39 Digest (Repl.) 541, 762.
- D *Hudley v. Barendale*, [1843-60] All E.R. Rep. 461; (1854), 9 Exch. 341; 23 L.J.Ex. 179; 23 L.T.O.S. 69; 156 E.R. 145; 8 Digest (Repl.) 151, 956.  
*Heron II, The, Koufos v. C. Czarnikow, Ltd.*, [1967] 3 All E.R. 686; [1967] 3 W.L.R. 1491; Digest (Repl.) Supp.  
*Ireland v. Livingston*, [1861-73] All E.R. Rep. 585; (1872), L.R. 5 H.L. 395; 41 L.J.Q.B. 201; 27 L.T. 79; 1 Asp. M.L.C. 389; *revsg.* (1870), L.R. 5 Q.B. 516 Exch.; *revsg.* (1866), L.R. 2 Q.B. 99; 39 Digest (Repl.) 686, 1810.
- E *Jackson v. Rotax Motor & Cycle Co.*, [1910] 2 K.B. 937; 80 L.J.K.B. 38; 103 L.T. 411; 39 Digest (Repl.) 555, 856.  
*Jones v. Bright*, (1829), 5 Bing. 533; Dan. & Ll. 304; 7 L.J.O.S.C.P. 213; 130 E.R. 1167; 39 Digest (Repl.) 553, 832.
- F *Jones v. Just*, (1868), L.R. 3 Q.B. 197; 9 B. & S. 141; 37 L.J.Q.B. 89; 18 L.T. 208; 39 Digest (Repl.) 531, 675.  
*Jones v. Padgett*, (1890), 24 Q.B.D. 650; 59 L.J.Q.B. 261; 62 L.T. 934; 39 Digest (Repl.) 544, 783.
- G *Lambert v. Rowe*, [1914] 1 K.B. 38; 83 L.J.K.B. 274; 109 L.T. 939; 78 J.P. 20; 33 Digest (Repl.) 482, 366.  
*M'Callum v. Mason*, 1956 S.C. 50; [1956] S.L.T. 50; 39 Digest (Repl.) 546, \*369.  
*McCutcheon v. David Macbrayne, Ltd.*, [1964] 1 All E.R. 430; [1964] 1 W.L.R. 125; [1964] 1 Lloyd's Rep. 16; Digest (Cont. Vol. B) 71, 254b.
- H *Manbré Saccharine Co. v. Corn Products Co.*, [1918-19] All E.R. Rep. 980; [1919] 1 K.B. 198; 120 L.T. 113; sub nom. *Mambre Saccharine Co. v. Corn Products Co.*, 88 L.J.K.B. 402; 39 Digest (Repl.) 705, 1951.  
*Manchester Liners, Ltd. v. Rea, Ltd.*, [1922] All E.R. Rep. 605; [1922] A.C. 74; 91 L.J.K.B. 504; 127 L.T. 405; 39 Digest (Repl.) 547, 804.
- I *Mash & Murrell, Ltd. v. Joseph I. Emanuel, Ltd.*, [1961] 1 All E.R. 485; [1961] 1 W.L.R. 862; *revsd.* C.A., [1962] 1 All E.R. 77; [1962] 1 W.L.R. 16; 39 Digest (Repl.) 545, 788.  
*Medway Oil & Storage Co., Ltd. v. Silica Gel Corpn.*, (1928), 33 Com.Cas. 195; 39 Digest (Repl.) 538, 806.  
*Morelli v. Fitch & Gibbons*, [1928] All E.R. Rep. 610; [1928] 2 K.B. 636; 97 L.J.K.B. 812; 140 L.T. 21; 39 Digest (Repl.) 528, 658.  
*Niblett, Ltd. v. Confectioners' Materials Co., Ltd.*, [1921] All E.R. Rep. 459; [1921] 3 K.B. 387; 90 L.J.K.B. 984; 125 L.T. 552; 39 Digest (Repl.) 527, 648.

- Pinnock Brothers v. Lewis & Peat, Ltd.*, [1923] 1 K.B. 690; 92 L.J.K.B. 695; A  
129 L.T. 320; 39 Digest (Repl.) 594, 1124.
- Preist v. Last*, [1903] 2 K.B. 148; 72 L.J.K.B. 657; 89 L.T. 33; 39 Digest  
(Repl.) 545, 785.
- R. v. Garham*, (1861), 2 F. & F. 347; 175 E.R. 1090; 8 Cox, C.C. 451; 15  
Digest (Repl.) 1078, 10,654.
- R. v. Head*, (1857), 1 F. & F. 350; 175 E.R. 759; 15 Digest (Repl.) 1078, B  
10,653.
- Sanders v. Maclean*, (1883), 11 Q.B.D. 327; 52 L.J.Q.B. 481; 49 L.T. 462;  
5 Asp. M.L.C. 160; 39 Digest (Repl.) 518, 591.
- Shields v. Honeywell and Stein, Ltd.*, [1953] 1 Lloyd's Rep. 357.
- Smyth (Ross T.) & Co., Ltd. v. T. D. Bailey, Son & Co.*, [1940] 3 All E.R. 60;  
164 L.T. 102; 39 Digest (Repl.) 611, 1239. C
- Stretch v. White*, (1861), 25 J.P. 485; 33 Digest (Repl.) 482, 363.
- Wallis v. Russell*, [1902] 2 I.R. 585; 39 Digest (Repl.) 546, \*374.
- Wallis, Son & Wells v. Pratt and Haynes*, [1910] 2 K.B. 1003; *reversd.* H.L.,  
[1911-13] All E.R. Rep. 989; [1911] A.C. 394; 80 L.J.K.B. 1058;  
105 L.T. 146; 39 Digest (Repl.) 588, 1089.
- Ward v. Great Atlantic & Pacific Tea Co., Ltd.*, (1918), 231 Mas. 90. D

### Appeals.

These were two consolidated appeals by leave by the appellants, Henry Kend-  
dall & Sons (a firm), against William Lillico & Sons, Ltd. and Grimsdale & Sons,  
Ltd., and the appellants, Holland Colombo Trading Society, Ltd. against Grims-  
dale & Sons, Ltd. and another appeal by Grimsdale & Sons, Ltd. against the  
Suffolk Agricultural & Poultry Producers Association, Ltd. The two consoli-  
dated appeals were against the judgment of the Court of Appeal (SELLERS,  
DAVIES and DIPLOCK, L.JJ.), dated Dec. 20, 1965, and reported [1966] 1 All E.R.  
309 confirming in parts the judgment of HAVERS, J., dated July 30, 1964. The  
facts are set out in the opinion of LORD REID. E

*R. J. Parker, Q.C.*, and *Adrian Hamilton* for the appellants Henry Kendall &  
Sons and Holland Colombo Trading Society, Ltd. F

*R. A. MacCrindle, Q.C.*, *Leo Clark* and *M. O. Saville* for the respondents  
William Lillico & Sons, Ltd. and Grimsdale & Sons, Ltd.

*R. A. MacCrindle, Q.C.*, and *M. O. Saville* for the appellants Grimsdale & Sons,  
Ltd.

*A. J. L. Lloyd, Q.C.*, and *Barry Chedlow* for the respondents, Suffolk  
Agricultural and Poultry Producers Association, Ltd. G

Their lordships took time for consideration.

May 8. The following opinions were delivered.

**LORD REID:** My Lords, in the summer of 1960 very large numbers of  
young turkeys died in what appeared to be an epidemic of an unknown disease; H  
but the outbreaks were curiously patchy and the trouble was soon traced to feed-  
ing stuffs. Such birds are generally fed on mixtures of various ingredients. It  
was common to include up to about ten per cent. of ground nut extractions, and  
it was found that in the mixture fed to these birds there had been a proportion of  
ground nut extractions imported from Brazil. Then it was found that much of  
this Brazilian food was contaminated by a poison Aflatoxin to amounts up to  
five parts per million. Then it appeared that owing to climatic conditions in  
Brazil spores of a fungus *aspergillus flavus* had caused a mould to grow on the  
ground nuts and secrete this poison. Ground nut extractions had for many years  
been imported from India. It has now been found that the Indian product some-  
times contains some of this poison, though generally in smaller amounts, but in  
1960 there was no reason to suspect that any ground nut extractions might contain  
this poison. I

The plaintiffs, Hardwick Game Farm, had about two thousand breeding

- A pheasants. The eggs were collected and hatched and the young pheasants reared in much the same way as chickens or turkeys. A large number of them died in 1960 from this poison, and it is not disputed that it was contained in compound feeding stuffs supplied by a local compounder referred to in this case as S.A.P.P.A. They sued S.A.P.P.A. and S.A.P.P.A. agreed to pay £3,000 damages. That settlement is admitted to have been reasonable and proper. S.A.P.P.A., however, brought in their suppliers Grimsdale and Lillico and they in turn brought in their suppliers, Kendall and Holland Colombo. It has been held that Grimsdale and Lillico are liable to S.A.P.P.A. and that Kendall and Holland Colombo are liable to Grimsdale and Lillico. In the first appeal Kendall and Holland Colombo maintain that they are not liable. Lillico do not appeal; but Grimsdale in effect maintain in the second appeal that, if they cannot recover from Kendall and Holland Colombo, then S.A.P.P.A. cannot recover from them. I need make no further mention of Lillico and Holland Colombo and it will be clearer simply to have in mind the chain Kendall to Grimsdale to S.A.P.P.A. to the game farm.

Kendall and Grimsdale are both members of the London Cattle Food Traders' Association. Brazilian ground nuts had not been imported until 1959, but early in 1960 there were large shipments. Kendall had acquired a large quantity and, while the goods were afloat, Kendall sold a considerable quantity in the London Market to Grimsdale. Then Grimsdale sold a part of this to S.A.P.P.A. at the market at Bury St. Edmunds; S.A.P.P.A. took delivery shortly after the arrival of the goods in London.

The case raises a number of points and I shall first consider the position under the Sale of Goods Act, 1893, s. 14. The relevant subsections are:

- E " (1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies upon the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonable fit for such purpose, provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose.
- F " (2) Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not) there is an implied condition that the goods shall be of merchantable quality: provided that if the buyer has examined the goods there shall be no implied condition as regards defects which such examination ought to have revealed."

G Conflicting arguments have been submitted about the meaning of almost every part of these subsections. If one puts aside for the moment the encrustations of authority, their meaning appears to me to be reasonably clear. If, however, a whole chapter of the law is compressed into one section of a code, one cannot expect its words to apply to unusual cases without expansion or adaptation. That is the task of the court; but it is not in my view legitimate to substitute for the words of the code some general words used by an eminent judge in a particular case and to treat them as a test of universal application. Where that has been done in other chapters of the law it has led to trouble, and there has been a tendency to do that here.

H I take first sub-s. (2), because it is of more general application. It applies to all sales by description where the seller deals in such goods. There may be a question whether the sale of a particular article is not really a sale by description but that does not arise here. These are clearly sales by description. Then it is a condition (unless excluded by the contract) that the goods must be of merchantable quality. Merchantable can only mean commercially saleable. If the description is a familiar one, it may be that in practice only one quality of goods answers that description—then that quality and only that quality is merchantable quality. Or it may be that various qualities of goods are commonly sold under that



description—then it is not disputed that the lowest quality commonly so sold is what is meant by merchantable quality; it is commercially saleable under that description. I need not consider here what expansion or adaptation of the statutory words is required where there is a sale of a particular article or a sale under a novel description. Here the description ground nut extractions had been in common use. A

The novel feature of this case is that whereas in 1960 there appears to have been thought to be only one quality of this product, subject to minor variations, it has now been discovered that particular parcels though apparently of the usual quality may really be of a very different quality because they are contaminated by minute quantities of a powerful poison. So the question at once arises—do you judge merchantable quality in the light of what was known at the time of the sale or in the light of later knowledge? It is quite clear that some later knowledge must be brought in for otherwise it would never be possible to hold that goods were unmerchantable by reason of a latent defect. By definition a latent defect is something that could not have been discovered at the time by any examination which in the light of then existing knowledge it was reasonable to make; but there is a question as to how much later knowledge ought to be brought in. In the present case it had become well known before the date of the trial that the defect was that these Brazilian ground nut extractions were contaminated by poison; but it had also become well known that, while this poison made the goods unsuitable for inclusion in food for poultry, it was generally regarded as proper to include such extractions in cattle food provided that the proportion included did not exceed five per cent. of the whole. The question is whether this latter fact should be taken into account in deciding whether these goods were of merchantable quality in 1960. B C D E

I think it would be very artificial to bring in some part of the later knowledge and exclude other parts. In this case it is quite true that there was a period, after the nature and effect of this contamination had been discovered but before it had become accepted that small quantities of contaminated goods could safely be included in cattle foods, during which contaminated ground nut extractions were virtually unsaleable. Suppose, however, that in this case it had been discovered at an early stage that these goods could be used for cattle food, so that there never was a period during which they were unsaleable. In that case I would not think it possible to take into account the nature of the defect but to exclude from consideration the effect which knowledge of the defect had on the market. F G

There is clear evidence that before the date of the trial Indian ground nut extractions so contaminated were sold under the ordinary description and were not rejected by the buyers when the contamination was discovered; a director of British Oil and Cake Mills who are by far the largest compounders in this country said that they bought these goods untested and then tested them. If they were found to be very highly contaminated they were destroyed; but otherwise they were included in feeding stuffs for cattle. This company apparently did not claim any relief on the ground that such goods were of defective quality or were of no use if highly contaminated; and it appears that other buyers who who found poison in the goods which they bought did not try to reject the goods, but merely asked for rebates on the price. They never got any rebates and the evidence is that they did not press their claims. So I think that it sufficiently appears that ground nut extractions contaminated to an extent not said to be different from the contamination of the Brazilian product were regarded as of merchantable quality under the ordinary description at the date of the trial. H I

I do not think that I am precluded from taking this view of the meaning of s. 14 (2) by any of the authorities.

A statement with regard to the meaning of s. 14 (2) which has been commonly

- A accepted is that of LORD WRIGHT in *Cammell Laird Co., Ltd. v. Manganese Bronze and Brass Co., Ltd.* (1). In that case the respondents contracted to supply two specially designed ship's propellers. They first supplied propellers which were unsatisfactory and it was only at a third attempt that they supplied propellers which were satisfactory. Camunell Laird sued for damages caused by the delay. They succeeded on the terms of the contract and under s. 14 (1); but LORD
- B WRIGHT went on to consider the application of s. 14 (2). Apart from a short general statement at the end of the speech of LORD TOMLIN none of the other noble and learned lords said anything about s. 14 (2) or LORD WRIGHT's gloss on it. LORD WRIGHT said (2):

C "In earlier times the rule of caveat emptor applied save only where an action could be sustained in deceit on the ground that the seller knew of the defect or for breach of express warranty (*warrantizando vendidit*). But with the growing complexity of trade dealings increased in what are now called 'unascertained or future goods' and more generally 'goods sold by description'. As early as 1815 in *Gardiner v. Gray* (3), LORD ELLENBOROUGH stated the rule. Goods had been sold as waste silk; a breach was held to have

D been committed on the ground that the goods were unfit for the purpose of waste silk and of such quality that they could not be sold under that denomination. What sub-s. (2) now means by 'merchantable quality' is that the goods in the form in which they were tendered were of no use for any purpose for which such goods would normally be used and hence were not saleable under that description."

- E I feel sure that LORD WRIGHT did not really mean this to be a test of universal application in the form in which he stated it. If he did, I disagree for reasons which I shall state. In the *Cammell Laird* case (1), if the propellers were of no use for the ship for which they had been designed it was true to say that they were of no use for any other ship and therefore unsaleable as propellers. There are many cases, however, in which different qualities of a particular kind of
- F goods are commonly sold under different descriptions. Suppose goods are sold under the description commonly used to denote a high quality and the goods delivered are not of that high quality but are of a lower quality which is commonly sold under a different description, then it could not possibly be said that the goods in the form in which they were tendered were of no use for any purpose for which those goods would normally be used. They would be readily saleable
- G under the appropriate description for the lower quality. But surely LORD WRIGHT did not mean to say that therefore they were merchantable under the description which was appropriate for the higher quality. They plainly were not. LORD WRIGHT said: "no use for any purpose for which *such goods* would normally be used." Grammatically "such goods" refers back to "the goods in the form in which they were tendered"; but what he must have meant by "such goods"
- H were goods which complied with the description in the contract under which they were sold. Otherwise the last part of the sentence "and hence were not saleable under that description" involves a non sequitur. If I now set out what I am sure that he meant to say, I think it would be accurate for a great many cases though it would be dangerous to say that it must be universally accurate. The amended version would be "What sub-s. (2) now means by 'merchantable
- I quality' is that the goods in the form in which they were tendered were of no use for any purpose for which goods which complied with the description under which these goods were sold would normally be used, and hence were not saleable under that description." This is an objective test: "were of no use for any purpose . . ." must mean "would not have been used by a reasonable man for any purpose . . .".

(1) [1934] All E.R. Rep. 1; [1934] A.C. 402.

(2) [1934] All E.R. Rep. at p. 14; [1934] A.C. at p. 430.

(3) (1815), 4 Camp. 144.

That would produce a sensible result. If the description in the contract was so limited that goods sold under it would normally be used for only one purpose then the goods would be unmerchantable under that description if they were of no use for that purpose. If, however, the description was so general that goods sold under it were normally used for several purposes then goods would be merchantable under that description if they were fit for any one of these purposes. If the buyer wanted the goods for one of those several purposes for which the goods delivered did not happen to be suitable, though they were suitable for other purposes for which goods bought under that description were normally bought, then he could not complain. He ought either to have taken the necessary steps to bring sub-s. (1) into operation or to have insisted that a more specific description must be inserted in the contract. That would be in line with the judgment of MELLOR, J., in *Jones v. Just* (4) which has always been regarded as high authority. He said (5):

"It appears to us that, in every contract to supply goods of a specified description which the buyer has no opportunity to inspect, the goods must not only in fact answer the specific description, but must also be saleable or merchantable under that description."

The buyer bought manilla hemp. On arrival the goods were found to be damaged to such an extent as not to be saleable under that description, and the buyer resold under the description "Manilla hemp with all faults" and received about seventy-five per cent. of what merchantable manilla hemp would have fetched. So it certainly could not be said that the goods were of no use; but the buyer recovered, as damages for breach of the implied warranty, the difference between what the hemp would have been worth if merchantable as manilla hemp and what he was able to get for it when sold "with all faults".

It would also be in line with what LORD WRIGHT said in *Canada Atlantic Grain Export Co., Inc. v. Eilers* (6). He said (7):

"If goods are sold under a description which they fulfil, and if goods under that description are reasonably capable in ordinary user of several purposes, they are of merchantable quality within s. 14 (2) of the Act if they are reasonably capable of being used for any one or more of such purposes even if unfit for use for that one of those purposes which the particular buyer intended."

There is another statement by LORD WRIGHT regarding s. 14 (2) in *Grant v. Australian Knitting Mills, Ltd.* (8). He said (9):

"The second exception [i.e., s. 14 (2)] in a case like this in truth overlaps in its application the first exception [i.e., s. 14 (1)]; whatever else 'merchantable' may mean, it does mean that the article sold, if only meant for one particular use in ordinary course, is fit for that use. 'Merchantable' does not mean that the thing is saleable in the market simply because it looks all right . . ."

That too appears to me to be in line with my amended version of what he said in the *Cammell Laird* case (10). Another explanation of the phrase "merchantable quality" which has frequently been quoted is that of FARWELL, L.J., in *Bristol Tramways, etc. Carriage Co., Ltd. v. Fiat Motors, Ltd.* (11). He said (12):

"The phrase in s. 14 (2) is, in my opinion, used as meaning that the article

(4) (1869), L.R. 3 Q.B. 197.

(5) (1869), L.R. 3 Q.B. at p. 205.

(6) (1929), 35 Lloyd L.R. 206.

(7) (1929), 35 Lloyd L.R. at p. 213.

(8) [1935] All E.R. Rep. 209; [1936] A.C. 85.

(9) [1935] All E.R. Rep. at p. 215; [1936] A.C. at pp. 99, 100.

(10) [1934] All E.R. Rep. 1; [1934] A.C. 402.

(11) [1908-10] All E.R. Rep. 113; [1910] 2 K.B. 831.

(12) [1908-10] All E.R. Rep. at pp. 117, 118; [1910] 2 K.B. at p. 841.



A is of such quality and in such condition that a reasonable man acting reasonably would, after a full examination, accept it under the circumstances of the case in performance of his offer to buy that article and, whether he buys for his own use or to sell again . . .”

I do not find this entirely satisfactory. I think what is meant is that a reasonable man in the shoes of the actual buyer would accept the goods as fulfilling the contract which was in fact made. But if the description was so wide that goods required for different purposes were commonly bought under it, and if these goods were suitable for some of those purposes, but not for the purpose for which the buyer bought them, it would have to be a very reasonable buyer indeed who admitted that the goods were merchantable, and that it was his own fault for not realising that goods might be merchantable under that description although unsuitable for his particular purpose.

There was also another explanation brought to our attention. In *Australian Knitting Mills, Ltd. v. Grant* (13), DIXON, J., said (14):

“The condition that goods are of merchantable quality requires that they should be in such an actual state that a buyer fully acquainted with the facts and therefore, knowing what hidden defects exist and not being limited to their apparent condition would buy them without abatement of the price obtainable for such goods if in reasonable sound order and condition and without special terms.”

I would only qualify this by substituting “some buyers” for “a buyer”. “A buyer” might mean any buyer. Moreover for the purposes for which some buyers wanted the goods the defects might make the goods useless, whereas for the purposes for which other buyers wanted them the existence of the defects would make little or no difference. That is in fact the position in the present case. I think that it must be inferred from the evidence that buyers who include ground nut extractions in their cattle foods are prepared to pay a full price for goods which may be contaminated; but buyers who only compound poultry foods would obviously not be prepared to buy contaminated goods at any price. Nevertheless contaminated ground nut extractions are merchantable under the general description of ground nut extractions because, rather surprisingly, some buyers appear to be ready to buy them under that description and to pay the ordinary market price for them. On the face of it s. 14 (1) of the Act of 1893 has a narrower scope. It requires that the buyers shall have required the goods for a particular purpose, that that purpose shall have been made known to the seller, and that it shall have been made known to him in such circumstances that he realised or ought to have realised that the buyer was relying on his using his skill or judgment to select goods fit for that purpose. Many cases in which the seller has been held liable under this subsection might equally well and more logically have been decided under s. 14 (2); but there has been a tendency to construe sub-s. (2) too narrowly and to compensate for that by giving a wide construction to sub-s. (1).

If the object of the disclosure of the particular purpose is, as I think it must be, to give to the seller an opportunity to exercise his skill or judgment in making or selecting appropriate goods, then it is difficult to see how a stated purpose can be a “particular” purpose if it is stated so widely that it would cover different qualities of goods, because carrying out the purpose in one way would only require a lower quality of goods whereas carrying it out in another way would require a higher quality. Different qualities normally sell at different prices. If a customer sought from a manufacturer or dealer cloth for the purpose of making overcoats, the dealer could not know what quality was required. A cut price tailor would not want to pay the price of cloth used in Savile Row, and the tailor in Savile Row would not use the quality which the cut price tailor wants. Unless the seller

(13) (1933), 50 C.L.R. 387.

(14) (1933), 50 C.L.R. at p. 418.

knew the nature of the buyer's business, his only clue to the quality which the buyer wanted would be the price which the buyer was prepared to pay. If a high price was offered it might no doubt be right to hold that he must supply goods suitable for high quality coats; but it could not be right that if the cloth was sold at a price appropriate for the lower quality, the dealer would have to supply a higher quality simply because the buyer had stated that his purpose was to make overcoats and the lower quality would not always be reasonably fit for making every kind of overcoat. A  
B

It was argued that, whenever any purpose is stated so as to bring this subsection into operation, the seller must supply goods reasonably fit to enable the buyer to carry out his purpose in any normal way. That can only be right however, if the purpose is stated with sufficient particularity to enable the seller to exercise his skill or judgment in making or selecting appropriate goods. The seller may know or be told that the merchant who is buying from him is buying for the purpose of reselling the goods in the course of his business. That may be sufficient to enable the seller to select appropriate goods or it may not. If the buyer's trade is such that some of his customers will want goods of the description which he is buying from the seller for one purpose or of one quality, and others of his customers will want goods of that description of another quality for another purpose, it could not be right that the buyer, merely by stating that he wants the goods for resale in the course of his business, could impose on the seller the obligation to supply goods reasonably fit for resale to every ordinary customer of the buyer no matter what his requirements might be. C  
D

Perhaps the solution of this problem is to be found in the application of the requirement of the section that the particular purpose must be made known "so as to show that the buyer relied upon the seller's skill or judgment". A buyer who is buying for the purpose—known to the seller—of re-selling in the course of his business may want superior goods for which some of his customers will pay a high price, or he may want goods of lower quality to sell to less demanding customers. If he does not say which he wants, or at least indicate which he wants by the price which he is offering, how can he be relying on the seller to supply something reasonably fit for his purpose? The leading case is *Manchester Liners, Ltd. v. Rea, Ltd.* (15); but it is not a very satisfactory source from which to extract general principles. LORD BUCKMASTER began his speech by saying (16): E  
F

"When the circumstances in which this appeal has arisen are examined, it will be found that its determination really depends upon the proper aspect of the facts rather than on an examination of uncertain principles of law." G

Rea were coal merchants and the shipowner's order was for "five hundred tons South Wales coal for the steamship Manchester Importer". It might seem from LORD BUCKMASTER's speech that there was something unusual about the furnaces in this ship, but LORD ATKINSON (17) quoted the findings of the trial judge that H

"coal actually delivered was not reasonably fit for an ordinary average Manchester steamer like the Manchester Importer in the hands of average officers and crew."

So one would assume that coal merchants could easily have found out, if they did not know already, what kind of coal was needed. LORD DUNEDIN said (18): I

"It was not the buyer who was going to find the coal. He says to the seller: 'I want five hundred tons for a special purpose, will you give it to me?' The seller could easily have guarded himself, but he merely answers 'Yes'

(15) [1922] All E.R. Rep. 605; [1922] A.C. 74.

(16) [1922] All E.R. Rep. at p. 606; [1922] A.C. at p. 77.

(17) [1922] All E.R. Rep. at pp. 609, 610; [1922] A.C. at p. 83.

(18) [1922] All E.R. Rep. at p. 609; [1922] A.C. at p. 82.

A by confirming the proposal as made. Not only so, but he came into court asserting that he did supply Welsh coal of suitable quality."

The passages in LORD BUCKMASTER'S speech usually quoted are (19):

B "It is plain that the order was expressed for the use of a particular steamship, and it must, therefore, be assumed that the respondents knew the nature of her furnaces and the character of the coal she used, for it was this coal they contracted to supply . . . If goods are ordered for a special purpose, and that purpose is disclosed to the vendor, so that in accepting it he undertakes to supply goods which are suitable for the object required, such a contract is, in my opinion, sufficient to establish that the buyer has shown that he relies on the seller's skill and judgment."

C I think that importance was attached to the fact that the seller was expressly told for what ship the coal was wanted. It is certainly not necessary in many cases that the buyer should state his purpose expressly, but in a doubtful case it is much easier to infer that the seller ought to have realised that the buyer was relying on him if the purpose is stated expressly. I am not at all convinced that that inference would have been drawn if Rea had merely happened to know—  
D still less if he had merely assumed—that the coal was wanted for the Manchester Importer. I do not think that this case is any authority for the view, which has sometimes been expressed, that if the seller knows the purpose for which the buyer wants the goods it will be presumed that the buyer relied on his skill and judgment. LORD SUMNER said (20):

E "The words of s. 14 (1) are 'so as to show' not 'and also shows'. They are satisfied, if reliance is a matter of reasonable inference to the seller and to the court, and in this case I think the evidence supports the finding of SALTER, J., that the inference ought to be drawn."

LORD WRIGHT might appear to be going further when he said in the *Cammell Laird* case (21):

F "Such a reliance must be affirmatively shown; the buyer must bring home to the mind of the seller that he is relying on him in such a way that the seller can be taken to have contracted on that footing. The reliance is to be the basis of a contractual obligation."

I do not think, however, that he meant more than that in the whole circumstances a reasonable man in the shoes of the seller would have realised that he was being

G relied on. In *Grant's* case (22) he said (23):

H "It is clear that the reliance must be brought home to the mind of the seller, expressly or by implication. The reliance will seldom be express: it will usually arise by implication from the circumstances; thus to take a case like that in question of a purchase from a retailer the reliance will be in general inferred from the fact that a buyer goes to the shop in the confidence that the tradesman has selected his stock with skill and judgment: the retailer need know nothing about the process of manufacture; it is immaterial whether he be manufacturer or not; the main inducement to deal with a good retail shop is the expectation that the tradesman will have bought the right goods of a good make . . ."

I A shopkeeper's goodwill consists largely in his reputation of being reliable—the better the shop the easier it is to draw this inference.

*Drummond v. Van Ingen* (24) was decided at a time when there was no clear distinction between the two implied conditions which are now set out in s. 14 (1)

(19) [1922] All E.R. Rep. at p. 607; [1922] A.C. at p. 79.

(20) [1922] All E.R. Rep. at p. 613; [1922] A.C. at p. 90.

(21) [1934] All E.R. Rep. at p. 11; [1934] A.C. at p. 423.

(22) [1935] All E.R. Rep. 209; [1936] A.C. 85.

(23) [1935] All E.R. Rep. at p. 215; [1936] A.C. at p. 99.

(24) (1887), 12 App. Cas. 284.



and (2) of the Act of 1893. The contract was for "mixt worsted coatings" equal in quality and weight to samples. The goods were exported by Van Ingen but rejected by the buyers, returned and resold at a loss. Van Ingen claimed damages on the ground that the goods were not merchantable. The trial judge found that there was an implied warranty that the cloth should be merchantable generally as worsted coatings, should be properly manufactured and should be suitable to be made up into coats in the ordinary course of tailor's work, but that the cloth was not merchantable as worsted coating and was not properly manufactured and suitable to be made up into coats in the ordinary course of tailoring. The EARL OF SELBORNE said (25):

"I think your lordships must . . . take the existence of the defect, to a degree sufficient to render the cloth unmerchantable for the purposes for which goods of the same general class had previously been used in the trade, to have been sufficiently established."

He went on (26) to discuss the degree of knowledge of the trade to be expected of the manufacturer—but still I think in connexion with merchantability—for he said that the respondents had (27):

". . . a right to assume that the appellants, accepting the order, could and would produce and deliver a good article, having the weight and all the other apparent qualities of the samples, which would be as merchantable for coatings as other articles of the same class previously known in the trade."

LORD HERSCHELL and LORD MACNAGHTEN come nearer to applying the condition now set out in s. 14 (1). Indeed LORD MACNAGHTEN says (28):

"But the question is not were they saleable, but were they fit for the purpose for which they were known to have been ordered."

This was a case of the goods being bought from the manufacturer. It can only be in unusual circumstances that a buyer does not rely in part at least on the skill or judgment of the manufacturer, or that a manufacturer is entitled to assume that the buyer is not relying on him at least to some extent.

The difference between the two conditions—they were called warranties in these cases—is illustrated by the decision in *Jones v. Padgett* (29). The plaintiff was a wollen merchant and he ordered a quantity of "indigo blue cloth". He also had a tailor's business and he intended to use and did use the cloth for making servants' liveries. It proved to be not strong enough for that purpose and he sued for breach of an implied warranty that the cloth should be merchantable. He failed. The cloth was suitable for other purposes for which cloth of that description was ordinarily used, and he had not told the defendant the particular purpose for which he wanted it.

There is some Scottish authority for giving a restricted meaning to the phrase "particular purpose". In *Flynn v. Scott* (30) (an Outer House case) LORD MACKINTOSH followed an earlier view that decisions under the Mercantile Law Amendment Act, 1856, were applicable to s. 14 (1) of the Sale of Goods Act, 1893. I think that this was wrong. The Act of 1856 required that the goods should have been "expressly sold for a specified and particular purpose"—words which seem to me to be much narrower than those in s. 14 (1). In *Flynn's* case (30) the buyer of a second hand motor van had informed the seller that he wanted it for the purposes of a haulage contractor and intended to use it for the carriage of articles such as furniture and livestock. That purpose appears to me to have been stated with sufficient particularity to enable the seller to use his skill and judgment and therefore to come within the scope of s. 14 (1).

We were also referred to a more recent case *M'Callum v. Mason* (31) where a nurseryman bought fertiliser for application to his 1952 tomato crop. It contained

(25) (1887), 12 App. Cas. at p. 287.

(26) (1887), 12 App. Cas. at p. 288.

(27) (1887), 12 App. Cas. at p. 289.

(28) (1887), 12 App. Cas. at p. 296.

(29) (1890), 24 Q.B.D. 650.

(30) 1949 S.C. 442.

(31) 1956 S.C. 50.

A poison and damaged both his 1952 and 1953 crops. The Second Division upheld that he could rely on s. 14 (1) of the Act of 1893 as regards the 1952 crop but not as regards the 1953 crop, because application to the later crop was not within the particular purpose for which he bought it. The court did not, however, consider the matter from the point of view of measure of damages—whether the seller ought to have known that it was not unlikely that some of the poisoned goods would remain and be used the next year without the buyer realising that the 1952 damage had been caused by this fertiliser. There appears to have been no doubt that the later damage was in fact caused by the breach of contract in delivering poisoned goods.

C There is no doubt that in this case Kendall knew that Grimsdale were buying the goods to resell to compounders of animal feeding stuffs. In 1960 that was, in my view, a particular purpose, because there is no evidence to show that it was not sufficiently particular to enable Kendall to exercise skill and judgment. It would not have helped Kendall to be told that the goods were ultimately to be fed to any particular kind or age of animal, because at that time nobody knew that what was suitable for one kind of animal might not be suitable for another. D Both Kendall and Grimsdale would assume that Grimsdale's customers would only include a suitable proportion in the particular food that they were compounding. If they caused damage by using a wrong formula for their product, neither Grimsdale nor Kendall would be responsible for that.

E The difficult question is whether the circumstances were such as to show that Grimsdale were relying on Kendall's skill and judgment. Before I come to that there are two other matters which require some explanation. If the law were always logical, one would suppose that a buyer, who has obtained a right to rely on the seller's skill and judgment, would only obtain thereby an assurance that proper skill and judgment had been exercised, and would only be entitled to a remedy, if a defect in the goods was due to failure to exercise such skill and judgment; but the law has always gone farther than that. By getting the seller F to undertake to use his skill and judgment the buyer gets under s. 14 (1) of the Act of 1893 an assurance that the goods will be reasonably fit for his purpose, and that covers not only defects which the seller ought to have detected but also defects which are latent in the sense that even the utmost skill and judgment on the part of the seller would not have detected them. It is for that reason that, if s. 14 (1) applies, Grimsdale are entitled to relief even although Kendall had no G reason to suspect that the goods might be poisoned.

Secondly, it is not necessary to decide whether today it would be a sufficiently particular purpose for Kendall to know that Grimsdale intended to resell to compounders of feeding stuffs. Today some compounders are willing to buy infected goods but presumably some are not, and I doubt whether mere knowledge on the part of Kendall that Grimsdale intended to re-sell would oblige Kendall to H supply goods free from this poison. I would readily accept that a customer, buying from an apparently reputable shopkeeper or from a manufacturer, will normally as a matter of fact be relying on the seller's skill and judgment, unless there is something to exclude the inference. I do not think, however, that the same can be said when two merchants equally knowledgeable deal with each other. Then I can see no reason in law or in fact for any presumption either way.

I If one merchant merely acquired from an importer by buying on c.i.f. documents goods from a normal source and then re-sold to another merchant by transfer of the c.i.f. documents before taking delivery, there might then be little or no reason to suppose that the former merchant had exercised or could have exercised any skill or judgment with regard to the quality of the goods or that the latter was relying on him; but that was not the position in this case. Kendall had acquired these goods from a new source and, one would suppose, must have exercised skill and judgment in deciding to buy them and put them on the market. Moreover, the evidence appears to me to show that Kendall were recommending

them to Grimsdale. In order to bring this subsection into operation it is not necessary to show that the parties consciously applied their minds to the question. It is enough that a reasonable seller in the shoes of Kendall would have realised that he was inviting Grimsdale to rely on his skill and judgment, and that is what I think that in fact Kendall were doing; and the same applies to Holland Colombo. If that is right, then s. 14 (1) did apply to this case. I agree with your lordships that the clause in the contract on which Kendall rely as exempting them from liability does not apply. A  
B

I turn now to the claims under the Fertilisers and Feeding Stuffs Act, 1926. Section 2 (2) provides:

“On the sale for use as food for cattle or poultry of an article included in the first column of Sch. 1 or Sch. 2 to this Act there shall be implied, notwithstanding any contract or notice to the contrary, a warranty by the seller that the article is suitable to be used as such, and does not, except as otherwise expressly stated in the statutory statement, contain any ingredient included in Sch. 3 to the Act.” C

In each case the buyers maintain against the sellers that the ground nut extractions (which are an article included in the Schedule) were sold to them for use as food for cattle or poultry, that therefore there was a warranty by the sellers that the goods were suitable to be used as such, that the goods were not suitable and that this defect caused the death of the pheasants for which S.A.P.P.A. had to pay damages to Hardwick Game Farm. So S.A.P.P.A. claim relief against Grimsdale, and Grimsdale in turn claim relief against Kendall. In each case the sellers have two answers. In the first place they put forward what has been called the “ingredients” point: they say that they did not sell for use as food because ground nut extractions are always compounded with other ingredients before being fed to animals. They argue that the Act of 1926 distinguishes between articles used as food and ingredients of such articles. I agree with your lordships that there is no substance in this argument. If a miller sells to a baker flour which is to be made into bread, or if a grocer sells dried fruit, eggs and butter which are to be made into a cake, all these articles are sold for use as food for human consumption, though none of them is to be eaten in the form in which it is sold; the fact that the Act of 1926 makes some distinctions between articles and ingredients does not in my view indicate any intention to limit the generality of the provision in this section. Any such limitation would produce capricious results and would go far to thwart the obvious purpose of this legislation. D  
E  
F

The second argument requires more consideration. In the first place they say that pheasants are not poultry, and that therefore the subsection does not apply. I do not think that these pheasants were poultry. They were reared for the purpose of being released to serve as targets for sportsmen, and pheasants which have never been in captivity are clearly not poultry. It may well be that, if it should prove profitable to rear and keep pheasants in captivity until killed for human consumption, such pheasants should be regarded as poultry. The mere fact, however, that these pheasants like other game will come to the table after they have been shot seems to me to be immaterial. It would not in my view be in accordance with the ordinary use of language to say that they were poultry until released and then became game. They were game throughout, and the farm where they were reared was properly called a game farm. G  
H

The next question is whether the subsection applies when the damage is done to some animals other than cattle or poultry. The argument is that this Act of 1926 was passed for the protection of cattle and poultry and their owners, and cannot have been intended to confer rights when other animals have been harmed. I would accept that if this provision were reasonably capable of that interpretation, but I do not think that it is. It may be that, if a customer states that his purpose is to feed the goods to some other animals, or even if the seller happens to know that, the section does not apply because the food was not sold for use I



A as food for cattle or poultry and the mere fact that the bag is labelled "poultry food" would not matter; but that is not this case.

The main purpose for which S.A.P.P.A. bought was, as Grimsdale knew, to include these goods in compound foods for pigs and poultry (pigs are included in the definition of cattle), and it would appear that only a small part of their production was sold to the game farm for pheasants. So one must construe the

B subsection. Does it mean that the warranty is to the effect that if the goods are fed to cattle or poultry they are guaranteed to be suitable, or does it mean that they are guaranteed to be of a quality suitable for cattle and poultry? If the former is right then no warranty would operate until the goods are fed to these animals; if the latter then the warranty is broken as soon as the goods are delivered and damages can be claimed before the goods are fed to any animals

C on proof of their defective quality. I cannot avoid the conclusion that the latter is the true meaning.

So in this case this statutory warranty was broken when Grimsdale delivered the goods to S.A.P.P.A. because they were by reason of the poison unsuitable to be used as food for poultry; and it becomes an ordinary question of remoteness of damage whether damage suffered by loss of pheasants is recoverable. The

D question then is whether Grimsdale knew or as reasonable traders in this market ought to have known that it was not unlikely that part of the goods which they sold would ultimately be fed to pheasants. There is no evidence that they did know, but other traders in the market certainly knew that, and poultry food has been fed to pheasants for many years. I cannot avoid the conclusion that, if Grimsdale had thought about it, they would have realised that compounds

E sold by country compounders like S.A.P.P.A. were quite likely to be fed to pheasants. If that is so then this damage was not too remote. I agree with your lordships that the clause in the contract which purports to exclude Grimsdale's liability in certain cases does not apply to this case. I am therefore of opinion that Grimsdale's appeal against S.A.P.P.A. ought to be dismissed and I return to Kendall's appeal against Grimsdale.

F The question whether the statutory warranty under the Act of 1926 attached to the contract between Kendall and Grimsdale raises another question of quite a different character. Kendall held various c.i.f. documents which gave them a right to large quantities of these Brazilian goods which were in transit in various vessels. In particular they held such documents for 750 tons, and these they sold to Grimsdale, who took delivery of the appropriate c.i.f. documents. Counsel

G were agreed about the general legal effect of that sale. When goods are shipped c.i.f., there is a contract of affreightment under which the master of the vessel is bound to deliver the goods to whoever produces the documents at the end of the voyage. While the goods are in transit the first holder of the documents can sell the goods to a buyer by delivering the documents in exchange for payment of the price, and there may be a chain of such sales. None of the sellers knows for certain

H whether his buyer will take delivery or will re-sell the goods by delivering the documents to another buyer. None of these sales is intimated to the master of the vessel. He has no concern with them, and once a seller has delivered the documents and received the price he has no concern with further sales or with the ultimate delivery of the goods. He does not deliver the goods either actually or fictionally to his buyer on their arrival. The only delivery of the goods is by the master to

I the ultimate buyer who presents the documents to him.

Kendall contend that the statutory warranty never attaches to any sale by delivery of c.i.f. documents. This matter was considered by the Court of Appeal in *C. E. B. Draper & Son, Ltd. v. Edward Turner & Son, Ltd.* (32) but I agree with my noble and learned friend LORD WILBERFORCE that the reasoning in that decision cannot be supported. Accordingly I must go back to the Act of 1926 and examine its purpose and effect. It attaches the warranty to sales of

feeding stuffs for cattle or poultry. That is obviously intended to protect livestock and its owners and Parliament must have had in mind primarily at least livestock in this country. There is a general presumption that Parliament does not intend to legislate with regard to things done abroad; and this provision cannot be held to apply to a foreign sale which has no other connexion with this country than that it was the buyer's intention to bring the feeding stuffs here for use in this country. Farther, I do not think that Parliament can have intended the warranty to attach to an English contract for the sale of feeding stuffs which are in transit to a foreign country. What then if the seller knows that the buyer intends to take delivery of goods consigned to a British port and immediately ship them abroad? It does not seem to be within the purpose of the Act of 1926 that this warranty should be compulsorily attached to that contract. The warranty will not attach to further sales to the farmer in the foreign country. There must be many sales by delivery of c.i.f. documents where neither the seller nor the buyer knows for certain how or where the goods will ultimately be used, because the buyers may intend to re-sell to the highest bidder before the goods are delivered. It is sufficient to attract the warranty that the parties to such a sale know that there is a probability that the goods will ultimately be used as food for cattle or poultry in this country? The operation of s. 2 (2) of the Act of 1926 is certainly not confined to sales to farmers or others who intend to feed the goods to their own livestock, however with regard to imported goods its operation must stop somewhere, and where it is to stop must be determined by examining the terms of the Act of 1926.

Section 1 requires the seller to deliver to the buyer a statement in writing regarding the nature, substance and quality of the goods before or as soon as reasonably practicable after delivery. I do not see how that section can apply to a seller on c.i.f. documents. Even if he knows enough to enable him to complete the statement, he never delivers the goods to the buyer, and if the buyer re-sells on the documents he never takes delivery of the goods. Section 3 entitles the purchaser to have a sample taken within fourteen days after delivery to him; that cannot apply, if neither the seller nor the buyer has ever taken delivery of the goods. Failure to comply with these and other requirements of the Act of 1926 involves criminal liability. There are obvious difficulties in the way of enforcing criminal liability against c.i.f. sellers. Leaving aside s. 2 and s. 5 it appears to me that the operation of the Act of 1926 is confined to sales of goods where the seller can make delivery to the buyer in this country.

Section 5 applies where the goods are delivered from a ship or quay to the purchaser. It appears to assume that the delivery will be made by or on behalf of the seller, for it imposes duties on the seller to keep a register of certain particulars; but the last buyer on c.i.f. documents does not take delivery from the seller, and the master does not deliver as the agent of the last c.i.f. seller. That seller has no concern with the goods at that stage and I do not see how he can keep this register. Unless the buyer from him or the master chooses to give him information, he cannot make out this register. I cannot read into the Act of 1926 provisions which would be necessary to enable or require the last c.i.f. seller to comply with the provisions of this section. Any c.i.f. seller may be the last because his buyer may take delivery, or he may not be the last because his buyer may resell on the documents. I can find nothing in the Act of 1926 to require or to enable every c.i.f. seller to find out whether his buyer has re-sold on the documents or has taken delivery of the goods.

So it appears to me to be clear that no part of the Act of 1926 other than s. 2 (2) can apply to a seller who sells by delivery of the documents. Why should s. 2 (2) alone apply to him? To hold that it did would do no good to the farmer or the person who feeds the goods to his livestock. It would only be of advantage to the merchant like Grimsdale, who was the last buyer who took delivery of the c.i.f. documents. Some merchant has to bear the ultimate liability because it cannot go back to the person who was primarily responsible—the producer in

- A Brazil. It seems to me that all the arguments are in favour of construing s. 2 so that this warranty attaches to sellers who have duties to perform under the Act of 1926, but that it does not attach to contracts made by sellers who are not otherwise affected by the Act of 1926. In my view Kendall had no duties to perform under the Act of 1926 and the warranty did not attach to the contract of sale which they made with Grimsdale by delivery of the c.i.f. documents to
- B Grimsdale. The same must apply to Holland Colombo. I would dismiss the appeals of Kendall and Holland Colombo because, and only because, there attached to the contracts made by them conditions in terms of s. 14 (1) of the Sale of Goods Act, 1893, and the appellants were in breach of these conditions.

- I have already stated that I would dismiss the second appeal because Grimsdale were liable to S.A.P.P.A. by reason of a breach of the statutory warranty under
- C the Act of 1926.

- LORD MORRIS OF BORTH-Y-GEST:** My Lords, after Hardwick Game Farm fed certain compounded meal to their pheasants and partridges and poults and chicks the consequences were disastrous and alarming. Many of the young birds died, many were made ill, many were permanently affected. The
- D litigation which resulted has involved many parties and has raised varied and diverse legal issues. The compounded meal had been bought by Hardwicks from S.A.P.P.A. It undoubtedly contained a deleterious substance which, as has been held, undoubtedly was the cause of the havoc. Invoking the provisions of the Fertilisers and Feeding Stuffs Act, 1926, and s. 14 (1) and (2) of the Sale of Goods Act, 1893, Hardwicks sued S.A.P.P.A. S.A.P.P.A. had compounded
- E the meal and in doing so had used as an ingredient some Brazilian fifty per cent. fine ground extracted ground nut meal, some of which they had bought from Lillico and some of which they had bought from Grimsdale. So those two companies were brought in by S.A.P.P.A. as third parties. Lillico had bought ground nut meal (to a larger extent) from Kendalls; Grimsdale had bought ground nut meal (to a larger extent) partly from Kendalls and partly from Holland Colombo.
- F So Kendalls and Holland Colombo who imported the meal were brought in as fourth parties.

- Before the litigation came on for trial S.A.P.P.A. compromised the claim of Hardwicks and agreed to pay a certain sum. All parties have recognised that the settlement was wise and reasonable, and the issues between S.A.P.P.A. and the third parties and those between the third and fourth parties have been fought
- G on the basis that any liability should be related to the sum which S.A.P.P.A. agreed to pay.

- It is now known that the deleterious substance in the compounded meal which S.A.P.P.A. sold to Hardwicks was a toxin, which has been given the name "aflatoxin". In the careful judgment of HAVERS, J., his finding (resulting from a consideration of much detailed evidence) is recorded that the toxin was in the
- H ground nut meal before it was shipped from Brazil and was therefore in the ground nut meal bought by S.A.P.P.A. Its presence was not visible and was not known to any of the parties.

- It was held by the learned judge that when S.A.P.P.A. bought the ground nut meal from Lillico they made it known to Lillico that their purpose in buying the meal was so that it should be compounded into feeding stuffs for various kinds of poultry and pigs. They had previously bought ground nut meal from Lillico, though not Brazilian ground nut meal. Brazilian ground nut meal had not been imported into this country before 1959. S.A.P.P.A. had previously
- I also bought ground nut meal from Grimsdale. The judge held that S.A.P.P.A. also made known to Grimsdale that their purpose in buying the meal was so that they would use it in their compounds for pig and poultry rations. On these facts it was held by the judge and unanimously in the Court of Appeal (33) that S.A.P.P.A. could successfully rely on s. 14 (1) of the Sale of Goods Act, 1893,



as against Lillico and Grimsdale. It was in the course of the latter's business to supply meal and S.A.P.P.A. had made known their particular purpose in buying, so as to show that they relied on the skill and judgment of Lillico and Grimsdale. Lillico did not appeal against the finding of the learned judge that they were liable to S.A.P.P.A.

A considerable issue was raised in the litigation as to the meaning and extent of "a particular purpose". This issue was mainly debated in respect of the purchases from the fourth parties Kendall and Holland Colombo. If Grimsdale failed to recover against the fourth parties for the reason that no particular purpose had been made known to the fourth parties by Grimsdale, then Grimsdale argue that they should not be held liable to S.A.P.P.A. My conclusion is that S.A.P.P.A. did make known a particular purpose to Grimsdale, but I will revert to a consideration of s. 14 (1) when dealing with the claims against the fourth parties.

A separate issue arises, however, as between Grimsdale and S.A.P.P.A. There were three contracts between Grimsdale and S.A.P.P.A. They were oral. The judge found that there had been frequent prior transactions between them. There had been three to four deals a month during the previous three years. The practice had been that Grimsdale would send a contract note to S.A.P.P.A. either later on the day of an oral contract or on the day following. S.A.P.P.A. would expect to receive such a contract note. It was routine practice. The same practice was indeed followed when S.A.P.P.A. bought this type of material (cakes and meals) from London wholesalers. On the back of the contract notes there were certain terms or conditions. Mr. Golden who acted for S.A.P.P.A. knew that there were such conditions, though he had not read them. One term on the contract notes was as follows: "The buyer under this contract takes the responsibility of any latent defects". It was the contention of Grimsdale (a) that the terms or conditions on the contract notes were terms of or were incorporated into the relevant contracts of sale and (b) that the above quoted term operated, on the facts of the present case, to relieve Grimsdale from any liability to S.A.P.P.A. As to (a) the judge after considering the case of *McCutcheon v. David Macbrayne, Ltd.* (34) held that the conditions in the contract note were not incorporated into the contracts of sale. In agreement with all the members of the Court of Appeal (35) I consider that they were. Over the course of a long period prior to the three oral contracts which are now in question S.A.P.P.A. knew that when Grimsdale sold they did so on the terms that they had continuously made known to S.A.P.P.A. In these circumstances it is reasonable to hold that when S.A.P.P.A. placed an order to buy they did so on the basis and with the knowledge that an acceptance of the order by Grimsdale and their agreement to sell would be on the terms and conditions set out on their contract notes to the extent to which they were applicable. As to (b) I am in agreement with the members of the Court of Appeal (34a) that the term which I have quoted does not avail Grimsdale. In their contract of sale with S.A.P.P.A. there was an implied condition that the goods would be reasonably fit for the purpose of being used in compounds for pig and poultry rations. There was also an implied condition as to merchantability. There was also an implied condition that the goods supplied would correspond with their description. It is well settled law that clauses such as that now being considered must be clear before they can be held to exclude a condition of the contract. If the contracts between S.A.P.P.A. and Grimsdale are held, as I think they should be held, to include (inter alia) the condition as to fitness for the known particular purpose and also the term that the buyer takes the responsibility of any latent defects, the latter term should not be held to be inconsistent with or destructive of the former. The word "defects" relates prima facie to the quality of goods. Goods might be fit for a

(34) [1964] 1 All E.R. 430.

(35) [1966] 1 All E.R. 309.

A known particular purpose and yet have certain defects. Any latent defects covered by the clause are such as do not prevent the goods being reasonably fit for their purpose. As the clause does not refer to the conditions which, being implied, are part of the contract between the parties and as, in my view, the clause does not either expressly or by necessary inference negative or cancel any of the conditions, it must be construed as referring to such latent defects as do not prevent compliance with the conditions. The clause cannot in any event affect the question of any liability of Grimsdale under the Fertilisers and Feeding Stuffs Act, 1926; there is a prohibition against contracting out of the provisions of the Act of 1926.

The implied condition under s. 14 (1) of the Sale of Goods Act, 1893, as held by the judge was that the ground nut meal should be reasonably fit for the purpose of being used in S.A.P.P.A.'s compounds for pig and poultry rations. The compound food sold by S.A.P.P.A. was in fact given by Hardwicks to young pheasants and partridges. If such are not within the designation of "poultry", does that prevent S.A.P.P.A. from recovering damages? I think not. There was much evidence which showed that it was quite usual to feed poultry food to pheasants. There was evidence that turkey and pheasant rations are practically the same, and turkeys are within the description of poultry. Dealers in poultry foods would regard food for young pheasants as being within the "general umbrella" of poultry foods. In these circumstances if Grimsdale had given thought to the matter they would, I think, have considered that, if they supplied meal for use in a compound for poultry rations, it was reasonably likely that such poultry rations would be fed to pheasants or at least that such feeding to pheasants would be liable to happen (see *Hadley v. Baxendale* (36), and *The Heron II, Koufos v. C. Czarnikow, Ltd.* (37)).

In agreement with the judge and with all members of the Court of Appeal (38) I consider, therefore, that the condition implied by s. 14 (1) arose between the third parties and S.A.P.P.A. and in agreement with all the members of the Court of Appeal (38) that though the sold notes clauses were, in general, applicable the clause concerning latent defects did not avail the third parties to exempt them from liability.

I pass, then, to consider the position in regard to s. 14 (1) as between the third and fourth parties. Here the various contracts were in writing. They were on the printed standard form of the London Cattle Food Trade Association. I need not set out the dates and details of the contracts. They are recorded in the judgment of the judge. Lillico bought from Kendall. Grimsdale bought both from Kendall and from Holland Colombo. The finding of the judge was that Kendall on their own account and as brokers for Holland Colombo knew the particular purpose for which Lillico and Grimsdale respectively required the Brazilian ground nut meal "namely to re-sell in smaller quantities to be compounded into food for cattle and poultry". He held that it was in the course of both Kendall's business and of Holland Colombo's business to supply Brazilian ground nut meal. The judge and DIPLOCK, L.J., held that liability under s. 14 (1) did not follow from those findings. They considered that no reliance on Kendall and Holland Colombo was being placed. SELLERS, L.J., and DAVIES, L.J., held that there was reliance.

The Act of 1893 was an Act for codifying the law relating to the sale of goods. If its provisions are clear, it should be possible to reach decision by reference only to the facts that arise in some particular situation. The law as it evolved before 1893 is revealed by a study of a number of notable decisions. The law since 1893 is in the terms of the statute. Many of the reported cases since 1893 are seen, when analysed, to be no more than decisions on the facts of a case

(36) [1843-60] All E.R. Rep. 461; (1854), 9 Exch. 341.

(37) [1967] 3 All E.R. 686.

(38) [1966] 1 All E.R. 309.

whether the words of the section applied. I therefore limit my citations. In general there is no implied warranty or condition as to the quality of goods which are supplied under a contract of sale nor as to their fitness for any particular purpose. There are, however, exceptions to this general rule. One exception arises in the following circumstances: (i) if the buyer makes known to the seller the particular purpose for which the goods are required; that may be made known expressly or it may be made known impliedly, and (ii) if the buyer makes that known so as to show that he relies on the skill or judgment of the seller, and (iii) if the goods are of a description which it is in the course of the business of the seller (who need not necessarily be the manufacturer) to supply. In those circumstances (subject to one proviso) there will be an implied condition that the goods shall be reasonably fit for the purpose which has been made known.

In dealing with this part of the case the judge said:

"I am satisfied that Kendall on their own account and as brokers for Holland Colombo knew the particular purpose for which Lillico and Grimsdale respectively required the Brazilian ground nut meal, namely to re-sell in smaller quantities to be compounded into food for cattle and poultry. It is established by *Manchester Liners, Ltd. v. Rea, Ltd.* (39), that if the particular purpose is made known by the buyer to the seller, then, unless there is something in effect to rebut the presumption, that in itself is sufficient to raise the presumption that he relies on the skill and judgment of the seller."

After a reference to some cases he said:

"It seems to me however that there are facts in this case which do rebut the presumption. Lillico, Grimsdale, Kendall and Holland Colombo were all members of the London Cattle Food Trade Assn. (Inc.)."

He then referred to what DIPLOCK, L.J., had said in *Draper (C. E. B.) & Son, Ltd. v. Edward Turner & Son, Ltd.* (40). He then proceeded:

"It was argued for Grimsdale that this comment was obiter but, even if it was, I respectfully agree with it. In these circumstances, notwithstanding the evidence of Mr. Waterfall, I am unable to accept that in any of these cases the buyers did rely upon the seller's skill and judgment and accordingly no condition can be implied under s. 14 (1) of the Sale of Goods Act, 1893, that the goods were reasonably fit for the said purpose."

I think that it is implicit from these passages that the judge was holding not merely that the sellers knew the particular purpose but that the buyers either expressly or impliedly had made known the purpose. It was because the learned judge was unable to hold that there was reliance that he did not hold in favour of the third parties under s. 14 (1). Mr. Waterfall (of Grimsdale) said in his evidence that in his dealings with Mr. McLeod (of Kendall) it was understood that Grimsdale were buying for wholesale distribution as animal feed for poultry and cattle; it was implicit that anything that Grimsdale bought or sold they bought and sold only for animal feeding stuffs. Mr. Waterfall said that Grimsdale would not trade with anyone they did not trust. I do not read the judge's judgment as doubting Mr. Waterfall's evidence generally but only as disagreeing with the conclusion that there was reliance on the skill and judgment of Kendall. Mr. McLeod had been market clerk with Kendall for seventeen years and had been in the trade for forty years. He explained that Kendall got to know what was being offered in the market; they found that Brazilian ground nuts "competed, with the duty, against Indian". He said "It is all a question of comparison of price and quality, taking level quality". So Kendall purchased Brazilian ground nuts and then sought purchasers in the market. Mr. McLeod had traded with Grimsdale and Lillico for years. When he sold to Grimsdale he would know that Grimsdale would buy in order to make various re-sales to compounders, who would

(39) [1922] All E.R. Rep. 605; [1922] 2 A.C. 74.

(40) [1964] 3 All E.R. 148; [1965] 1 Q.B. 424.



A

in turn mix the ground nuts into food, some for cattle, some for poultry and some for birds. Mr. Brown (of Lillico) said that Mr. McLeod spoke of a nice line of ground nut extraction. Mr. Brown said that he placed great reliance on Kendall's integrity as brokers and he knew that Mr. McLeod would not offer him anything that he knew was rubbish.

B

There was I think ample evidence to warrant a finding that the buyers impliedly made known their purpose in buying. It was so that they could re-sell in smaller quantities to be compounded into food for cattle and poultry. Was this a particular purpose? I have no doubt that it was. The degree of precision or definition which makes a purpose a particular purpose depends entirely on the facts and circumstances of a purchase and sale transaction. No need arises to define or limit the word "particular". If a buyer explains his purpose or impliedly makes it known so that, to put the matter in homely language, in effect he is saying "that is what I want it for, but I only want to buy if you can sell me something that will do", then it will be a question of fact whether the buyer has sufficiently stated his purpose. There is no magic in the word "particular". A communicated purpose, if stated with reasonably sufficient precision, will be a particular purpose. It will be the given purpose. Sometimes the purpose of a purchase will be so obvious that only one purpose could reasonably be in mutual contemplation. An only purpose or an ordinary purpose may therefore be a particular purpose (see *Preist v. Last* (41); *Wallis v. Russell* (42)). Sometimes a particular purpose will be made known expressly: sometimes it will be made known by implication.

D

E

If then Grimsdale and Lillico made it known (either expressly or impliedly) that they were buying the ground nuts in order to pass them on by way of re-sales to a number of people, who would use the ground nuts in making compound foods for cattle and poultry, that, in my view, was a particular purpose. No greater precision or elaboration of purpose was necessary. The law neither requires the use of any set formula nor the formal re-iteration of that which has been made clear.

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The next question that arises is whether that particular purpose was made known so as to show that the buyers relied on the skill and judgment of the sellers. The object of stating or making known a particular purpose will usually be to ensure that the seller only sells something that is reasonably fit for the purpose. It was well established at common law (see *Jones v. Bright* (43)) and it would appear to be commonsense that, if a man sells something for a particular purpose, he undertakes that it will be fit for that purpose. A question of fact may arise, therefore, whether a particular purpose was made known in such a way or in such circumstances that showed that the buyers were relying on the sellers to show skill and judgment so that they would supply what was reasonably fit for the buyers' need. Again, there is no magic in any particular word in the section. In *Manchester Liners, Ltd. v. Rea, Ltd.* (44) coal was ordered by the plaintiff (shipowners) from the defendants (coal merchants); the coal was expressly ordered for a named steamship. The coal that was supplied was unsuitable for that ship. LORD SUMNER pointed out in his speech (45) that the words "so as to show" in s. 14 (1) are satisfied if the reliance is a matter of reasonable inference to the seller and to the court. The fact that the buyer in that case knew at the date of the contract that the seller's sources of supply of coal were limited did not negative the implication of a condition of reasonable fitness.

I

The matter was clearly put by LORD WRIGHT in *Cammell Laird & Co., Ltd. v. Manganese Bronze and Brass Co., Ltd.* (46) when he said (47):

(41) [1903] 2 K.B. 148.

(42) [1902] 2 I.R. 585.

(43) (1829), 5 Bing. 533.

(44) [1922] All E.R. Rep. 605; [1922] 2 A.C. 74.

(45) [1922] All E.R. Rep. at p. 613; [1922] 2 A.C. at p. 90.

(46) [1934] All E.R. Rep. 1; [1934] A.C. 402.

(47) [1934] All E.R. Rep. at p. 11; [1934] A.C. at p. 423.

"Such a reliance must be affirmatively shown; the buyer must bring home to the mind of the seller that he is relying on him in such a way that the seller can be taken to have contracted on that footing. The reliance is to be the basis of a contractual obligation."

LORD WRIGHT also pointed out (48) that reliance need not be total or exclusive. He re-echoed what LORD SUMNER had said in *Medway Oil and Storage Co., Ltd. v. Silica Gel Corpn.* (49). In the later case of *Grant v. Australian Knitting Mills, Ltd.* (50) LORD WRIGHT said:

"It is clear that the reliance must be brought home to the mind of the seller, expressly or by implication. The reliance will seldom be express; it will usually arise by implication from the circumstances . . ."

He proceeded to point out that, when there is a purchase from a retailer, reliance by the buyer on the latter will in general be inferred from the fact that the buyer goes to the shop in the confidence that the tradesman has selected his stock with skill and judgment. The main inducement to deal with a good retail shop is the expectation that the tradesman will have bought the right goods of a good make.

My lords, the evidence points, in my view, to the conclusion that the contracts between the buyers and the sellers were on the basis that the buyers were relying on the skill and judgment of the sellers to supply goods that would be reasonably fit for the purpose which the buyers had made known to the sellers. Mr. McLeod (of Kendall) was concerned on the market with selling feeding stuffs for all farm stock. The feeding stuff which he sold was sold, without any reservation, as being fit to be fed to all stock on the farm. When he sold to Grimsdale (or to other comparable purchasers) he would expect that there would be many re-sales in small quantities to many compounders, who would mix the ground nuts into food, in some cases for cattle, in some cases for poultry and in some cases for birds. It was contended, however, that because the buyers and sellers were all members of the London Cattle Food Trade Association reliance by the buyers on the sellers' skill and judgment must be or should be ruled out. The judge expressed his concurrence with, and as I read his judgment was much influenced by, the view that fellow membership of the association negatives reliance. In *C. E. B. Draper & Son, Ltd. v. Edward Turner & Son, Ltd.* (51) DIPLOCK, L.J., (52) in observing that in that case it had not been argued that any warranty as to fitness was to be implied under s. 14 (1) of the Act of 1893, added that he supposed that that was for the "good reason" that as both parties were members of the London Cattle Food Trade Association it could hardly be suggested that the buyers relied on the sellers' skill or judgment. That was a purely personal view expressed obiter in relation to a point not debated in the case. With respect I cannot agree that the fact that buyers and sellers are members of the trade association inevitably or generally brings it about that no reliance is placed on the skill or judgment of sellers. The contrary may well be the case. Nor does the fact that on arrival of the goods there will be or may be analysis of them, negative a reliance on skill or judgment. The cattle food market was, in SELLERS, L.J.'s phrase, "an informed market". Those who were selling would themselves have had to acquire. They would exercise their judgment and their skill in making their purchases. They would decide whether or not to buy from a new supplier or from a new source. They would decide whether to acquire some new variety. The buyers from them might have added confidence because they would feel that they could rely on a fellow member of their association. Such reliance might especially arise if a new line in some commodity was being sold. I agree with SELLERS, L.J., when he said (53):

(48) [1934] All E.R. Rep. at p. 13; [1934] A.C. at p. 427.

(49) (1928), 33 Com. Cas. 195.

(50) [1935] All E.R. Rep. at p. 215; [1936] A.C. at p. 99.

(51) [1964] 3 All E.R. 148; [1965] 1 Q.B. 424.

(52) [1964] 3 All E.R. at p. 151; [1965] 1 Q.B. at pp. 433, 434.

(53) [1966] 1 All E.R. at p. 320, letter I.

A "It is a market in which a prospective buyer would be entitled to expect that if he bought a feeding stuff commodity he would receive that which he or his purchaser then could use as feeding stuff."

The contracts between the third and fourth parties, which were on the printed form of contracts of the association, contained a clause (cl. 10) under the heading of "Latent Defects" which was in these terms:

B "The goods are not warranted free from defect, rendering same un-merchandiseable, which would not be apparent on reasonable examination, any statute or rule of law to the contrary notwithstanding."

Whatever may be the effect of this clause, I think it cannot be construed as negating the implication of a condition under s. 14 (1) nor a defeating a claim for damages when there is an election to treat a breach of a condition implied by s. 14 (1) as a breach of warranty (see the judgment of FLETCHER MOULTON, L.J., in *Wallis Son & Wells v. Pratt and Haynes* (54)). The words in cl. 10 are wholly inapt to exclude a condition of the contract. They do not refer to a condition. One does not exclude a condition by excluding or purporting to exclude a warranty. In *Clarke v. Army and Navy Co-operative Society* (55), SIR RICHARD HENN COLLINS, M.R., expressed the view (56), though perhaps obiter, that the words "no warranties are given with the goods sold by the society except on the written authority of one of the managing directors or the assistant manager" would not exclude a condition implied by s. 14 (1). In *Cammell Laird & Co., Ltd. v. Mangnese Bronze and Brass Co., Ltd.* (57), LORD WRIGHT having referred (58) to *Wallis Son & Wells v. Pratt and Haynes* (59) and to *Baldry v. Marshall* (60) said (61):

E "The principle of these authorities is that though a condition is deemed to be and can be treated as a warranty, if it is not availed of to reject the goods, still it remains a condition; once a condition always a condition. Hence apt and precise words must be used to exclude it; the words guarantee or warranty are not sufficiently clear."

F It was contended in the alternative that the existence of cl. 10 in the contract was a factor which could lend support to the view that the buyers (third parties) were not placing reliance on the skill or judgment of the sellers (fourth parties). I cannot accept this. If cl. 10 does not refer to conditions, it cannot affect a condition which arises because the buyers make known to the sellers their particular purpose in circumstances which show that they do rely on the seller's skill or judgment. As it was common ground that Brazilian ground nut extractions were goods of a description which it was in the course of the sellers' business to supply, I think that, for the reasons which I have set out, it was established that there was an implied condition that the goods to be supplied would be reasonably fit for the particular purpose which was made known, i.e., the purpose of re-selling in smaller quantities to be compounded into food for cattle and poultry.

H The next question is whether the goods which were supplied were reasonably fit for the purpose made known. There was ample evidence to support the conclusion that they were not.

I Liability was also claimed both as between the defendants and the third parties and as between the third and fourth parties under the provisions of s. 14 (2) of the Act of 1893. The respective sellers did deal in goods of the description of Brazilian ground nut extractions. The respective buyers did buy by description.

(54) [1911-13] All E.R. Rep. 989; [1911] A.C. 394; [1910] 2 K.B. 1003.

(55) [1903] 1 K.B. 155.

(56) [1903] 1 K.B. at p. 163.

(57) [1934] 1 All E.R. Rep. 1; [1934] A.C. 402.

(58) [1934] All E.R. Rep. at p. 15; [1934] A.C. at p. 431.

(59) [1911-13] All E.R. Rep. 989; [1911] A.C. 394.

(60) [1924] All E.R. Rep. 155; [1925] 1 K.B. 260.

(61) [1934] All E.R. Rep. at p. 15; [1934] A.C. at pp. 431, 432.



There was therefore an implied condition under s. 14 (2) that the goods should be of merchantable quality. No question arises under the proviso to the subsection. Even if the goods had been examined by the respective buyers the defects in the goods would not have been revealed. So the issue which arises is whether the goods were of "merchantable quality". By "the goods" I mean the goods which were received by the respective buyers. When considering s. 14 (2) there need not be the circumstance that goods will have been asked for by a buyer in order to satisfy or to meet some stated purpose. Some goods which are bought by description may be capable of being used in many different ways. It can happen, therefore, that, if a buyer just orders goods generally by description, he may want them for only one or possibly for more than one of several uses. It would not be reasonable to require the seller to deliver goods which would do for all the possible purposes. If the buyer wants goods that are suitable for each one of several purposes, he must make that clear to the seller and make it clear that he is relying on the seller to let him have goods that would be suitable for each one of the purposes. If the buyer merely orders goods by description, all that he can expect is that he will get goods that correspond with the description and goods of such a quality that they could be used for one of the purposes for which such goods are normally used. In the old case of *Gardiner v. Gray* (62) LORD ELLENBOROUGH said (63).

"He cannot, without a warranty, insist that it shall be of any particular quality or fineness, but the intention of both parties must be taken to be, that it shall be saleable in the market under the denomination mentioned in the contract between them. The purchaser cannot be supposed to buy goods to lay them on a dunghill."

Sometimes there may only be one use for an article. The provisions of sub-s. (1) and sub-s. (2) of s. 14 will overlap. As LORD WRIGHT said (64) in *Grant v. Australian Knitting Mills, Ltd.* (65):

"... whatever else 'merchantable' may mean, it does mean that the article sold, if only meant for one particular use in ordinary course, is fit for that use; 'Merchantable' does not mean that the thing is saleable in the market simply because it looks all right; it is not merchantable in that event if it has defects unfitting it for its only proper use but not apparent on ordinary examination..."

In *Niblett v. Confectioners Materials Co.* (66) ATKIN, L.J., used the words (67): "No one who knew the facts would buy them in that state or condition; in other words they were unsaleable and unmerchantable." This passage brings out the point that in deciding whether goods are merchantable it has to be considered whether some buyer or buyers could reasonably be contemplated who would wish to buy goods which were in the actual condition of the goods tendered and who had knowledge of defects in them which might be hidden. The goods must of course comply with the description. If, therefore, goods of the contract description are tendered and if the tendered goods though having certain defects are reasonably capable of being put to a use for which a buyer knowing of the defects would be likely to buy them, then they are of merchantable quality. This, I think, is what was indicated by LORD WRIGHT in his speech in the *Cammell Laird* case (68). I prefer his approach to that which was expressed by FARWELL, L.J., in *Bristol Tramways, etc. Carriage Co., Ltd. v. Fiat Motors, Ltd.* (69). In the earlier

(62) (1815), 4 Camp. 144.

(63) (1815), 4 Camp. at p. 145.

(64) [1935] All E.R. Rep. at p. 215; [1936] A.C. at pp. 99, 100.

(65) [1935] All E.R. Rep. 209; [1936] A.C. 85.

(66) [1921] All E.R. Rep. 459; [1921] 3 K.B. 387.

(67) [1921] All E.R. Rep. at p. 465; [1921] 3 K.B. at p. 404.

(68) [1934] All E.R. Rep. at p. 14; [1934] A.C. at p. 430.

(69) [1908-10] All E.R. Rep. at pp. 117, 118; [1910] 2 K.B. at p. 841.

A case of *Canada Atlantic Grain Export Co., Inc. v. Eilers* (70), LORD WRIGHT had said (71):

B “It seems to follow that if goods are sold under a description which they fulfil, and if goods under that description are reasonably capable in ordinary use of several purposes, they are of merchantable quality within s. 14 (2) of the Act [of 1893] if they are reasonably capable of being used for any one or more of such purposes, even if unfit for use for that one of those purposes which the particular buyer intended. No doubt it is too wide to say that they must be of use for some purpose, because that purpose might be foreign to their ordinary user.”

C If a buyer wants more than this he must get his seller to sell on the basis that the goods are reasonably fit for some stated purpose. The buyer may not fare so well if he cannot bring himself within s. 14 (1).

D In my view, the judge applied the correct tests when considering the question of liability under s. 14 (2). As I consider that s. 14 (1) was operative not only as between S.A.P.P.A. and the third parties but also as between the third and fourth parties liability rests as a result of breaches of the implied conditions arising under s. 14 (1). The question of liability under s. 14 (2) has to be approached on the assumption that no particular purpose was made known. The judge analysed the evidence carefully. He came to the conclusion that though the meal was unfit for use for one purpose (i.e. for use in a compound food for poultry) it could not be said that in the form in which it was tendered the meal was of no use for any purpose for which the meal (in its defective state) would normally be used; accordingly he could not hold that under its description it was unsaleable. The judge had a great deal of evidence to consider and as there was evidence which warranted his conclusion I do not think that it can be disturbed.

E Liability on the part of the respective sellers is also claimed by virtue of the provisions of s. 2 (2) of the Fertilisers and Feeding Stuffs Act, 1926. By that subsection it is provided:

F “On the sale for use as food for cattle or poultry of an article included in the first column 1 of Sch. 1 or Sch. 2 to this Act there shall be implied, notwithstanding any contract or notice to the contrary, a warranty by the seller that the article is suitable to be used as such, and does not, except as otherwise expressly stated in the statutory statement, contain any ingredient included in Sch. 3 to this Act.”

G It is necessary to consider, in the first place, the position as between the S.A.P.P.A. and the third parties. In my view, s. 2 (2) applied. The sales of Brazilian ground nut meal were made for the purpose for which the defendants required the meal, i.e. to be compounded into feeding stuffs for various kinds of poultry and pigs. It is said, however, that as the meal would not normally be given as food in its neat stage but would only be an ingredient in what was later to be used as food, the meal was not an “article” which was sold for use as food. The question that arises was thus formulated in the Court of Appeal (72): “Does the Act apply to a substance which is sold for the purposes of re-sale as an ingredient in some compounded food and not as a foodstuff itself?”

H On this question there has been a division of opinion. The trial judge and I SELLERS, L.J. answered the above question in the affirmative, while DAVIES and DIPLOCK, L.J.J. answered it in the negative. In support of the negative view it was contended that the compounders (S.A.P.P.A.) were free to select the ingredients for their compounds and the percentages of their inclusion, but that Lillico and Grimsdale would not know nor be concerned to know how the compounds were to be composed. Kendall and Holland Colombo, it was submitted,

(70) (1929), 35 Com. Cas. 90.

(71) (1929), 35 Com. Cas. at pp. 102, 103.

(72) [1966] 1 All E.R. at p. 315, letter C.

would be even further removed from any knowledge or control over the compounds into which the ground nut extractions would be introduced. It was further submitted that the Act of 1926 draws a distinction between an "article" and its "ingredients" (see s. 1 (1) (c) s. 2 (2), s. 2 (4), s. 2 (5), s. 7 (1), s. 20 (2) and (3) and Sch. 3 and Sch. 5) and that accordingly the warranty given by s. 2 (2) is limited to the sale of an "article" which is intended to be used in its existing state (and as the same article) as food for cattle and poultry.

It would appear that many of the articles set out in the schedules of the Act of 1926 are generally used as ingredients in some compound. This would suggest that the warranty was to apply both to any articles used as food in their existing state and to articles which would go into a compound which would be used as food. The articles were, in my view, sold with a warranty that they would be suitable to be used as food for cattle or poultry: that would cover use as food for cattle or poultry in a form which a reasonably competent user would adopt. They would be so used if used in a compound food for cattle or poultry, provided always that the compound was made in a reasonable or normal or recognised manner. I agree, therefore, with *SELLERS, L.J.* that the warranty applies whether the use as food is with or without admixture with other articles or substances.

It is submitted, however, that s. 2 (2) does not apply to any c.i.f. contract of imported goods. The various contracts between the fourth and third parties were contracts for the sale of goods on c.i.f. terms. Thus for example there was a contract (on printed form No. 6 of the London Cattle Food Trade Association) made between Kendall and Grimsdale on Mar. 28, 1960. It was for five hundred tons of Brazilian ground nut extractions at a specified price "cost, freight and insurance to London". Shipment was to be made in Santos during April, 1960. There was a provision as to quality. There was the latent defect clause already noted. There were express provisions relating to sampling and analysis. Payment was to be made by cash in London not later than thirty days from date of bill of lading or on arrival of steamer at destination, whichever was the earlier, of ninety-eight per cent. of the provisional invoice amount in exchange for documents; the small balance to be settled on rendering final invoice. There was a provision whereby buyers and sellers agreed that for the purpose of proceedings, either legal or by arbitration, the contract should "be deemed to have been made in England and to be performed there": exclusive jurisdiction (in the terms of cl. 26) was given to the English courts and disputes were to be settled according to the law of England. In fact the contract was made in England between trading concerns carrying on business in England. In accordance with the requirement of the contract the shipping documents were taken up and paid for in London.

It is alternatively submitted that s. 2 (2) does not apply to any c.i.f. contract where the property in the goods has passed before the goods have crossed the ship's rail on discharge. A further alternative submission is that s. 2 (2) does not apply to any c.i.f. sale (on contract form No. 6) whether the property in the goods has passed before or after the goods have come within the territorial limits of the United Kingdom. Reliance was placed on the decision in *Draper's case* (73) to the extent that it decided that s. 2 (2) does not apply to sales under c.i.f. contracts where the property in the goods passes at a time when the goods are outside the territorial limits of the United Kingdom.

My lords, these submissions require a study of the provisions of s. 2 (2) in its context in an Act which clearly was intended inter alia to prevent unsuitable food being given to cattle or poultry. When s. 2 (2) refers to a sale of an article, I think, the reference is to a sale which takes place within the United Kingdom. Reading the Act of 1926 as a whole the provisions mainly relate to transactions which take place at a time when the articles referred to in the schedules are



- A within the United Kingdom, but I do not think that the Act of 1926 is limited so as to relate only to such transactions. The Act of 1926 by s. 24 gives exemption in the case of a certain, rather limited, class of sales. If s. 2 (2) applies to sales which are not exempted, I see no justification for ignoring it, even if it is thought that some of the provisions of some sections of the Act of 1926 do not or may not apply to sales which are covered by the words of s. 2 (2).
- B In *Draper's case* (74) it was held that the sale of goods under a c.i.f. contract (in the form now being considered) took place where the goods were when the property in them passed. That meant that in the case of goods being carried across an ocean the sale would take place at the place on the ocean where the moving ship happened to be at the moment when, on payment, documents were handed over. The judge was bound by this decision and accordingly
- C became bound to investigate the positions of the various ships at the respective dates of payment with the remarkable result that warranties applied to goods in those cases where payment was made (and the documents received) after a ship was within territorial waters but that warranties did not apply if a ship was not within territorial waters. I cannot think that *Draper's case* (74) was correct in so deciding.
- D The opening words of s. 2 (2) are "on the sale". In my view, the subsection applies to any sale made within the territorial limits of the United Kingdom. That was fully recognised in *Draper's case* (74), but in that case the court pointed to the distinction between a contract for sale and a sale and held that the sale (as opposed to the contract for sale) took place where the goods happened to be at the time of payment. Even on that somewhat refined approach, I would
- E not agree with the conclusion. Section 1 of the Sale of Goods Act, 1893 provides that "a contract of sale of goods" may be either (a) a contract whereby the seller transfers the property in goods to a buyer: such a contract of sale is called a sale; or (b) a contract whereby the seller agrees to transfer the property in the goods to a buyer at some future time or subject to some condition to be fulfilled: such a contract of sale is called an agreement to sell. An agreement to
- F sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred. These provisions must be considered in relation to a contract for the sale of goods on c.i.f. terms. Where there is a contract for the sale of goods on c.i.f. terms, a seller may either arrange for the shipment of goods (of contract description and quality) on a ship bound for the destination stated in the contract or he may buy (when afloat)
- G goods which have been so shipped and, in accordance with the terms of the contract, he must tender the shipping documents to the purchaser. While on the voyage the goods are at the purchaser's risk but one of the shipping documents which the purchaser will receive will be a policy of insurance. The incidence of the risk is not linked with the passing of the property. Such a contract for the sale of goods is, therefore, implemented by the seller by the transfer by him
- H of the proper documents. The general nature of c.i.f. contracts has frequently been defined (see the judgment of KENNEDY, L.J. in *Biddell Brothers v. E. Clements Horst Co.* (75), approved in the House of Lords (76) the speech of LORD WRIGHT in *Ross T. Smyth & Co., Ltd. v. T. D. Bailey Son & Co.* (77), the speech of LORD PORTER in *Comptoir d'Achat et de Vente du Boerenbond Belge S/A. v. Luis de Ridder Limitado*, (78). It can, of course, happen that at
- I the time when payment is made in exchange for documents the goods have already been lost. In his speech in *Ross T. Smyth & Co., Ltd.'s case* (77) LORD WRIGHT pointed out (79) that that did not mean that a c.i.f. contract was a sale of documents not goods. The contract—

(74) [1964] 3 All E.R. 148; [1965] 1 Q.B. 424.

(75) [1911-13] All E.R. Rep. 18; [1911] 1 K.B. 934.

(76) [1911-13] All E.R. Rep. 93; [1912] A.C. 18.

(77) [1940] 3 All E.R. 60.

(78) [1949] 1 All E.R. 269; [1949] A.C. 293.

(79) [1940] 3 All E.R. at p. 70.

"contemplates the transfer of actual goods in the normal course, but, if the goods are lost, the insurance policy and bill of lading contract—that is, the rights under them—are taken to be, in a business sense, the equivalent of the goods."

If the word "sale" in s. 2 (2) is being regarded as the transaction which brings about a transfer of property, then in the present case there was such a transaction when, on payment in London, there was receipt of the documents in London. The sale was therefore in London. Nothing happened on the various ships. The particular location of a particular ship was an entirely irrelevant circumstance. The transaction which consisted of making payment in exchange for the documents was effective to pass the property. The delivery of a bill of lading operated as a symbolical delivery of the goods that it covered (see *Sanders v. Maclean* (80)). If there were a sale in England of a chattel which was in a foreign country there might be questions whether there were provisions of the local law which would affect the passing of property. No such points here arise.

If, therefore, the technical approach of the Court of Appeal in *Draper's* case (81) is followed and if the word "sale" in s. 2 (2) is considered by reference to s. 1 of the Sale of Goods Act, 1893, then the parties made "a contract of sale" of goods, which was called "an agreement to sell" until such time as the conditions were fulfilled subject to which the property in the goods was to be transferred, but which became a "sale" when those conditions were fulfilled. On this basis there was an agreement to sell which was made in England by parties carrying on business in England who made conditions to be fulfilled in England. Those conditions were fulfilled in England and the contract of sale (or agreement to sell) then became a sale. It became a sale in England. There was the further consideration (if it advances the matter) that the goods were destined for England. It seems to me, therefore, that s. 2 (2) of the Act of 1926 was applicable.

The same result is reached by a slightly different approach. The word "sale" in s. 2 (2) may reasonably be considered to be referring to a contract of sale or an agreement to sell. A warranty is in its nature a contractual term. In s. 14 (1) and (2) of the Sale of Goods Act, 1893, the implied conditions are referable to a contract of sale. An implied warranty under s. 2 (2) of the Act of 1926 would seem, therefore, to be something implied in a contract of sale. The various contracts (which begin with the words "We have this day sold") were all made in England between parties who were in England. The implied warranty would, therefore, arise at the time of and be a term of the contract of sale, although it would only be effective when the contract became a sale. In my opinion, therefore, the provisions of s. 2 (2) applied and there was a warranty in the terms of the section. I do consider that in this case dependence need be placed on cl. 26 of the contract to reach this conclusion.

I do not find it necessary to express any final conclusion in regard to the questions whether various other sections of the Act apply in the case of this or other c.i.f. contracts. A question may arise whether every seller under a c.i.f. contract must give the prescribed statutory instrument. The obligation is to give one to the purchaser on or before delivery. In the case of a c.i.f. contract a seller will not be making actual delivery of the goods; he will have handed over documents which will entitle the holder of them to obtain the goods from the master of a ship. But delivery in s. 1 may cover delivery of documents. As *SELLERS, L.J.* pointed out, shippers and exporters are not unaccustomed to meeting the requirements of importing countries in respect of such matters as certificates of origin or licences in respect of goods shipped. I see no special difficulty in the application of s. 1. Much discussion took place as to the applicability of s. 5 and the keeping of a register in cases of c.i.f. contracts. I consider

(80) (1883), 11 Q.B.D. 327 at p. 341.

(81) [1964] 3 All E.R. 148; [1965] 1 Q.B. 424.

- A that the provisions of s. 5 and, indeed, those in various other sections are primarily referable to sales in this country of goods which had arrived in this country prior to such sales. There are certainly difficulties in applying the section in the case of many sales on c.i.f. terms. Seller A might sell on c.i.f. terms to B: if B paid A and received the shipping documents, he might sell on c.i.f. terms to C: C after payment to B and receipt of the shipping documents from B might sell to D, who after payment and receipt of the shipping documents might present a bill of lading to the master of the carrying ship and receive the goods. Section 5 (2) refers to "The seller of an article . . . so delivered or consigned". That is a reference to sub-s. (1) which refers to "an article delivered or consigned direct from a quay or a ship to a purchaser". The section is not wholly clear, but it would appear to denote a seller who delivers or consigns to a purchaser direct from a quay or a ship. In the illustrations that I have mentioned the respective sellers would hardly seem to be sellers who deliver or consign to a purchaser direct from a quay or a ship. Furthermore, the respective sellers, in the above illustrations, would not necessarily know the date of delivery from ship to purchaser and could not enter such date in a register so as to comply with s. 5 (2) (a).

- D Without endeavouring to express an opinion as to various possible situations that may arise, I consider that the words of s. 2 (2) of the Act of 1926 are clear and that the warranty specified did in this case arise. It was a warranty that the Brazilian ground nut extraction was suitable for use as food for cattle or poultry. There is no definition of "poultry" in the Act of 1926. Are partridges and pheasants included within the word? The competing contentions in regard
- E to this matter are comprehensively contained in the judgments now under consideration. I do not think that any useful purpose would be served by doing more than to state the conclusion which I have reached, which is that partridges and pheasants are not within the description of "poultry".

- Was the warranty broken? In my view, it was. The ground nut extraction was not suitable for use as food for cattle and poultry. What, then, was the
- F measure of damages for the breach? The problem is the same as that which arises if the damages are claimed in this case for breach of the condition implied under s. 14 (1) of the Sale of Goods Act, 1893. When the sellers decided to sell they must be taken to have known (for they either knew or are not excused if they did not) that if they sold there would be (a) a condition implied by statute that what they sold would be reasonably fit for the particular purpose for which
- G it was being bought, i.e., as between the fourth and third parties, that it was being bought to re-sell in smaller quantities to be compounded into food for cattle and poultry; and (b) a warranty implied by statute that what they sold would be suitable for use as food for cattle or poultry. The circumstance that in one case there could be no contracting out makes no difference. In either case, if there is a breach, the measure of the damages that flow is to be determined
- H by an application of recognised legal principle. The evidence showed that it was normal and reasonable to give poultry food to young partridges and pheasants, and the contracting parties must have contemplated that it was reasonably likely that what was sold as fit for poultry would be fed to young partridges and pheasants. I think, therefore, that the damages as claimed did flow from the breach.

- I For the above reasons I would in each case hold the sellers liable both under s. 14 (1) of the Sale of Goods Act, 1893 and under s. 2 (2) of the Fertilisers and Feeding Stuffs Act, 1926.

**LORD GUEST:** My Lords,

*Section 14 (1) of the Sale of Goods Act, 1893.*

Different considerations may apply according as to whether the question arises as between S.A.P.P.A. and Grimsdale, on the one hand, or as between Grimsdale and Kendall and Holland Colombo, on the other hand.



*S.A.P.P.A. and Grimsdale.*

Section 14 (1) provides as follows:

"Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose, provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose:"

I have little doubt that the Court of Appeal (82) were right in holding that S.A.P.P.A. were entitled to recover from Grimsdale in respect of Grimsdale's breach of warranty under s. 14 (1). S.A.P.P.A.'s representative, Mr. Golden, made known to Grimsdale the particular purpose for which the Brazilian ground nut meal was required, namely, for use in compounds for pig and poultry rations. S.A.P.P.A. was the compounder and the trial judge was, in my view, entitled to draw the inference that S.A.P.P.A. relied on Grimsdale's skill and judgment. Brazilian ground nut meal was of a description which it was in the course of Grimsdale's business to supply. There was a breach of the warranty because it was not reasonably fit for the purpose.

In the case of S.A.P.P.A. and Grimsdale there was a verbal contract followed on the next day by a sold note which contained a condition in the following terms:

"Sellers not accountable for weight, measure or quality after delivery from ship, mill or granary. The buyer under this contract takes the responsibility of any latent defects."

In the course of dealing between the parties the practice was that on each occasion when a deal was effected between Mr. Golden on behalf of S.A.P.P.A. and Mr. Thearle on behalf of Grimsdale the sold note invariably followed the verbal contract. All the judges in the Court of Appeal (82) expressed the view that the conditions in the sold note were incorporated in the contract between the parties. I agree with this conclusion. HAVERS, J., held that the sold note was not incorporated in the contract by reason of some observations by LORD DEVLIN in *McCutcheon v. David Macbrayne, Ltd.* (83) when he said (84):

"Previous dealings are relevant only if they prove knowledge of the terms, actual and not constructive, and assent to them. If a term is not expressed in a contract, there is only one other way in which it can come into it and that is by implication. No implication can be made against a party of a term which was unknown to him. If previous dealings show that a man knew of and agreed to a term on ninety-nine occasions, there is a basis for saying that it can be imported into the hundredth contract without an express statement. It may or may not be sufficient to justify the importation—that depends on the circumstances; but at least by proving knowledge the essential beginning is made. Without knowledge there is nothing."

The rest of the members of the House did not concur in this obiter dictum of LORD DEVLIN and there is nothing, in my view, in *McCutcheon's* case (83) to conflict with the decisions of the Court of Appeal (82). In *McCutcheon's* case (83) there was a verbal contract for the carriage of a motor car by sea, but the course of dealing between the parties differed from previous occasions in that on the relevant occasion a risk note was not, as before, signed by the consignor of the motor car. In the present case S.A.P.P.A. by continuing to conduct their business with Grimsdale on the basis of the sold notes, which contained the

(82) [1966] 1 All E.R. 309.

(83) [1964] 1 All E.R. 430.

(84) [1964] 1 All E.R. at p. 437.

A relevant condition, and by not objecting to the condition must be taken to have assented to the incorporation of these terms in the contract. The remaining question is whether the clause applies so as to exempt Grimsdale from liability. Exemption clauses must be construed strictly (*Adamastos Shipping Co., Ltd. v. Anglo Saxon Petroleum Co., Ltd.* (85)) and the exception must be expressed in sufficiently clear words. I cannot find that condition 17 is in sufficiently clear terms to exempt Grimsdale of responsibility.

B *Grimsdale and Kendall and Holland Colombo.*

In this situation I am content to follow the Court of Appeal (86) to this extent, that the purpose for which Grimsdale required the meal was made known to Kendall and Holland Colombo, namely for re-sale in smaller quantities for compounding as a food for cattle and poultry and that this purpose was sufficiently specific to come within the meaning of "particular purpose", under s. 14 (1) of the Act of 1893. In the Irish case of *Wallis v. Russell* (87) it was held that on a sale of fresh crabs to a customer the purpose indicated for which the goods were required was for human consumption and that this was a particular purpose within s. 14 (1). PALLES, C.B. said (88):

D "So much for the first ground of limitation relied upon. I come now to the second—on the meaning of 'particular purpose'. As to that I have but little to say. The well-known judgment of BEST, C.J. in *Jones v. Bright* (89), points out the distinction between two classes of warranty, or, strictly speaking, of warranty and condition, that are dealt with in the two sub-sections under consideration: 1, fitness for a particular purpose; 2, that the goods shall be of a merchantable quality. Where no purpose is mentioned, there is a warranty, or condition, as the case may be, that the goods are, in the words of BEST, C.J. 'fit for *some* purpose' or, in other words, merchantable as such; where a *particular* purpose is mentioned, the warranty or condition is that they shall be reasonably fit for *that* purpose. I think that that distinction, which has been established by the course of legal decision for a century, shows that the words 'particular purpose' in a case of this description have a technical meaning; that it is not so much particular purpose as distinct from general purpose; but it is purpose stated to the seller, as distinct from absence of purpose stated to the seller. In the absence of purpose stated, the warranty is that the article shall be fit for some purpose—in other words, merchantable; where the purpose is stated, the warranty is that it shall be fit for that purpose. I cannot doubt that the purpose of using for human food is a 'particular purpose' within the meaning of the sub-section."

The Court of Appeal affirmed the decision of PALLES, C.B.

H While it may be clear that the particular purpose for which the goods were required was made known to the supplier, the difficult question arises in connexion with the subsequent part of s. 14 (1). The particular purpose must be made known "so as to show that the buyer relies on the seller's skill and judgment". I have difficulty in acceding to what I understand to be the views of the rest of your lordships on this point. In *Manchester Liners v. Rea, Ltd.* (90), the fact that the particular purpose was made known to the seller was sufficient to raise the inference that the buyer relied on the seller's judgment and skill. In *Grant v. Australian Knitting Mills* (91), LORD WRIGHT said (92):

I "The first exception, if its terms are satisfied, entitles the buyer to the benefit of an implied condition that the goods are reasonably fit for the purpose for which the goods are supplied, but only if that purpose is made

(85) [1958] 1 All E.R. 725; [1959] A.C. 133.

(87) [1902] 2 I.R. 585.

(89) (1829), 5 Bing. 533.

(91) [1935] All E.R. Rep. 209; [1936] A.C. 85.

(92) [1935] All E.R. Rep. at p. 215; [1936] A.C. at p. 99.

(86) [1966] 1 All E.R. 309.

(88) [1902] 2 I.R. at pp. 598, 599.

(90) [1922] All E.R. Rep. 605; [1922] A.C. 74.

known to the seller 'so as to show that the buyer relies on the seller's skill or judgment'. It is clear that the reliance must be brought home to the mind of the seller, expressly or by implication. The reliance will seldom be express: it will usually arise by implication from the circumstances: thus to take a case like that in question, of a purchase from a retailer the reliance will be in general inferred from the fact that a buyer goes to the shop in the confidence that the tradesman has selected his stock with skill and judgment: the retailer need know nothing about the process of manufacture; it is immaterial whether he be manufacturer or not; the main inducement to deal with a good retail shop is the expectation that the tradesman will have bought the right goods of a good make; the goods sold must be, as they were in the present case, goods of a description which it is in the course of the seller's business to supply; there is no need to specify in terms the particular purpose for which the buyer requires the goods which is none the less the particular purpose within the meaning of the section, because it is the only purpose for which any one would ordinarily want the goods."

It must depend on the circumstances of each case whether that inference can fairly be drawn. In *Cammell Laird Co., Ltd. v. Manganese Bronze and Brass Co., Ltd.* (93) LORD WRIGHT said (94):

"But the more difficult question remains whether the particular purpose for which the goods were required was not merely made known, as I think it was, by the appellants to the respondents, but was made known so as to show that the appellants as buyers relied on the sellers' skill and judgment. Such a reliance must be affirmatively shown; the buyer must bring home to the mind of the seller that he is relying on him in such a way that the seller can be taken to have contracted on that footing. The reliance is to be the basis of a contractual obligation."

I can well understand that, where the sale is by a manufacturer or a retailer to a customer, the inference can easily be drawn; but Grimsdale and Kendall and Holland Colombo were all dealers on the London Cattle Food Market buying and selling goods of the same description possibly on the same day, certainly from day to day. The section may apply to dealers inter se as *Shields v. Honeywell and Stein, Ltd.* (95) shows. There is, however, an air of unreality, in my view, in the idea that either of these dealers relied on the other's skill and judgment. It may well be that they trusted each other's honesty, as one of them said, but that is not the same thing as relying on each other's skill and judgment to select goods suitable for the particular purpose for which they were required. There is, in my view, great force in the judgment of DIPLOCK, L.J., in the Court of Appeal (96) when he analyses his reasons for saying that the implied warranty in s. 14 (1) did not apply to ordinary sales between dealers on the London Cattle Food Trade Market, and I respectfully agree with his conclusion.

In the case of Grimsdale and Kendall and Holland Colombo the latent defect clause is in the following terms:

"LATENT DEFECT—The goods are not warranted free from defect, rendering same unmerchantable, which would not be apparent on reasonable examination, any statute or rule of law to the contrary notwithstanding."

A long line of authority has decided that an exemption from breach of warranty will not exempt for breach of condition (see *Wallis, Son & Wells v. Pratt and Haynes* (97); *Baldry v. Marshall* (98)). I agree with the Court of Appeal (99) that the latent defects clause does not exempt Kendall and Holland Colombo.

As an addendum to these remarks I wish to mention a Scottish case which

(93) [1934] All E.R. Rep. 1; [1934] A.C. 402.

(94) [1934] All E.R. Rep. at p. 11; [1934] A.C. at p. 423.

(95) [1953] 1 Lloyd's Rep. 357.

(96) [1966] 1 All E.R. at pp. 341, 342.

(97) [1911-13] All E.R. Rep. 989; [1911] A.C. 394; [1910] 2 K.B. 1003.

(98) [1924] All E.R. Rep. 155; [1925] 1 K.B. 260.

(99) [1966] 1 All E.R. 309.



A was referred to in argument (*Flynn v. Scot* (100)). This decision appears to run counter to the principle in *Wallis v. Russell* (101) on the construction of s. 14 (1), which case has been followed in many subsequent English cases. *Flynn v. Scot* (100), which was decided by LORD MACKINTOSH in the Outer House would appear to conflict with the decision in the English case of *Bartlett v. Sidney Marcus, Ltd.* (102). Both were cases of the sale of secondhand motor cars.

B Section 14 (2) of the *Sale of Goods Act*, 1893.

The judges in the courts below are unanimous that the goods were not proved to be of unmerchantable quality under s. 14 (2). The same considerations affect the issue as between S.A.P.P.A. and Grimsdale and as between Grimsdale and Kendall and Holland Colombo. HAVERS, J., having examined the authorities

C came to the conclusion that the test which fell to be applied to the question of merchantability was that of LORD WRIGHT expressed in *Canada Atlantic Grain Export Co., Inc. v. Eilers* (103), and in *Cammell Laird Co., Ltd. v. Manganese Bronze and Brass Co., Ltd.* (104) when he used these words (105):

“What sub-s. 2 now means by ‘merchantable quality’ is that the goods in the form in which they were tendered were of no use for any purpose for which such goods would normally be used and hence were not saleable under that description.”

D Applying these principles the judge found as a fact that the Brazilian ground nut meal as compounded had been used without harm for older cattle and that there was still a market for it on the continent in large quantities. He further found that it did no harm to breeding hen pheasants. For these reasons he was unable to

E find that the meal was of no use for any purpose for which it would normally be used and that accordingly it was not unmerchantable. The basis of his decision was adhered to unanimously by the Court of Appeal (106).

Two criticisms were made of the judge’s decision. It was said that by applying the wrong test his decision was vitiated and that his finding was invalidated by his reliance on certain inadmissible factors. So far as the proper test is concerned

F there is, in my view, considerable force in the criticism first advanced. The test under s. 14 (2) must be whether the article is saleable in the ordinary market for such goods under that description. The test put forward by LORD WRIGHT (105) may be one factor or one guide in the determination of merchantability, but it cannot be the determining factor since purpose is not the sole test of merchantability and the test omits all reference to price. If the test of unmerchantability is

G that the article is fit for no use, few goods would be unmerchantable because use can always be found for goods at a price. The case of *Grant v. Australian Knitting Mills, Ltd.* (107) decided in the Privy Council was on appeal from the High Court of Australia. Section 41 of the South Australian Sale of Goods Act, 1895, was in similar terms to the United Kingdom Sale of Goods Act, 1893. In the High Court, DIXON, J., expressed the test in this way (108):

H “The condition that goods are of merchantable quality requires that they should be in such an actual state that a buyer fully acquainted with the facts and therefore knowing what hidden defects exist and not being limited to their apparent condition would buy them without abatement of the price obtainable for such goods if in reasonably sound order and condition and without special terms.”

I He then referred to certain English cases which it is unnecessary to quote. It appears to me that this is a preferable test to apply. Even assuming, however, that the trial judge applied the wrong test it does not, in my view, invalidate

(100) 1949 S.C. 442.

(102) [1965] 2 All E.R. 753.

(104) [1934] All E.R. Rep. 1; [1934] A.C. 402.

(105) [1934] All E.R. Rep. at p. 14; [1934] A.C. at p. 430.

(106) [1966] 1 All E.R. 309.

(108) (1933), 50 C.L.R. at p. 408.

(101) [1902] 2 I.R. 585.

(103) (1929), 35 Com. Cas. at p. 102.

(107) [1935] All E.R. Rep. 209; [1936] A.C. 85.

his decision. On the basis of the test applied by DIXON, J., his decision can still stand. There is no evidence that the price at which the goods were sold after the defect had been discovered was other than the ordinary price for the goods and the onus was on the buyer to prove unmerchantability. There was thus, in my view, evidence to justify the judge's finding. A

The second criticism which was made was that the judge took into consideration the fact that when the goods were sold after the defect was known, it was discovered that they could be safely fed to some animals at a limited rate of inclusion. It is clear that the quality of the goods has to be assessed at the time of the trial when the latent defect has become known; but it is said one must not, in ascertaining the condition of the goods and their merchantability, attribute the knowledge that they would not be harmful if compounded at a low rate of inclusion. This is, in my view, to approach the true situation with blinkers. The defect as ultimately discovered must be taken with its qualifications. It is not possible to stop half way and say "We know there is a defect" without proceeding to say "Although there is a defect we know it can be cured by a limited rate of inclusion". The defect was thus of only a limited character and did not in that state detract from the merchantability of the goods. I would, therefore, hold that the judge was entitled to view the matter in the state of knowledge at the date of the trial, namely, that the goods were saleable for a limited purpose at a limited rate of inclusion. The latent defect clause cannot exempt either suppliers or the dealers. B C D

*Fertilisers and Feeding Stuffs Act, 1926: c.i.f. contracts.*

The position under the Act of 1926 is affected in relation to Grimsdale and Kendall and Holland Colombo on the question whether the Act covers goods delivered in the United Kingdom under c.i.f. contracts. The Court of Appeal (109) considered themselves bound by the decision in *C. E. B. Draper & Son, Ltd. v. Edward Turner & Son, Ltd.* (110) where the Court of Appeal decided that the Act of 1926 could apply to c.i.f. contracts, but that whether it did so depended on the fortuitous circumstance whether the goods at the time of sale had reached the United Kingdom or the territorial waters thereof. This led HAVERS, J., into making fine distinctions as between the various cargoes. It is right to say that the Court of Appeal (109) viewed the decision in *Draper's* case (110) as leading to whimsical and illogical distinctions and, if they had been free to do so, would have reached a different result, but they felt themselves bound by the decision (see *SELLERS, L.J.* (111)). I agree with the criticisms of the decision in *Draper's* case (110). This House is free to consider the matter afresh. I have found the arguments whether the Act of 1926 applies to c.i.f. contracts to be finely balanced on either side. I see the force of the suggestion made by counsel for Grimsdale that the Schedules to the Act of 1926 contain a number of substances which normally reach this country from overseas and to refuse the protection of the Act of 1926 to these goods might go very largely to defeat some of its purposes. If, however, the Act of 1926 is to apply to c.i.f. contracts, these must somehow be fitted into the framework of the Act of 1926. I take the description of a c.i.f. contract from *Biddell Brothers v. E. Clemens Horst Co.* (112) where HAMILTON, J., used the following words (113): E F G H

"A seller under a contract of sale containing such terms has firstly to ship at the port of shipment goods of the description contained in the contract; secondly to procure a contract of affreightment, under which the goods will be delivered at the destination contemplated by the contract; thirdly to arrange for an insurance upon the terms current in the trade which will be available for the benefit of the buyer; fourthly to make out an invoice as I

(109) [1966] 1 All E.R. 309.

(110) [1964] 3 All E.R. 148; [1965] 1 Q.B. 424.

(111) [1966] 1 All E.R. at p. 318.

(112) [1911] 1 K.B. 214.

(113) [1911] 1 K.B. at p. 220.

A described by BLACKBURN, J., in *Ireland v. Livingston* (114) or in some similar form; and finally to tender these documents to the buyer so that he may know what freight he has to pay and obtain delivery of the goods, if they arrive, or recover for their loss if they are lost on the voyage."

(See also *Manbré Saccharine Co. v. Corn Products Co.* (115).) It is clear that the delivery of the goods is effected symbolically by the tendering of the documents in this country, but the c.i.f. seller does not make delivery of the goods in this country. Counsel for Grimsdale put forward several possibilities as to the test in the application of the Act of 1926 to a c.i.f. contract, but ultimately he conceded that there were really only two effective possibilities—first that the Act did not apply to any c.i.f. importations into this country or that it applied where the sale was completed by the delivery in the United Kingdom. In the light of the decisions to which I have referred it is impossible, in my view, to say that delivery on a c.i.f. contract takes place in the United Kingdom. An argument was advanced that s. 26 (2) of the Fertilisers and Feeding Stuffs Act, 1926, supplied the deficiency. Section 26 (2) is in the following terms:

D "An article consigned to a purchaser shall not for the purposes of this Act be deemed to be delivered to him until it arrives at the place to which it is consigned whether the consignment is by direction of the seller or the purchaser."

This section does not, in my view, have that result as the goods in a c.i.f. contract are not consigned to a purchaser.

E There are, however, other reasons why, in my view, the Act of 1926 cannot apply to a c.i.f. contract. The general tenor of the Act is that it is to apply to goods within the United Kingdom for use in this country. The administrative provisions stress the domestic nature (see s. 11 (1), s. 12 (1), s. 15 and s. 27 (1)). The scheme of the Act of 1926 is that under s. 1 the seller of articles mentioned is bound to give the purchaser, before delivery or as soon thereafter as may be practicable, a statutory statement giving certain particulars. This statutory statement then has the effect, under s. 2 (1), as a warranty that the particulars contained in the statutory statement are correct. There follow in s. 4 and s. 5 the provisions regarding criminal liabilities. Section 4 provides that any article mentioned when prepared for sale or consignment for use as food for cattle or poultry shall be marked in the prescribed manner. Section 5 contains a sanction in the case of an article delivered or sent direct from a ship or quay to a purchaser for the particulars in the statutory statement being true. Section 7 provides that it is an offence to sell or offer or expose for sale for use for food for cattle or poultry any article which contains a deleterious ingredient. Proceedings for this offence cannot be instituted unless the article was sampled by the inspector in accordance with the Act on the premises where it was exposed or offered for sale. These sections, in my view, lead to two conclusions: (i) the Act of 1926 was intended to deal with fertilisers and feeding stuffs in the United Kingdom for use in this country, and (ii) that in order to secure the proper application of the Act of 1926 the civil and criminal liabilities are intended to go hand in hand. I reach the conclusion that the Act of 1926 does not apply to c.i.f. importations.

*Fertilisers and Feeding Stuffs Act, 1926: Are pheasants "poultry"?*

I This is a pure question of statutory construction. "Poultry" is not defined in the Act of 1926 although "cattle" is and includes a wide variety of animals which ordinarily would not be so denoted (s. 26 (1)). In the absence of indications to the contrary words of a statute must be interpreted according to the ordinary and natural meaning of the words used. None of the dictionary definitions of "poultry", apart from that contained in WESTER'S THIRD NEW INTERNATIONAL DICTIONARY (1961) includes pheasants as poultry. In the ordinary use of words,

(114) [1861-73] All E.R. Rep. 585 at p. 589; (1872), L.R. 5 H.L. 395 at p. 406.

(115) [1918-19] All E.R. Rep. 980 at p. 983; [1919] 1 K.B. 198 at p. 202.



poultry would not, in my view, comprehend pheasants or other game. Certain evidence was led that in the poultry food trade, poultry was understood to include pheasants. The judge, in my view rightly, rejected such evidence. In any event it was of little assistance to him. All that it amounted to was that there was not in the animal food trade a separate food for pheasants. They came under the general umbrella of poultry food. It is said, however, that in view of the method of rearing young pheasants, which is similar to young chickens, Parliament must have intended that pheasants would be comprehended by the term "poultry". The process of rearing is described in detail in the evidence. It is sufficient to say that wild hen pheasants are caught in the woods and after the laying season their eggs are put into an incubator. After the pheasants have hatched out they are put in an electric brooder. Thereafter when the chicks are strong enough they are let out and eventually at the age of about five or six weeks let out wild into the fields and woods. The difficulty about S.A.P.P.A.'s construction that "poultry" includes pheasants is that it involves that a wild hen pheasant, until caught, is not poultry, but when it is caught it becomes poultry. The chicks remain poultry after having hatched out but cease to be poultry when they are let out wild. Such an artificial and illogical construction of "poultry" does not appear to me to be justified. It would mean that while pheasants were fed with meal in the field the Act of 1926 did not apply, but when the birds came within the pheasantry the food would have to comply with the Act of 1926. The essential difference between the pheasants involved in this case and poultry is that poultry are normally reared for table use, while these pheasants are reared not for table use but for sporting purposes. The case of *R. v. Garnham* (116) was founded on by S.A.P.P.A.'s counsel as showing a distinction between young pheasants hatched under a hen and wild pheasants. While the young pheasants were within the confines of the farmyard they were not game and as being the property of the farmer could be the subject of larceny (see *R. v. Head* (117)). These cases were not, however, concerned with the question whether young pheasants were poultry. I can find nothing in the Act of 1926 to indicate that the ordinary and natural meaning of the word "poultry" was not intended. The majority of the Court of Appeal (118) were right, in my view, in holding that pheasants are not poultry within the Act of 1926.

#### *Remoteness of Damage.*

The final question is whether, assuming that pheasants are not "poultry" within the meaning of the Fertilisers and Feeding Stuffs Act, 1926, damages can be recovered as against the vendors for breach of the statutory warranty contained in s. 2 (2). The question of liability falls to be decided on the principle of whether, in the terms of the Sale of Goods Act, 1893, s. 53 (2), the loss directly and naturally in the ordinary course of events resulted from the breach, in other words are the damages too remote. The goods were sold for use as food for poultry; the goods were unfit for use as food for poultry. There was thus on this argument a breach. Can it be an answer to a claim that when fed to young pheasants it killed them? In my view, a reasonable and competent seller would have realised that it might be fed to young pheasants even though the seller did not know positively that it would be fed to pheasants.

On the whole matter I would allow the appeal of Kendall and Holland Colombo, but I would dismiss the appeal of Grimsdale as against S.A.P.P.A.

**LORD PEARCE:** My Lords, young pheasants on the Hardwick Game Farm were killed or stunted through eating food which was compounded and supplied by Suffolk Agricultural and Poultry Producers Association, Ltd. ("S.A.P.P.A."). Nobody has doubted that the Hardwick Game Farm had a good cause of action or that S.A.P.P.A. were right in admitting it. The question is, how far that loss can be handed on to the various merchants up the line of supply. The claims are

(116) (1861), 2 F. & F. 347.

(117) (1857), 1 F. & F. 350.

(118) [1966] 1 All E.R. 309.

- A based on breaches of condition or warranty under the Sale of Goods Act, 1893, and the Fertilisers and Feeding Stuffs Act, 1926.

The damage came from a latent toxin in Brazilian ground nut meal which S.A.P.P.A. used as an ingredient in their compound food. They had bought the meal from Grimsdale (and from Lillico who have not appealed from the judgment against them and have therefore passed out of the picture). Grimsdale

- B have been held liable under s. 14 (1) of the Sale of Goods Act, 1893, in that the meal was not reasonably fit for the purpose, but not liable under s. 14 (2) since the meal was held to be merchantable. Grimsdale bought the meal from Kendall who have likewise been held liable under s. 14 (1) but not under s. 14 (2). Kendall appeal against this liability, Grimsdale are content to accept their own liability, so long as they can hand it on to Kendall. If, however, Kendall succeed in disclaiming liability, then Grimsdale in turn seek to disclaim their own liability to S.A.P.P.A.

- When Grimsdale orally sold to S.A.P.P.A., it was in the course of Grimsdale's business to sell cattle and poultry feeding stuffs to the manufacturers of compound feeding stuffs. (Judgment of HAVERS, J. (119).) Grimsdale knew that the meal was "liable to be used in the " manufacture of compound feeding stuffs for cattle or poultry ". They were further aware that S.A.P.P.A. "only compounded feeding stuffs for poultry, pheasants and pigs" and "did not compound feeding stuffs for cattle". It was held that the particular purpose was made known so as to show that S.A.P.P.A. relied on Grimsdale's skill and judgment. It has been held unanimously by the trial judge and the Court of Appeal (120) that the condition of fitness implied by s. 14 (1) has been proved and that the meal was not fit for the purpose for which it was supplied. In my opinion, that view is right; and it is clear that the injury to the pheasants was well within the range of damages recoverable. Therefore, whether or not Grimsdale can hand on their liability to Kendall, they cannot avoid liability themselves.

- The only matter on this point which has given rise to real difficulty is the question whether Grimsdale were protected by the latent defect clause in the conditions of sale printed on the contract note which they sent to S.A.P.P.A.: "The buyer under this contract takes the responsibility of any latent defects". The trial judge held that these printed conditions did not apply to this oral sale of meal. In so doing he relied on a dictum of LORD DEVLIN in *McCutcheon v. David Macbrayne, Ltd.* (121). That case was, however, different from the present case. For there was no contractual document in that case. The carrier orally accepted goods for transport without importing written conditions. On some previous dealings with the plaintiff's agent the carrier had imported conditions by a written contract. On such occasions the carrier could have relied on the ticket cases and had the benefit of the conditions, although the consignor was not aware of their extent. Since, however, he did not import any written terms on the particular occasion in question, he could not get the benefit of unknown conditions which were not imported into the transaction. The ordinary course of business was therefore no help to the carrier, since the transaction did not follow the ordinary course; and in that case the plaintiff's agent, acting in good faith, was unaware that the carrier was intending to import written conditions.

- In the present case, S.A.P.P.A. had regularly received more than a hundred similar contract notes from Grimsdale in the course of dealing over three years. I They knew of the existence of the conditions on the back of the contract note. They never raised any query or objection (HAVERS, J. (122)). The court's task is to decide what each party to an alleged contract would reasonably conclude from the utterances, writings or conduct of the other. The question, therefore, is not what S.A.P.P.A. themselves thought or knew about the matter, but what they should be taken as representing to Grimsdale about it or leading Grimsdale to believe. The only reasonable inference from the regular course of dealing over

(119) [1964] 2 Lloyd's Rep. 227 at p. 269.

(121) [1964] 1 All E.R. 430.

(120) [1966] 1 All E.R. 309.

(122) [1964] 2 Lloyd's Rep. at p. 267.

so long a period is that S.A.P.P.A. were evincing an acceptance of, and a readiness to be bound by, the printed conditions of whose existence they were well aware although they had not troubled to read them. Thus the general conditions became part of the oral contract. A

On the other hand, although S.A.P.P.A. must in general be bound by the printed conditions (so far as applicable) in their oral purchases from Grimsdale, these wide and varied conditions had to be adapted to the particular transaction in each case and some of them were obviously inapplicable. Those which are capable of applying do not carry the same weight and precision as they might have done had they been part of a written contract in which they had been deliberately inserted in a special context. The court has to find out, as best it may, what the parties should be taken to have intended. There is no doubt that there was an implied condition between the parties that the meal in question was suitable as an ingredient in feeding stuff for cattle or poultry, unless it was effectively excluded. Is one to deduce that at the same time they were agreeing that if it contained a concealed poison which rendered the meal unfit, the condition was to be abrogated to that extent by the general conditions? Was the resulting composite condition intended to be that the meal was fit in so far only as it looked fit, and that if its unfitness was hidden, it need not be fit? In my opinion, that is not a satisfactory or necessary effect of the latent defects clause, nor does the clause necessarily abrogate in part the condition as to fitness. The goods might have had defects of quality which did not make them unfit for their purpose. It is to these defects that the clause should be read as applicable. If it was intended to cut down the condition as to fitness in respect of all latent defects, the clause should have said so in clear and unambiguous terms, referring expressly to the condition which it was limiting. For the same reasons I would not read it as limiting the condition as to merchantability. B C D E

The more difficult question is whether Grimsdale's purchase from Kendall contained under s. 14 (1) or 14 (2) conditions which were broken.

There is in this contract also a "latent defects" clause: F

"The goods are not warranted free from defect rendering same unmerchantable which would not be apparent on reasonable examination, any statute or rule of law to the contrary notwithstanding." F

This clause is confined to questions of merchantability. It certainly cannot affect the implied condition as to fitness. Moreover, there is a consistent body of authority from the early years of this century which has construed exclusions narrowly and declined to accept exclusions of warranty as sufficing to exclude conditions. (See *Clarke v. Army and Navy Co-operative Society* (123); *Wallis Son & Wells v. Pratt and Haynes* (124); *Baltry v. Marshall* (125); *Barker (W.) Junior & Co., Ltd. v. Agius (Ed. T.), Ltd.* (126), and *Cammell Laird & Co., Ltd. v. Manganese Bronze and Brass Co., Ltd.* (127).) On these authorities I do not think that the clause protects Kendall against an implied condition as to merchantability. G H

When Kendall sold to Grimsdale they were aware that the purpose of Grimsdale was "to re-sell in smaller quantities to be compounded into food for cattle and poultry" (HAVERS, J. (128)). If, therefore, a condition resulted under s. 14 (1) from that knowledge, the food must be fit both for cattle and poultry. Fitness for one coupled with unfitness for the other would not suffice.

The judge and the Court of Appeal (129) held that the purpose of Grimsdale was a "particular purpose" within s. 14 (1). It was argued that such a purpose was too wide and had not enough particularity to constitute a particular purpose. I do not accept this contention. Almost every purpose is capable of some sub- I

(123) [1903] 1 K.B. 155.

(124) [1911-13] All E.R. Rep. 989; [1911] A.C. 394.

(125) [1924] All E.R. Rep. 155; [1925] 1 K.B. 260.

(126) [1927], 33 Com. Cas. 120; 28 Lloyd L.R. 282.

(127) [1934] All E.R. Rep. at p. 15; [1934] A.C. at p. 432.

(128) [1964] 2 Lloyd's Rep. at p. 272.

(129) [1966] 1 All E.R. 309.



- A division, some further and better particulars; but a particular purpose means a given purpose, known or communicated. It is not necessarily a narrow or closely particularised purpose (see BENJAMIN ON SALE (8th Edn.) p. 630: "A particular purpose is not necessarily distinct from a general purpose"). A purpose may be put in wide terms or it may be circumscribed or narrowed. An example of the former is to be found in *Bartlett v. Sydney Marcus, Ltd.* (130) where the purpose
- B was that of a car to drive on the road. See also *Baldry v. Marshall* (131) ("a comfortable car suitable for touring purposes"). A somewhat narrower purpose was to be found in *Bristol Tramways, etc. Carriage Co., Ltd. v. Fiat Motors, Ltd.* (132) ("an omnibus for heavy traffic in a hilly district"). The less circumscribed the purpose, the less circumscribed will be, as a rule, the range of goods which are reasonably fit for such purpose. The purpose of a car to drive on the
- C road will be satisfied by almost any car so long as it will function reasonably; but the narrower purpose of an omnibus suitable to the crowded streets of a city can only be achieved by a narrower range of vehicles. This, however, is a question of fact and degree. LORD HERSCHELL said in *Drummond v. Van Ingen* (133):

"Where the article may be used as one of the elements in a variety of other manufactures, I think it may be too much to impute to the maker of this common article a knowledge of the details of every manufacture into which it may enter in combination with other materials."

In general it would be wrong to say, as was suggested in argument, that a wide purpose is unfair to the seller because it purports to require fitness for every conceivable subdivision of purpose within the main purpose.

- E I would expect a tribunal of fact to decide that a car sold in this country was reasonably fit for touring even though it was not well adapted for conditions in a heat wave; but not, if it could not cope adequately with rain. If, however, it developed some lethal or dangerous trick in very hot weather, I would expect it to be found unfit. In deciding the question of fact the rarity of the unsuitability would be weighed against the gravity of its consequences. Again, if food was
- F merely unpalatable or useless on rare occasions, it might well be reasonably suitable for food; but I should certainly not expect it to be held reasonably suitable if even on very rare occasions it killed the consumer. The question for the tribunal of fact is simply "were these goods reasonably fit for the specified purpose?"

- "To re-sell in smaller quantities to be compounded into food for cattle and poultry" was, therefore, a particular purpose within s. 14 (1). If a particular
- G purpose is made known, that is sufficient to raise the inference that the buyer relies on the seller's skill and judgment unless there is something to displace the inference. There is no need for a buyer formally to "make known" that which is already known. See *Manchester Liners, Ltd. v. Rea, Ltd.* (134); *Cammell Laird & Co., Ltd. v. Manganese Bronze and Brass Co., Ltd.* (135); *Mash and Murrell, Ltd. v. Joseph Emanuel, Ltd.* (136) (a sale from one merchant to another). The
- H reliance need not be exclusive. Partial reliance will suffice.

- The judge considered that the inference that the buyer relied on the seller's skill and judgment was displaced by the fact that Grimsdale and Kendall were members of the same association, the London Cattle Food Traders Association. I do not, with respect, accept this view. The whole trend of authority has inclined
- I towards an assumption of reliance wherever the seller knows the particular purpose; and where there are several subsales and the purpose is obvious, the liability is frequently passed up the line. To cut the chain of liability at one particular point is not fair unless there is some cogent reason for doing so. In

(130) [1965] 2 All E.R. 753. (131) [1924] All E.R. Rep. 155; [1925] 1 K.B. 260.

(132) [1908-10] All E.R. Rep. at p. 118; [1910] 2 K.B. at p. 841.

(133) (1887), 12 App. Cas. at p. 293.

(134) [1922] All E.R. Rep. at p. 614; [1922] 2 A.C. at p. 92.

(135) [1934] All E.R. Rep. 1; [1934] A.C. 402.

(136) [1961] 1 All E.R. 485 at p. 487.

the present case I see no grounds for holding that Kendall were in any relevantly different position from Grimsdale. The fellow-membership of the C.F.T.A. was irrelevant. One member may rely on another member just as much as he relies on an outside trader. The fellow-membership may even increase his reliance. A

Reliance is not excluded by the fact that the seller may not himself have seen the goods he sells. In *Bigge v. Parkinson* (137) where it was implied that stores for troops in India must be fit for their purpose, SIR ALEXANDER COCKBURN, C.J., B said (138):

“Where a person undertakes to supply provisions, and they are supplied in cases hermetically sealed, but turn out to be putrid, it is no answer to say that he has been deceived by the person from whom he got them.”

The seller, not the buyer, is aware of the provenance of the goods and has chosen to acquire them for disposal. It would, therefore, be not unreasonable that the buyer should rely on the seller's “knowledge and trade wisdom” to use a phrase quoted in *Grant v. Australian Knitting Mills, Ltd.* (139), by EVATT, J., from *Ward v. Great Atlantic & Pacific Tea Co., Ltd.* (140). Moreover WALTON, J., in *Preist v. Last* (141) refers to the buyer's reliance that the seller will not sell him “mere rubbish”. This expression is echoed in the evidence in the present case where Mr. Brown of Lillico said that they relied on Kendall “not to sell what they knew was rubbish”. C D

It is argued that the width of the purpose should prevent one from inferring that there was reliance. I do not think so. The compounders of food for cattle and poultry need healthy ingredients, as the sellers knew. The parties were not considering what admixture of healthy ground nut meal would be good for particular animals or birds, but whether assuming a certain quantity of ground nut meal would be a fit ingredient, the goods delivered would be healthy or harmful ground nut meal. It was reasonable that the buyer should rely on the seller to deliver ground nut meal which would, as ground nut meal, be a healthy and not a harmful ingredient in a compound. E

In my opinion, there was on the circumstances of this case sufficient to establish reliance by Grimsdale on Kendall and a resulting condition. F

The condition did not mean that the food was fit, however strange or unsuitable the proportions of the compound might prove to be. It meant that the food was fit if compounded reasonably and competently according to current standards. Goods are not fit if they have hidden limitations requiring special precautions, unknown to the buyer or seller. The ground nut meal delivered was plainly not fit for the purpose of reselling in smaller lots to compounders of food for cattle and poultry. It was highly toxic. It is beside the point that Kendall were unaware of the proportions in which it was to be compounded. It was unfit for use in the normal range of proportions. The evidence shows that ten per cent. was included in the feeding stuff for pheasants. This was not abnormal. When the toxicity had been discovered and investigated the recommendation of a reputable working party was that not more than five per cent. of meal with a high toxicity should be included even in cattle rations and none should be included in rations for birds. Moreover, while its toxicity was unknown, the meal was thereby far more harmful and dangerous. Even had the buyer known of its toxic qualities, it was not fit for compounding for poultry. For a compounder's business is to mix healthy foods in suitable compounds. It is quite unsuitable that he should get toxic meal which can only be used by inserting it in quantities so abnormally small that the dilution of other compounds removes its lethal effect. All the courts below have held rightly, without any dissent, that this meal was not reasonably fit for the purpose for which it was supplied by Kendall to Grimsdale. G H I

(137) (1862), 7 H. & N. 955.

(138) (1862), 7 H. & N. at p. 959.

(139) (1933), 50 C.L.R. at p. 445.

(140) (1918), 231 Mass. 90,

(141) (1903), 89 L.T. 33 at p. 35.

A Kendall are therefore liable in breach of the condition under s. 14 (1). The resulting damage was injury to young pheasants who ate the compound. Was this too remote? Although the intention of the compounders to use the meal in compounds for pheasants was not known, the meal would be harmful for the known particular purpose which was compounding into food for cattle and poultry since it would be harmful to poultry. The use of poultry compounds  
 B for rearing pheasants was a generally known use. In my opinion, the damage was in the natural course of events and also was within the contemplation of the parties. Kendall are therefore liable for it.

Were these goods merchantable? Merchantability is concerned not with purpose but with quality. The judge found that the ground nut meal was of merchantable quality and the Court of Appeal (142) has upheld this finding.

C That finding does not, as it happens, affect the result of the case. Therefore, no purpose could be served by a detailed investigation of the complicated evidence and considerations involved; but in my opinion the judge arrived at this conclusion on an erroneous view of the principles applicable. He found (143) that the goods

D “were capable in their ordinary user of being ultimately compounded into food for cattle (including a wide variety of animals under that description) or into food for poultry (including a wide variety of birds under that description). As compounded into food for cattle, certainly older cattle, it has been used without harm, though some of it has been injurious to calves and pigs. There was at any rate a limited market in this country after the troubles arose in 1960, inasmuch as B.O.C.M. sold some of their Brazilian  
 E ground nut meal which they had left on their hands for food for cattle but not for poultry. Again on the other hand since the trouble in 1960, the London cattle food trade market has not imported any ground nut meal into this country from Brazil and . . . the word ‘Brazilian’ as applied to ground nut meal in this country is a dirty word. As a compound food for  
 F poultry quantities of it have been proved to be lethal to very young birds, such as day-old ducklings, turkey poult, and pheasant chicks and poults, and injurious to chickens in a much less degree. The plaintiffs’ breeding hen pheasants, however, suffered no ill effects. Though the meal was unfit for use for one purpose as a compound food for poultry, I cannot find that the meal in the form in which it was tendered, *was of no use for any purpose for which the meal would normally be used and hence was unsaleable under that description.*”  
 G

The words which I have underlined come from LORD WRIGHT’s opinion in *Cammell Laird v. Manganese Bronze* (144). He used similar expressions in *Canada Atlantic Grain Export Co., Inc. v. Eilers* (145) where he upheld a finding of merchantability with which he was obviously out of sympathy and in *Grant v. Australian Knitting Mills, Ltd.* (146). HAVERS, J., preferred these dicta to the definition of FARWELL, L.J., in *Bristol Tramways etc., Carriage Co., Ltd. v. Fiat Motors, Ltd.* (147) that a merchantable article is

H “. . . of such quality and in such condition that a reasonable man acting reasonably would, after full examination, accept it under the circumstances of the case in performance of his offer to buy that article whether he buys for  
 I his own use or to sell again. . . .”

The latter definition has been amplified by DIXON, J. in *Grant v. Australian Knitting Mills, Ltd.* (148), where he said (149):

(142) [1966] 1 All E.R. 309. (143) [1964] 2 Lloyd’s Rep. at p. 271.

(144) [1934] All E.R. Rep. at p. 14; [1934] A.C. at p. 430.

(145) (1929), Lloyd L.R. at p. 213.

(146) [1935] All E.R. Rep. at p. 215; [1936] A.C. at p. 99.

(147) [1908-10] All E.R. Rep. at pp. 117, 118; [1910] 2 K.B. at p. 840.

(148) (1933), 50 C.L.R. 387. (149) (1933), 50 C.L.R. at p. 418.



"The condition that goods are of merchantable quality requires that they should be in such an actual state that a buyer fully acquainted with the facts and, therefore, knowing what hidden defects exist, and not being limited to their apparent condition would buy them without abatement of the price obtainable for such goods if in reasonably sound order and condition and without special terms. (See *Bristol Tramways, etc., Carriage Co., Ltd. v. Fiat Motors, Ltd.* (150); *Jackson v. Rotax Motor and Cycle Co.* (151); *Morelli v. Fitch & Gibbons* (152); *H. Beecham & Co., Pty., Ltd. v. Francis Howard & Co., Pty., Ltd.* (153).)"

In my opinion, the definition of FARWELL, L.J., as amplified by DIXON, J. is to be preferred to that of LORD WRIGHT which has, I think, the following weakness. The suggestion, without more, that goods are merchantable unless they are of no use for any purpose for which they would normally be used and hence would be unsaleable under that description may be misleading, if it contains no reference to price. One could not say that a new carpet which happens to have a hole in it or a car with its wings buckled are of no use for their normal purposes and hence would be unsaleable under that description. They would no doubt, if their price was reduced, find a ready market. In return for a substantial abatement of price a purchaser is ready to put up with serious defects, or use part of the price reduction in having the defects remedied. In several classes of goods there is a regular retail market for "seconds", that is, goods which are not good enough in the manufacturer's or retailer's view to fulfil an order and are therefore sold off at a cheaper price. It would be wrong to say that "seconds" are necessarily merchantable.

DIXON, J. was clearly right in saying (154) that in order to judge merchantability one must assume a knowledge of hidden defects, although these do not manifest themselves or are not discovered until some date later than the date of delivery which is the time as at which one must estimate merchantability (see also ATKIN, L.J. in *Niblett, Ltd. v. Confectioners Materials Co., Ltd.* (155): "No one who knew the facts would be willing to buy them in that state or condition; in other words they were unsaleable and unmerchantable"). What additional after-acquired knowledge, however, must one assume? Logic might seem to indicate that the court should bring to the task all the after-acquired knowledge which it possesses at the date of trial; but I do not think that this is always so. For one is trying to find what market the goods would have had if their subsequently ascertained condition had been known. As it is a hypothetical exercise, one must create a hypothetical market. Nevertheless the hypothetical market should be one that could have existed, not one which could *not* have existed at the date of delivery. Suppose goods contained a hidden deadly poison to which there was discovered by scientists two years after delivery a simple, easy, inexpensive antidote which could render the goods harmless. They would be unmarketable at the date of delivery if the existence of the poison was brought to light, since no purchaser could then have known the antidote to the poison. Hypothesis is no reason for complete departure from possibility. One must keep the hypothesis in touch with the facts as far as possible; but I do not think that the point is important on the present facts.

In the present case, if on the day of delivery one had immediately compounded from it and fed the mixture from it to turkeys or young chickens or young pheasants, it appears from the evidence that the birds would have died. One would then have had to label the goods for the market "This food contains toxin so that if compounded in normal proportions it is fatal to turkeys, young chickens, or young pheasants or ducklings". Also, I think, "the nature of

(150) [1908-10] All E.R. Rep. at pp. 117, 118; [1910] 2 K.B. at p. 840.

(151) [1910] 2 K.B. 937 at p. 950.

(152) [1928] All E.R. Rep. 610; [1928] 2 K.B. 636.

(153) [1921] V.L.R. 428.

(154) (1933), 50 C.L.R. at p. 418.

(155) [1921] All E.R. Rep. 459 at p. 465; [1921] 3 K.B. 387 at p. 404.

A and strength of the toxin are unknown". I find it hard to believe that there was on the date of delivery a market for it so labelled without abatement of price, even without the addition of the last sentence. On such evidence as there is it seems unlikely.

There is a further important point which the judge, I think, disregarded. The above argument is on the basis that the goods had a label setting out the courts' after-acquired knowledge of their toxin; but goods sold as fit for food and containing toxin of which no mention is made are quite different from goods which are labelled with a warning. Food which will be consumed by humans generally may be merchantable even though it will be dangerous to young children, provided, but only provided, that clear warning of that fact is given (or that the fact is so universally known that a warning is unnecessary). Food which was thought to be innocuous and whose normal purpose was for general consumption by cattle and poultry would be a hidden trap if, unknown to the buyers, it was lethal when used on some classes of its potential consumers. Thus the absence of a warning was in itself a serious defect, which can make goods unmerchantable even though they would have been merchantable if sold with due notice of the hidden defect. On this point it is irrelevant to consider whether, D with a warning, it would have found buyers at the price. In my opinion, the real question for the court to consider is whether *this* ground nut meal with its particular toxicity but *without any warning to buyers* was merchantable as ground nut meal, which normally was fit for consumption by cattle and poultry without discrimination.

In arriving at his finding on merchantability, the judge erroneously left out E of account both the trap element and the question of price and as a result of that, I think he arrived at a wrong decision on the point.

The question of liability under the Fertilisers and Feeding Stuffs Act, 1926, presents several problems. I agree with the majority of the Court of Appeal (156) that pheasants are not poultry within the meaning of the Act of 1926. I cannot, however, agree that food sold for use as an ingredient is outside the intention of s. 2 (2). Food is sold for use as food for cattle or poultry whether it is to be fed neat to them or to be compounded into a mixture which will be eaten by cattle or poultry. To exclude ingredients from the Act of 1926 would seriously weaken its effectiveness; and I find no sufficient indications in the Act of 1926 to justify excluding from the ambit of s. 2 (2) food sold for compounding, which would come within a natural interpretation of the words of the section. No such discrimination was made in *G. C. Dobell & Co., Ltd. v. Barber and Garrett* (157). (see the judgment of SCRUTTON, L.J. (158)). See also *Pinnock Brothers v. Lewis and Peat, Ltd.* (159).

The more difficult question is whether the Act of 1926 applies to c.i.f. contracts. Both sides contend that *C. E. B. Draper & Sons, Ltd. v. Edward Turner & Sons, Ltd.* (160) is unsatisfactory and neither seeks to support it. I agree with them H that the reasons on which it is based are wrong. The Act of 1926 cannot have intended to allow the existence of a warranty to depend on the fortuitous position of a ship on the ocean at the moment when the documents are taken up. That would be too whimsical a test. The words of the Act of 1926 do not compel one to such a conclusion.

I do not accept the hypothesis which underlay the judgments in *Draper's case* I (160) namely, that the sale occurs in the place where movable goods are at the moment when the property passes. If one Englishman in London sells to another Englishman in London some movable goods which he owns abroad, I do not accept that the sale takes place abroad. I would rather incline to the view that it takes place in England, where the contract takes effect and the property passes from vendor to purchaser; but I do not think that an exploration of

(156) [1966] 1 All E.R. 309.

(157) [1931] 1 K.B. 219.

(158) [1931] 1 K.B. at pp. 225, 228.

(159) [1923] 1 K.B. 690 at p. 699.

(160) [1964] 3 All E.R. 148; [1965] 1 Q.B. 424.

this problem will show what the Act of 1926 intended. The c.i.f. contract is unlike other sales of goods. It is completed when the bill of lading is transferred (in this case in London) and this constitutes constructive delivery. The legal situation is clearly analysed in the judgment of KENNEDY, L.J. in *Biddell Brothers v. E. Clemens Horst Co.* (161). The situation of the goods is irrelevant. A

Moreover, I doubt if the differentiation between sale and agreement for sale in *Draper's* case (162) is justified for the purpose of the Act of 1926. It is more likely I think that sale is intended to include an agreement to sell. (See *Lambert v. Rowe* (163) where there is quoted the complaint of CROMPTON, J. in *Stretch v. White* (164) that the justices "enchanted by the niceties of the law of sale" are "too reconcite in their law by far" for the construction of the Act there in question.) Section 7 of the Act of 1926 confirms this. It creates an offence in a person who sells or offers or exposes for sale. It seems likely that an agreement for sale must have been included, had it not been intended that it should be covered by the word "sells". Moreover, the appropriate occasion for the importation of a warranty under s. 2 (2) would be the contract or agreement for sale and under that subsection it would be more appropriate to read "sale" as including agreement for sale. B C D

The general intention of the Act of 1926 does not give any certain guidance on whether s. 2 (2) was intended to apply to c.i.f. contracts. Obviously the Act of 1926 intended to protect the English farmer in his purchases of food for his animals. It could have intended to do this by merely providing warranties at the bottom end of the chain of food purchases. Or it could have intended to keep the English market throughout clean from harmful foodstuffs, which would be an equally sensible and more reliable way of achieving the ultimate end in view. In the latter case it may have intended to take precautions, as soon as it could in practice do so, against harmful food imported into the market from abroad. All the indications seem to point in this direction. E

The words of s. 2 (2) contain no limitation in this respect. "On the sale for use as food for cattle or poultry . . . there shall be implied, notwithstanding any contract or notice to the contrary, a warranty by the seller . . ." Prima facie this would apply to every contract in this country. In the present case one has the following facts. The contract was made in England between two parties who carried on business in England. The contracts were governed by English law. The documents were taken up and paid for in London. The goods came to England; and it was English animals who would eat the food. Why, therefore, asks counsel for Grimsdale and Lillico, should s. 2 (2) not apply to this particular case, wherever the line may be drawn in cases which have different ingredients? F G

The most powerful argument against applying s. 2 (2) to c.i.f. contracts is the difficulty of also applying the criminal provisions. For instance, it is clear that the enforcement by county councils and county boroughs (s. 11), and the sections relating to samples (ss. 12-18) are simply directed to goods in this country. Moreover in s. 5 there seems good ground for assuming that the criminal responsibility goes no further back than sales ex-ship or ex-quay. That section makes it clear, however, that the Act of 1926 intends to catch the goods as soon as they leave the ship since it applies in the case of articles delivered or consigned ex-ship or quay to a purchaser. A further difficulty is caused by cases where it might seem absurd to apply even s. 2 (2) to c.i.f. contracts, e.g. (to take an extreme example) where both parties are foreigners abroad or the goods having come H I

(161) [1911-13] All E.R. Rep. at pp. 96, 97; [1911] 1 K.B. at pp. 955, 956.

(162) [1964] 3 All E.R. 148; [1965] 1 Q.B. 424.

(163) [1914] 1 K.B. 38 at p. 47,

(164) (1861), 25 J.P. 485.



A here from one foreign country are to be sold by a foreigner to another foreign country.

Admittedly there is a link between the criminal provisions and s. 2 (1). Section 2 (2), however, is a purely civil warranty. It is stated in explicit terms; and I cannot find from the terms of the criminal sections sufficient grounds for cutting down the express words of the civil warranty, more especially since  
B it is far from clear what is the exact extent of any resulting limit. At common law there is delivery of the goods when the bill of lading is handed over. Prior to that there is no delivery. By s. 26 (2), however,

C “An article consigned to a purchaser shall not for the purposes of this Act be deemed to be delivered to him until it arrives at the place to which it is consigned, whether the consignment is by direction of the seller or the purchaser.”

Although the language of the section is not very happy the goods bought by Grimsdale might be considered goods “consigned to a purchaser” when the documents were taken up under the contract of sale. If so, they were deemed to  
D be delivered in London.

Since, therefore, *prima facie* s. 2 (2) applies to all English contracts and all its ingredients are English, in my opinion s. 2 (2) applies and there was a statutory warranty. It may be that different ingredients might give rise to other considerations some of which have been explored in argument, but I do not find it necessary to consider them in the present case.

E The statutory warranty under the Act of 1926 was broken in that the food sold for the use of cattle or poultry was not suitable to be used as such. Grimsdale suffered damage in that they became liable in damages to S.A.P.P.A. They are entitled to recover this damage unless it was too remote. On the facts it was not too remote. The considerations are precisely the same as those under s. 14 (1) of the Sale of Goods Act, 1893. I see no ground for limiting the statutory warranty  
F under the Act of 1926 or treating it differently from warranty under the Sale of Goods Act, 1893. It was not a warranty that if used by cattle or poultry only it would do them no harm. It was a warranty that the food sold was suitable for use as food for cattle or poultry. That warranty has the same effect as an express warranty (*G. C. Dobell & Co., Ltd. v. Barber and Garrett* (165), per  
G LAWRENCE, J.). Once that warranty was broken the purchasers were entitled to normal damages. The mere fact that the statute allowed no contracting out of the warranty produced no abnormal limitation on damages. Nor is there anything to be deduced from other parts of the Act of 1926 which would indicate that it intended any such limitation.

I would therefore dismiss the appeals.

H LORD WILBERFORCE: My Lords, the findings of HAVERS, J. at the trial unequivocally established that the death and stunting of the plaintiffs' (Hardwick's) pheasants was caused by the presence of the toxin “aflatoxin” in part of the ground nut extractions sold by Kendall and Holland Colombo to Lillico and Grimsdale, resold by the latter to Suffolk Agricultural and Poultry  
I Producers Association, Ltd. and used by S.A.P.P.A. in the compound feeding stuffs supplied to Hardwick. The presence of this toxin was not known to, and in the state of expert knowledge at the relevant time could not have been reasonably detected by any of the sellers, but it is agreed that this circumstance does not affect their liability. On this set of facts, the appropriate remedy of the plaintiffs, and of the successive buyers up the chain of supply against their respective sellers would, one would think, naturally arise under the Fertilisers

and Feeding Stuff's Act, 1926, a piece of legislation passed to deal specifically with this type of situation. This has in fact been invoked, but since a claim under the Act of 1926 involves a number of separate ingredients as to each of which some doubt exists, a parallel set of claims has also been made under the Sale of Goods Act, 1893, and moreover—to complicate the issues further—under both s. 14 (1) and s. 14 (2) of the Act of 1893. I shall deal first with these and I shall do so as they arise between the parties to the main appeal, namely, as between Grimsdale and (in so far as they are involved) Lillico as buyers and Kendall or Holland Colombo as sellers. Inasmuch as Kendall, or their representative acted, for all relevant purposes, for Holland Colombo, it is fortunately not necessary to distinguish between the two sellers.

The buyers' claim is based, in the alternative, on s. 14 (1) or on s. 14 (2) of the Sale of Goods Act, 1893, and there is nothing surprising about this. These two subsections, together with sub-s. (3), state exceptions to the general rule supposed to exist at common law, of caveat emptor, a rule of which little now remains. They cover the main situations in which most buyers find themselves: either (s. 14 (2)) a buyer goes to a seller who deals in goods of a particular description and makes his purchase with nothing said or implied on either side: in that case the condition of "merchantability" arises. Or (166) a buyer, who wants goods for a particular purpose, makes this known to the seller, so as to show that he relies on his skill and judgment, in which case the narrower condition of fitness arises.

The words in which these simple situations, and their legal consequences, are described are plain, untechnical words. They are contained in an Act which is supposed (and generally thought with success) to codify this branch of our law. It should be possible to apply them directly to the given situation without the use of fact to fact analogies and fact from fact distinctions drawn from reported cases. Many of these were cited in the lengthy argument in this House, but I shall not refer to them because there is really no controversy as to what, relevantly, they show. They demonstrate, as one would assume, that both subsections are readily and untechnically applied to all sorts of informal situations—such as retail sales over the counter of articles whose purpose is well known—and are applied rather more strictly to large scale transactions carried through by written contracts. Further, that the legal consequences stated by the subsection may arise from the use of informal words, or without any words from a course of practice or through common knowledge. They confirm, too, that "particular" in s. 14 (1) is not used in contrast to "general" or so as to require a quantum of particularity, but more in the sense of "specified" or "stated". The word takes its colour from those that follow: the "particularity" must be such as to show to the seller the extent and manner in which his skill and judgment is relied on.

That the "fact to fact" approach is not merely circuitous but perilous is well shown in the present case. The sales here were from Kendall to Grimsdale (or Lillico) both members of and traders on the London Cattle Food Trade Association. Now in *C. E. B. Draper & Son, Ltd. v. Edward Turner & Son, Ltd.* (167) the Court of Appeal was concerned with another contract between members of the same association. The learned trial judge, after an examination of the evidence, which clearly disposed him towards a finding that the condition of fitness under s. 14 (1) ought to be implied, felt himself bound to hold otherwise because of observations in *Draper's* case (167); and when the present case reached the Court of Appeal (168) much of the argument, and some of the difference of opinion which emerged, was related to the effect of the earlier

(166) Section 14 (1)

(167) [1964] 3 All E.R. 148; [1965] 1 Q.B. 424.

(168) [1966] 1 All E.R. 309

- A decision. This approach has led to some confusion. To treat *Draper's case* (169) as deciding, either expressly or by implication, that s. 14 (1) does not apply to sales on a market, is to convert a decision on fact into a rule of law and to ignore the fact that not all sales, even on a given market, not to mention sales on different markets, bear the same character, or involve the same incidents.
- B There may be sales as between dealers, engaging in the same kind of activity where, nothing being said or implied, the conclusion ought to be that the parties stand on a level footing, neither relying on the skill or judgment of the other. There may equally be sales where, either, the two parties are fulfilling different functions, or they are requiring the goods for different purposes, and where some reliance is expressed or implied. What is necessary first, and probably last, is
- C to find out the nature and circumstances of the bargain. Such difficulty as there is in the present case arises from the fact that, no doubt because the parties were so largely preoccupied with other difficult issues, the evidence as to the relevant sale is exiguous. There is enough, in my opinion, however, to support the conclusion, to which I think HAVERS, J. would have arrived "unaided" by *Draper's case* (169), that there was a particular purpose made known to
- D Kendall so as to show that their skill and judgment was relied on.

As regards the relationship of the parties, it was shown that, in relation to the Brazilian ground nut extractions, Kendall were acting as shippers, Grimsdale as wholesalers. These shipments in 1960 were, it appears, among the earliest shipments of extractions of Brazilian origin; they were arranged by Kendall, and by them communicated to Grimsdale. This, to my mind, creates an initial area

E of responsibility on the part of Kendall.

Then was there a particular purpose made known to Kendall so as to show reliance? The purpose for which the goods were required and the knowledge of it was found by the learned judge in the following terms (170):

- "I am satisfied the Kendall on their own account and as brokers for
- F Holland Colombo knew the particular purpose for which Lillico and Grimsdale respectively required the Brazilian ground nut meal, namely to resell in smaller quantities to be compounded with food for cattle and poultry."

- He went on to say that if the particular purpose is made known that raises a presumption of reliance, but that in this case the presumption was rebutted by
- G common membership of the London Cattle Food Trade Association—a conclusion supported by *Draper's case* (169). In the Court of Appeal (171), DIPLOCK, L.J. who agreed with him on this point went further in attaching importance, where sales take place on an international commodity market on the terms of a standard printed contract, to maintaining uniformity of obligation as between seller and buyer.

- H With this general proposition I entirely agree. On many commodity markets, where business or speculative dealings take place between persons on the market, it would no doubt be true that each buyer relies on his own judgment and it would be wrong to seek to impose on sellers an implied condition based on reliance. To do so would impede the play and working of the market and would be in opposition to commercial reality. That does not mean, however, that in
- I individual cases the possibility of reliance may not exist. If the buyer can show that a particular purpose was made known so as to show reliance, the condition may attach: and, because the transaction takes place in the context of a market, between two persons of generally equal competence and knowledge and on the basis of a standard contract which incorporates no such condition and the terms of which may indeed suggest that no such condition applies, the buyers' task

(169) [1964] 3 All E.R. 148; [1965] 1 Q.B. 424.

(170) [1964] 2 Lloyd's Rep. at p. 272.

(171) [1966] 1 All E.R. 309.



may not be an easy one. In seeking to discharge it, it is not sufficient merely to show that the seller knew of the purpose. Of course he may. Business men do not work in a vacuum, they know their trade and their customers and they are not to be saddled with conditions merely because they are competent and knowledgeable. The purpose must be made known so as to show reliance. Was it, then, so here? The finding of the judge quoted above does not in its terms go as far as this, though I note that the following passage contains the phrase "if the particular purpose is made known" which suggests that he thought that it was. So we must look at such evidence as there is. On the sellers' side Mr. Macleod's evidence was that, without any detailed knowledge of the precise mixtures or proportions in which the extractions would be used, he knew they were going into the compound trade where they would finish up inside the turkey or the duck, that food was sold without reservation as fit to be fed to all stock, that a firm like Grimsdales would split it up for the country trade. On the buyers' side Mr. Waterfall, a director of Grimsdale, said that they had never bought Brazilian ground nut extractions before and that they got on to them because they were offered by Kendall, they were chased by Kendall. Mr. Brown, Lillico's representative, said that Mr. MacLeod told him that Kendall had a nice line of ground nut extractions and that he placed great reliance on their integrity and knew that they would not sell anything he knew was rubbish. This, taken together with the evidence as to the respective roles of Kendall on the one hand and Grimsdale and Lillico on the other, I think is so far sufficient to establish the required degree of reliance.

There remains, however, the point that the parties entered into a written contract on the London Cattle Food Trade Association's form No. 6 and this contained (cl. 10) a latent defect clause in the following terms:

"The goods are not warranted free from defect rendering same unmerchantable which would not be apparent on reasonable remuneration, any statute or rule of law to the contrary notwithstanding."

The appellants relied strongly on this clause. They had the support of DIPLOCK L.J. (172) who thought it offended common sense to believe that the buyer was prepared to accept total unmerchantability from latent defect, but not a more limited unsuitability.

While I feel the force of this, I think that the difficulty to which this clause gives rise disappears when one considers the way in which the bargain was made. This standard contract exists in order to regulate the normal situation of dealing on a market inter pares where no particular purpose is made known. In this situation, as I have suggested above, s. 14 (2) is the statutory provision which normally operates, and so the clause is inserted to exclude it. Then, in relation to an individual bargain a particular purpose is made known: this attracts s. 14 (1). Is, then, the fact that, in a different situation (viz., no particular purpose stated), the buyer accepts the risk of unmerchantability, relevant to the question whether the condition as to fitness (implied under s. 14 (1)) is to be introduced? I think not. The question of course remains whether the contractual cl. 10 excludes the new special condition. As to this see below (i). I come, therefore, on balance to the conclusion that the buyers (Grimsdale and Lillico) were entitled to rely on the implied condition as to fitness imported by s. 14 (1) of the Sale of Goods Act, 1893.

The remaining questions under this heading I would deal with as follows:

(i) The implied condition is not excluded by cl. 10 of the standard contract. The reasons for this are classical, and on it I agree with the judgments of SELLERS, L.J. (173) and DAVIES, L.J. (174).

(172) [1966] 1 All E.R. at 342, letter F.

(173) [1966] 1 All E.R. at p. 312.

(174) [1966] 1 All E.R. at p. 323.

- A** (ii) The condition (treated as a warranty) was broken by the sellers because, as the judge found and there was evidence in support, the food was unfit for use as a compound food for poultry.
- (iii) The buyers are entitled to damages whether or not "pheasants" are in this context to be included in the description "poultry". This follows on normal principles and is one point on which no difference of opinion exists in the courts below.
- B** (iv) The further question whether the buyers could recover under s. 14 (2) of the Sale of Goods Act, 1893, on the ground of unmerchantability does not, in my view, arise. On the interpretation of the subsection, however, I agree with the views expressed by my noble and learned friend, LORD PEARCE.
- C** I next come to the separate question whether the buyers are entitled to damages under the statutory warranty contained in s. 2 (2) of the Act of 1926. I shall deal briefly with all of the points arising under this Act except one, which is said to involve questions of general importance and on which the learned judges below have differed. I wish to make clear that this is a separate and independent ground of decision and not subsidiary or obiter to that under the Sale of Goods Act, 1893.
- D** (A) Whether "pheasants" are "poultry" within the meaning of the Act of 1926. This question, though emotive, is a short one and I shall answer it shortly. In common or dictionary parlance pheasants are clearly not poultry (see the judgments in the Court of Appeal (175)), but to rest there might attract a charge of literalism, so one must relate this question to the purpose of the Act of 1926. If the normal meaning is to be extended, that must be on one of two grounds.
- E** The first might be that the Act of 1926 is intended to apply to all domesticated birds, so that a pheasant reared and fed in captivity is, during that period, to be regarded as poultry, becoming "game" when released. This solution involves the difficulty that it would include as poultry a large class of other birds which can never have been intended, such as parrots or budgerigars. Then, alternatively,
- F** can it be said that the Act of 1926 is intended to protect all birds fed with a view to table consumption? This definition would commend itself to Dr. Johnson and Mrs. Beeton and the statutory intention reflected by it would be intelligible if anthropocentric; but it will not meet the present case. For Hardwick's business was that of a game farm and their pheasants were reared for sale to landowners. Their ultimate fate might not differ from that of their cousin, the common fowl,
- G** but the business of producing the two species is too widely different for both to be within the Act of 1926. On this I agree with DAVIES, L.J. (176) and DIPLOCK, L.J. (177).
- (B) Does the Act of 1926 apply to substances not intended to be fed to animals or poultry, but to be used as ingredients in a compound food? In my opinion clearly yes. I am content to agree in this with the reasons given by SELLERS,
- H** L.J. (178).
- (C) Is the statutory warranty broken although the animals killed or injured are not poultry? In my opinion, yes. While, with DIPLOCK, L.J. (162), I appreciate that the warranty is statutory and that the seller cannot contract out of it, it still is a warranty, imported as such into the contract of sale, and I can see no reason for not applying the normal rules as to damages to its breach. I agree
- I** on this with SELLERS, L.J. (178).
- (D) The final question, as stated by the Court of Appeal (175) is whether the Act of 1926 applies to sales under a c.i.f. contract. More precisely I think that the question should be whether the statutory warranty which arises under s. 2 (2) of the Act of 1926 ought to be imported into the contract of sale (c.i.f. London) between Kendall or Holland Colombo and Grimsdale made on form No. 6 of the

(175) [1966] 1 All E.R. 309.

(177) [1966] 1 All E.R. at p. 330.

(176) [1966] 1 All E.R. at p. 323.

(178) [1966] 1 All E.R. at p. 312.

London Cattle Food Trade Association, but I recognise that in seeking to answer this question it may be necessary to enlarge the enquiry and consider both other provisions in the Act of 1926 and c.i.f. contracts of sale generally. HAVERS, J., and the Court of Appeal (179) answered this question in the negative considering that they were bound by the previous decision in the Court of Appeal in *Draper's* case (180) though two of the learned lords justices expressed some doubts with regard to it.

In *Draper's* case (180) the contract was, as here, made in England between two English companies on the printed form No. 6 of the London Cattle Food Trade Association. This form of contract is described as a "contract for imported feeding stuffs and meals" and is expressed to be governed by English law. The question there arose as to the liability of the sellers (fifth parties) to the buyers (fourth parties) under the statutory warranty (s. 2 (2) of the Act of 1926) in respect of contamination of the goods and it may be noted that the buyers had, in that case, re-sold on c.i.f. terms, to other parties (the third parties) before the goods arrived in the United Kingdom. LYELL, J., held that the warranty should be implied. He pointed out that there is no express limit on the class of contracts to which s. 2 (2) applies and said that, whatever limitation might have to be made with respect to contracts for the sale of goods in one foreign country to another foreign country, he could see nothing in the section which would exclude a contract between an English buyer and seller for the sale of goods to be shipped to an English port. To me this argument seems persuasive.

The Court of Appeal (179), however, took the opposite view. LORD DENNING, M.R., in his judgment did not decide that the section could not apply to c.i.f. contracts as such; on the contrary, he clearly thought that it might do so. His reasoning that the subsection was not applicable was based on a construction of the words "on the sale" which he interpreted to mean "on the transfer", or passing, of the property in the "goods". The next step was to hold that the transfer, or passing of the property in the goods, takes place where the goods are at the time, so that if they are outside the United Kingdom (including territorial waters) the subsection does not attach. DIPLOCK, L.J., adopted a similar process of reasoning.

This argument was not supported by counsel for the appellants and I cannot think that it is sound. Even if one accepts that the section is distinguishing between the "sale" and the "contract of sale", and is referring by the former words to the passing of the property, I cannot find satisfaction in the statement that the transfer of the property takes place where the goods are, or that the property passes there. In the case of a c.i.f. contract of sale, what takes place between seller and buyer, by way of completion of the contract, is a transfer of the bill of lading, which, "in fact and in law represents the goods" and which transfer is a constructive delivery of the goods; see the judgment of KENNEDY, L.J., in *Biddell Brothers v. E. Clemens Horst Co.* (181) which was approved by this House (182). No other delivery or transfer takes place. This constructive delivery takes place, if locality is relevant, where the transfer of documents occurs. Physical delivery of the goods occurs when the buyer takes the goods from the master of the ship—but this delivery is not delivery by the seller but delivery by and under the contract of affreightment from the buyer's bailee. No doubt the contract of sale generally becomes a sale *when* the documents are handed over and the price is paid (s. 1 (4) of the Sale of Goods Act, 1893). No doubt the risk passes *when* the documents pass, but to all these matters the physical situation of the goods is irrelevant; indeed the sale is just as effective though the goods may

(179) [1966] 1 All E.R. 309.

(180) [1964] 3 All E.R. 148; [1965] 1 Q.B. 424.

(181) [1911-13] All E.R. Rep. at p. 97; [1911] 1 K.B. at p. 956.

(182) [1911-13] All E.R. Rep. 93; [1912] A.C. 18.



A be at the bottom of the sea (see *Manbré Saccharine Co. v. Corn Products Co.* (183)).

The difficulty of applying the test of locality of the goods is vividly illustrated in the case under appeal, for it forced HAVERS, J., into a detailed investigation, in relation to each shipment of the locality of each ship at the moment when the documents were taken over, with the result that distinctions, which one can only describe as arbitrary, arose between different consignments according to whether  
 B at the precise moment when documents passed the ship was on the high seas, in the port of destination, or in some other port. I think that DIPLOCK, L.J., really recognised this, for though he adhered to his former view that the subsection did not apply if the goods were on the high seas, he refused to accept the (one would think natural) converse that it did apply if the goods were in territorial waters, introducing in that case an additional test of whether property passed before the  
 C goods had passed the ship's rail.

My lords, rather than this enchantment by the niceties of the English law of sale of goods (I borrow from CROMPTON, J.) I think that a simpler approach is called for. I do not think that s. 2 (2) in its introductory words "on the sale" is making a technical distinction between the sale and the contract. It is, after  
 D all, introducing a warranty the impact of which is on the contract of sale; it operates by adding, compulsorily, a term to the contract. The natural prima facie inference should be that it applies to all contracts governed by, i.e. the proper law of which is, English law. One may test this by comparison with the statutory warranties under the Sale of Goods Act, 1893. Nobody disputes that they should (the facts so admitting) be introduced into this contract—and that  
 E must be because the proper law of the contract is English law. Why, then, should the same not be true of this statutory warranty? The only difference is that the parties may contract out of one but not of the other, but that difference does not seem a relevant distinction.

One starts, then, from the inference that the subsection applies to all English  
 F contracts, but one must next consider—recalling the reservations made by LYELL, J., in *Draper's case* (184)—whether there should be some additional requirement such as that the place of performance should be in this country. To do so would at least fit in both with the evident purpose of the Act of 1926 which must be concerned with the quality of foodstuffs for animals in the United Kingdom, and with the wording of s. 2 (2) which refers to sale for use as food for cattle and  
 G poultry (se. as I would read it, in the United Kingdom). In order to answer this, I think it desirable to look at those subsections of the Act of 1926 which impose criminal liabilities, for though there is no necessary reason why, in an Act which both imposes penalties and creates a civil liability, the scope of the two remedies should be exactly the same (for in relation to the latter it is evidently desirable that the chain of responsibility under the statutory warranty should be carried  
 H as far as possible up the chain of supply) there are some linkages between the two parts, particularly through those provisions which require the seller to furnish a statutory statement (see ss. 1, 2, 5, 8 (2)). Section 5 of the Act of 1926 is the provision which most directly appears to deal with imported goods. It relates to articles delivered or consigned direct from a ship or quay to a purchaser. From  
 I this it appears fair to deduce that the Act of 1926, in both its parts, is intended to apply to sales ex-ship or ex-quay. From this in turn it ought to follow that the Act of 1926 should apply to sales c.i.f. (U.K.) where the goods are in fact delivered ex-ship to a purchaser and in that case s. 26 (2) would appear to meet the difficulty, that under a c.i.f. contract "delivery" takes place by documents, by extending the date of "delivery" until the article reaches the purchaser. The obligation

(183) [1918-19] All E.R. Rep. at p. 984; [1919] 1 K.B. at p. 204.

(184) [1964] 1 Lloyd's Rep. 169.

to keep a register in this case falls without difficulty on the seller, and the rest of the machinery provisions as to sampling and analysis, etc., follow. The terms of the standard contract itself are, in fact, well designed to ensure that the seller, after his ship arrives in the U.K., has access to all information necessary to meet his statutory obligations. On the other hand, if the provisions of the Act of 1926 are to be applied a stage further back, e.g. to a sale on documents while the goods are in transit to a buyer who does not take delivery of the goods, difficulties may arise in working the machinery of the Act. The goods in the present case were delivered ex-ship to the buyers (Grimsdale) for use in the United Kingdom, so that on the minimum view the Act of 1926 would, in my opinion, apply. As regards other cases, of c.i.f. sales at earlier stages, or sales made otherwise than on the standard (No. 6) contract I would, as at present advised, find some difficulty in seeing how the statutory warranty can be said to arise.

On the second appeal, between Suffolk Agricultural and Poultry Producers Association and Grimsdale, I am of opinion:

(1) That the implied condition under s. 14 (1) arose. This is an a fortiori case as compared with that discussed above. All the learned judges below were of the same opinion.

(2) That the conditions contained in the sold note became incorporated in the contracts. I agree with SELLERS, L.J. (185) and DIPLOCK, L.J. (186) that *McCutcheon v. David Macbrayne, Ltd.* (187) relates to a very different situation and that in the present case the course of dealing was evidently and plainly such as to import the conditions.

(3) That the latent defect clause contained in the sold notes is not apt to exempt the third party sellers from liability. I agree on this with my noble and learned friend, LORD PEARCE.

In the result both appeals should, in my opinion, be dismissed.

*Appeals dismissed.*

Solicitors: *Sydney Morse & Co.* (for the appellants, Henry Kendall & Sons); *Parker, Garrett & Co.* (for the appellants, Holland Colombo Trading Society, Ltd.); *Blount, Petre & Co.* (for the respondents, William Lillico & Sons, Ltd.); *Barlow, Lyde & Gilbert* (for the respondents, Grimsdale & Sons, Ltd.); *Metson, Cross & Co.* (for the respondents Suffolk Agricultural and Poultry Producers Association, Ltd.).

[*Reported by S. A. HATTEEA, Esq., Barrister-at-Law.*]

(185) [1966] 1 All E.R. at p. 322.

(186) [1966] 1 All E.R. at p. 344.

(187) [1964] 1 All E.R. 430.

A

## SELVEY v. DIRECTOR OF PUBLIC PROSECUTIONS.

[HOUSE OF LORDS (Viscount Dilhorne, Lord Hodson, Lord Guest, Lord Pearce and Lord Wilberforce), February 20, 21, 22, 26, 27, 28, 29, March 4, May 9, 1968.]

B

*Criminal Law—Evidence—Character of accused—Imputation on character of prosecution witness—Discretion over allowing accused to be cross-examined as to his previous convictions—Whether any general rule to exclude such evidence where defence necessarily involved such imputations—Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36), s. 1, proviso (f) (ii).*

C

At the trial of the appellant on a charge of buggery with a young man ("the complainant"), the defence proceeded on the basis that the complainant was a male prostitute soliciting the appellant, an innocent man. The appellant gave evidence that the complainant had offered for money to have sexual connexion with the appellant, and that the complainant said that he had sexual connexion with another man that day for money. The complainant was cross-examined on these matters. The trial judge at his own instance ruled, in the absence of the jury, that the appellant could be cross-examined as to his previous convictions involving indecency. These convictions were put to the appellant in cross-examination. He refused either to admit or to deny them. In summing-up the trial judge treated that as tantamount to an admission. On ultimate appeal, the points of law certified for appeal being (i) if the making of the imputation was necessary for the proper development of the defence, was the cross-examination permitted by the Criminal Evidence Act, 1898, s. 1, proviso (f) (ii)\*, and (ii) was there a general rule as to the exercise of the judge's discretion as stated in *R. v. Flynn*†?

D

E

F

**Held:** (i) the cross-examination of an accused as to previous convictions or bad character was permissible under s. 1, proviso (f) (ii) of the Criminal Evidence Act, 1898, if the nature and conduct of his defence involved imputations on a prosecution witness, notwithstanding that the imputations were a necessary part of the accused's answer to the charge (see p. 508, letter D, p. 513, letters B and G, p. 518, letter D, p. 527, letter G, and p. 528, letter H, post).

G

*R. v. Hudson* ([1912] 2 K.B. 464); *R. v. Jenkins* ((1945), 114 L.J.K.B. 425) and *R. v. Cook* ([1959] 2 All E.R. 97) approved.

H

(ii) a trial judge had a discretion to refuse to permit cross-examination of an accused as to previous convictions, even though such cross-examination was permissible under s. 1, proviso (f) (ii) of the Act of 1898, but there was no rule that the discretion should be exercised by excluding cross-examination if the accused's defence necessarily involved the imputations that had been made (see p. 510, letters B and F, p. 514, letter H, p. 519, letter H, p. 527, letters F and H, and p. 528, letter H, post); in the present case the discretion had not been wrongly exercised by allowing the cross-examination (see p. 510, letter I, to p. 511, letter A, p. 520, letter H, and p. 528, letters E and H, post).

I

Dictum of SINGLETON, J., in *R. v. Jenkins* ((1945), 114 L.J.K.B. at p. 431); and of DEVLIN, J., in *R. v. Cook* ([1959] 2 All E.R. at pp. 100, 101) approved.

Dictum in *R. v. Flynn* ([1961] 3 All E.R. at p. 63) disapproved.

Per VISCOUNT DILHORNE and LORD HODSON: (i) in defence to a charge of rape an accused can raise and conduct a defence based on alleged consent without rendering himself subject, by virtue of proviso (f) (ii), to cross-examination as to previous convictions or bad character (see p. 506, letter E, p. 508, letter E, p. 513, letter D, p. 519, letter G, and p. 524, letter D, post).

\* Section 1, so far as material, is set out at p. 502, letters A to D, post.

† [1961] 3 All E.R. 58.



*R. v. Turner* ([1944] 1 All E.R. 599) and *R. v. Sheean* ((1908), 21 Cox, C.C. 561) approved.

(ii) a statement in evidence that amounts to no more than a denial of the charge though emphatically expressed, should not be regarded, for the purposes of proviso (f) (ii) as involving imputations on the character of the prosecutor or a prosecution witness (see p. 508, letter F, p. 512, letter G, p. 519, letter G, p. 521, letter F, post).

*R. v. Rouse* ([1904] 1 K.B. 184) approved.

Per VISCOUNT DILHORNE: it is desirable that a warning should be given when it becomes apparent that the defence is taking a course which may expose the accused to cross-examination as to previous convictions or bad character (see p. 510, letter I, post).

Decision of the COURT OF APPEAL (sub nom. *R. v. Selvey* [1968] 1 All E.R. 94) affirmed.

[As to cross-examination of defendant as to character, see 10 HALSBURY'S LAWS (3rd Edn.) 450, para. 828, text and note (b); and for cases on the subject, see 14 DIGEST (Repl.) 511-513, 4942-4968, and 515-518, 4987-5016.

For the Criminal Evidence Act, 1898, s. 1, see 9 HALSBURY'S STATUTES (2nd Edn.) 613.]

#### Cases referred to:

*Director of Public Prosecutions v. Christie*, [1914-15] All E.R. Rep. 63; [1914] A.C. 545; 83 L.J.K.B. 1097; 111 L.T. 220; 78 J.P. 321; 10 Cr. App. Rep. 141; *affg.* (1913), 109 L.T. 746; 14 Digest (Repl.) 405, 3962.

*Fielding v. H.M. Advocate*, [1960] S.L.T. 105; 1959 S.C. (J.) 100; Digest (Cont. Vol. A) 376, \*3420b.

*Harris v. Director of Public Prosecutions*, [1952] 1 All E.R. 1044; [1952] A.C. 694; 116 J.P. 248; 36 Cr. App. Rep. 39; 14 Digest (Repl.) 423, 4118.

*Jones v. Director of Public Prosecutions*, [1962] 1 All E.R. 569; [1962] A.C. at p. 647; [1962] 2 W.L.R. at p. 586; 126 J.P. 216; 46 Cr. App. Rep. 129; *affg.* sub nom. *R. v. Jones*, [1961] 3 All E.R. 668; [1962] A.C. 635; [1962] 2 W.L.R. 575; Digest (Cont. Vol. A) 375, 4942b.

*Kuruma, son of Kaniu v. Reginam*, [1955] 1 All E.R. 236; [1955] A.C. 197; [1955] 2 W.L.R. 223; 119 J.P. 157; Digest (Cont. Vol. A) 519, 303a.

*Lawrie v. Muir*, 1950 S.C. (J.) 19; 25 Digest (Repl.) 144, \*186.

*Malindi v. Reginam*, [1966] 3 All E.R. 285; [1967] A.C. 439; [1966] 3 W.L.R. 913; Digest (Cont. Vol. B) 176, \*3410d.

*Maxwell v. Director of Public Prosecutions*, [1934] All E.R. Rep. 168; [1935] A.C. 309; 103 L.J.K.B. 501; 151 L.T. 477; 98 J.P. 387; 24 Cr. App. Rep. 152; 14 Digest (Repl.) 515, 4983.

*Noor Mohamed v. Regem*, [1949] 1 All E.R. 365; [1949] A.C. 182; 14 Digest (Repl.) 421, 4097.

*O'Hara v. H.M. Advocate*, 1948 S.C. (J.) 90; 14 Digest (Repl.) 518, \*3420.

*R. v. Biggin*, [1918-19] All E.R. Rep. 501; [1920] 1 K.B. 213; 89 L.J.K.B. 99; 83 J.P. 293; 14 Cr. App. Rep. 87; 14 Digest (Repl.) 518, 5011.

*R. v. Bridgwater*, [1905] 1 K.B. 131; 74 L.J.K.B. 35; 91 L.T. 838; 69 J.P. 26; 14 Digest (Repl.) 517, 5006.

*R. v. Brown* (1960), 44 Cr. App. Rep. 181.

*R. v. Clark*, [1955] 3 All E.R. 29; [1955] 2 Q.B. 469; [1955] 3 All E.R. 313; 119 J.P. 531; 39 Cr. App. Rep. 120; 14 Digest (Repl.) 517, 518, 5010.

*R. v. Cook*, [1959] 2 All E.R. 97; [1959] 2 Q.B. 340; [1959] 2 W.L.R. 616; 123 J.P. 271; 43 Cr. App. Rep. 138; Digest (Cont. Vol. A) 374, 4942a.

*R. v. Dunkley*, [1926] All E.R. Rep. 187; [1927] 1 K.B. 323; 96 L.J.K.B. 15; 134 L.T. 632; 90 J.P. 75; 19 Cr. App. Rep. 78; 14 Digest (Repl.) 516, 4992.

*R. v. Flynn*, [1961] 3 All E.R. 58; [1963] 1 Q.B. 729; [1961] 3 W.L.R. 907; 125 J.P. 539; 45 Cr. App. Rep. 286; Digest (Cont. Vol. A) 376, 5016a.

- A** *R. v. Fletcher*, (1913), 9 Cr. App. Rep. 53; 14 Digest (Repl.) 337, 3286.  
*R. v. Grout*, (1909), 74 J.P. 30; 3 Cr. App. Rep. 64; 14 Digest (Repl.) 517, 5004.  
*R. v. Hudson*, [1912] 2 K.B. 464; 81 L.J.K.B. 861; 107 L.T. 31; 76 J.P. 421; 7 Cr. App. Rep. 256; 14 Digest (Repl.) 512, 513, 4961.  
*R. v. Jenkins*, (1945), 114 L.J.K.B. 425; 173 L.T. 311; 110 J.P. 86; 31 Cr. App. Rep. 1; 14 Digest (Repl.) 512, 4950.
- B** *R. v. Jones*, (1923), 87 J.P. 147; 17 Cr. App. Rep. 117; 14 Digest (Repl.) 517, 5009.  
*R. v. Marshall*, (1899), 63 J.P. 36; 14 Digest (Repl.) 516, 4993.  
*R. v. Murphy*, [1965] N.I. 138; Digest (Cont. Vol. B) 629, \*126a.  
*R. v. Preston*, [1909] 1 K.B. 568; 78 L.J.K.B. 335; 100 L.T. 303; 73 J.P. 173; 2 Cr. App. Rep. 24; 14 Digest (Repl.) 517, 5007.
- C** *R. v. Rappolt*, (1911), 6 Cr. App. Rep. 156; 14 Digest (Repl.) 515, 4989.  
*R. v. Roberts (otherwise Spalding)*, (1920), 15 Cr. App. Rep. 65; 37 T.L.R. 69; 14 Digest (Repl.) 516, 5000.  
*R. v. Rouse*, [1904] 1 K.B. 184; 73 L.J.K.B. 60; 89 L.T. 677; 68 J.P. 14; 14 Digest (Repl.) 515, 4990.  
*R. v. Rowton*, [1861-73] All E.R. Rep. 549; (1865), Lc. & Ca. 520; 34 L.J.M.C. 57; 11 L.T. 745; 29 J.P. 149; 14 Digest (Repl.) 409, 3995.
- D** *R. v. Sheean*, (1908) 72 J.P. 232; 24 T.L.R. 459; 21 Cox, C.C. 561; 14 Digest (Repl.) 516, 5002.  
*R. v. Turner*, [1944] 1 All E.R. 599; [1944] K.B. 463; 114 L.J.K.B. 45; 171 L.T. 246; 30 Cr. App. Rep. 9; 14 Digest (Repl.) 516, 5003.  
*R. v. Watson*, (1913), 109 L.T. 335; 8 Cr. App. Rep. 249; 29 T.L.R. 450; 14 Digest (Repl.) 511, 4942.
- E** *R. v. Westfall*, (1912), 107 L.T. 463; 76 J.P. 335; 7 Cr. App. Rep. 176; 14 Digest (Repl.) 516, 4997.  
*R. v. Wright*, (1910), 5 Cr. App. Rep. 131; 14 Digest (Repl.) 517, 5008.  
*Stirland v. Director of Public Prosecutions*, [1944] 2 All E.R. 13; [1944] A.C. 315; 113 L.J.K.B. 394; 171 L.T. 78; 109 J.P. 1; sub nom. *R. v. Stirland*, 30 Cr. App. Rep. 40; 14 Digest (Repl.) 511, 4949.
- F**

### Appeal.

This was an appeal by the appellant, Wilfred George Selvey, by leave from the decision of the Vacational Court of Appeal (Criminal Division), (LORD DENNING, M.R., WIDGERY and MacKENNA, JJ.), judgment being given on Nov. 12, 1967 (reported [1968] 1 All E.R. 94), dismissing his appeal against his conviction at Nottingham Assizes on Mar. 26, 1967, before STABLE, J., and jury of buggery. The points of law, certified to be of general public importance, involved in the decision were:—(i) If the making of the imputation is necessary for the proper development of the defence, is the cross-examination permitted by the Act (Criminal Evidence Act, 1898, s. 1 (f) (ii))? (ii) Is there a general rule as to exercise of the judge's discretion as stated in *R. v. Flynn*\*? The facts are set out in the opinion of VISCOUNT DILHORNE.

*J. N. Hutchinson, Q.C.*, and *R. D. L. Du Cann* for the appellant.

*B. Caulfield, Q.C.*, and *J. J. Deave* for the respondent.

Their lordships took time for consideration.

May 9. The following opinions were delivered.

**I** VISCOUNT DILHORNE: My Lords, the appellant was convicted at Nottingham Assizes on Mar. 26, 1967, of having committed buggery with a young man named McLaughlin on Jan. 26, 1967. He was sentenced by STABLE, J. to four years' imprisonment. At one time the appellant and McLaughlin lived in the same lodgings. The appellant moved to another lodging house, and during the afternoon of Jan. 26, after they had met in the street, the appellant and McLaughlin went to the appellant's room and it was there that McLaughlin said

\* [1961] 3 All E.R. 58.

the offence was committed. In the course of his cross-examination by counsel for the appellant, McLaughlin was asked the following questions and gave the following answers: A

" Q.—Did you then ask [the appellant] if he would give you a £1? A.—No, sir, I did not ask for any money.

Q.—Did you tell him that you had been with another man that afternoon and earned £1? A.—No, sir. Q.—Did you not then say to him ' If you give me £1, you can get on the bed with me? '. A.—No, sir. Q.—Did you not tell him further that you wanted £1 to buy some clothes? A.—No, sir." B

McLaughlin was then asked if certain photographs of an indecent character which he had said had been shown to him by the appellant were not in fact his. He said that they were not. Later the following questions were put to him and he gave the following answers: C

" Q.—I suggest to you, Mr. McLaughlin, that nothing of the sort happened in [the appellant's] room at all. A.—Not true, sir. Q.—And that an incident of this nature had taken place earlier that afternoon, with another man? A.—Not true. Q.—And that because [the appellant] would not give you £1, you are blaming him for your condition. A.—Not true." D

McLaughlin was examined by a doctor on the afternoon of Jan. 26 shortly after the offence was alleged to have been committed and in the doctor's opinion his condition showed that he had been recently the passive partner in an act of buggery.

The appellant in the course of his evidence in chief swore that McLaughlin had asked him for the loan of a pound to buy some clothing, that McLaughlin had said that he was prepared to go on the bed and that he had already earned £1 " by going with a fellow and having sexual connections ". The appellant said that he had told McLaughlin that he was not interested and he denied that he had committed the offence. E

At the end of the appellant's cross-examination, STABLE, J. asked him the following questions: F

" You are asking the jury, are you not, to disbelieve this young man, because, as you say, he told you that he had been bugged that day and bugged by somebody else? That is what you have told the jury?

A.—That is correct.

Q.—You are asking the jury to disbelieve him because he is that sort of young man? G

A.—Yes."

STABLE, J. then suggested to counsel for the Crown that there should be a discussion in the absence of the jury. After the jury had retired, STABLE, J., expressed the view that the appellant's defence had gone further than a denial that anything immoral had happened and had alleged that the incident was blackmail operation, and that it had involved an attack on McLaughlin's character. It was not until after the judge expressed this view that counsel for the prosecution applied for leave to put to the appellant his previous convictions. STABLE, J., gave him leave to do so, but intimated that he should confine his questions to sexual convictions. H

It appears from the shorthand note that the appellant was under the impression that the judge had stated that he was blackmailing. He denied that and asked for a retrial and intimated that he was not going to take any further part in the proceedings. I

When the jury returned to the court, STABLE, J., told them that, as it had been suggested that the evidence of McLaughlin should not be believed as he was a man of bad character, they were entitled to hear the record of the appellant. He told them then that they would not decide the case " purely on matters of character " and that they would deal with the case on the evidence that they



A had heard, but at least they would not go into the jury room having heard what was put to McLaughlin "without knowing anything about the previous record of the man by whom those charges are now brought".

Counsel for the Crown then put to the appellant that he had been convicted of indecent assault on two boys of eight and six in 1956. The appellant said that he did not know and, in reply to a question from the judge, that he was not willing to co-operate in view of what the judge had said to prosecuting counsel. He was presumably referring to the reference to blackmail. Counsel for the prosecution then put to him that he had been convicted on Mar. 1, 1960, of an indecent assault on a boy of eight and later of an indecent assault on a boy of eleven: that he was sentenced to two years' imprisonment on Aug. 1, 1961, for persistently soliciting for an immoral purpose and on June 1, 1964, to six months' imprisonment for persistently importuning male persons. The appellant's answer to these questions was that he was not speaking and had nothing to say.

None of the appellant's previous convictions was in fact proved but in his summing-up the judge proceeded as if they had been. In this summing-up, there occurs the following passage:

D "Before I pass from that, members of the jury, 'Do not give a man a bad name and hang him', do you follow? You would have been in a perfectly hopeless position, if you had to try this case with the idea that that young man was a sort of male prostitute, carrying about filthy photographs on him, and the man in the dock was a man, so far as you knew, of unblemished character. It is obvious you would have had a perfectly false picture before you. As I say 'Do not give a dog a bad name and hang him on that'. Deal simply and solely with the evidence relating to this particular charge."

and at the end of the summing-up, he said:

F "There it is, members of the jury: the young man says: 'Yes, it was done to me.' [The appellant] says: 'I really did not do anything indecent to that young man.' There was evidently some indecent attack which was initiated by the young man and, says [the appellant], he went beyond that. 'He tried to blackmail me, or get a pound out of me'. The suggestion is that, because he failed to get the pound, in revenge, he has gone round to the police and put this false story up against [the appellant]."

G The appellant's appeal to the Court of Appeal (Criminal Division) (1) was heard by LORD DENNING, M.R., WIDGERY and MACKENNA, JJ., and dismissed on Nov. 12, 1967. Dealing with the point that the judge ought to have warned the jury that the appellant's previous convictions had not been proved, LORD DENNING pointed out (2) that, when the appellant's previous convictions were read out after conviction, the appellant did not dispute them and said that the jury were quite entitled to treat the appellant's attitude as tantamount to an admission, and that, even if the judge should have warned the jury, there was no miscarriage of justice and the court would have applied the proviso. I agree with LORD DENNING.

H The main ground of the appeal before the Court of Appeal (1) was, as it was before your lordships, that the judge was wrong in allowing the appellant to be cross-examined in relation to his previous convictions. It was contended I that an accused person might, without losing the protection of the Criminal Evidence Act, 1898, ask a prosecution witness all questions that are necessitated by the proper conduct of his defence and that, so long as the nature or conduct of the defence is relevant to an issue upon the facts of the case, the accused does not lose the protection of the Act of 1898. The terms of s. 1 of the Act of 1898 are as follows:

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(1) [1968] 1 All E.R. 94.

(2) [1968] 1 All E.R. at p. 98.

"1. Every person charged with an offence, and the wife or husband, as the case may be, of the person charged, shall be a competent witness for the defence at every stage of the proceedings, . . . Provided as follows:— . . .

(e) A person charged and being a witness in pursuance of this Act may be asked any question in cross-examination notwithstanding that it would tend to criminate him as to the offence charged. (f) A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless— (i) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or (ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution; or (iii) he has given evidence against any other person charged with the same offence . . . "

Counsel for the appellant contended that the word "character" in para. (f) meant general reputation, and he based his argument on *R. v. Rowton* (3). In that case it was held that where evidence of good character had been given on behalf of the accused, evidence of his bad character might be given in reply; that the evidence whether for the defence or for the prosecution must be confined to evidence of general reputation; and that the individual opinion of a witness founded on his own experience and observation was inadmissible.

This argument was first advanced in 1927 in *R. v. Dunkley* (4). In the course of his judgment in that case LORD HEWART, C.J., said (4):

"... it is not difficult to suppose that a formidable argument might have been raised on the phrasing of this statute, that the character which is spoken of is the character which is so well known in the vocabulary of the criminal law, namely, the general reputation of the person referred to; in other words, that 'character' in that context . . . bears the meaning which the term 'character' was held to bear, for example, in *R. v. Rowton* (3) . . . Nevertheless when one looks at the long line of cases beginning very shortly after the passing of the Criminal Evidence Act, 1898, it does not appear that that argument has ever been so much as formulated. It was formulated yesterday. One can only say that it is now much too late in the day even to consider that argument, because that argument could not now prevail without the revision, and indeed to a great extent the overthrow, of a considerable number of decisions."

In *Stirland v. Director of Public Prosecutions* (5), VISCOUNT SIMON, L.C., posed the question whether character referred to the good reputation which a man may bear in his own circle, or to a man's real disposition as distinct from what his friends and neighbours think of him. He said (5) that he was "disposed to think that in para. (f) (where the word 'character' occurs four times) both conceptions are combined". This passage from his speech in this case was cited by LORD MORRIS OF BORTH-Y-GEST in *Malindi v. Reginam* (6) and was clearly accepted by their lordships as correct.

What has to be considered in this case is not what evidence can or cannot be given to establish a man's character, but whether the nature or conduct of the defence involved imputations on the character of the witness, McLaughlin.

(3) [1861-73] All E.R. Rep. 549; (1865), Le. & Ca. 520.

(4) [1926] All E.R. Rep. 187 at p. 190; [1927] 1 K.B. 323 at p. 329.

(5) [1944] 2 All E.R. 13 at p. 17; [1944] A.C. 315 at pp. 324, 325.

(6) [1966] 3 All E.R. 285 at p. 291; [1967] A.C. 439 at p. 461.

- A In my opinion, the questions put to him and the evidence given by the appellant clearly involved imputations on his character, and, if it were right to interpret "character" in the statute as meaning general reputation, also imputations on his general reputation. Counsel for the appellant further contended that the appellant had been trapped by the judge into making imputations by the questions put by the judge at the end of his cross-examination. I do not think
- B that this was the case. The imputations were first made in the cross-examination of the witness McLaughlin and then repeated by the appellant in his evidence in chief. The questions put by the judge at the end of his cross-examination did no more than remove all possible doubt whether the appellant was seeking to discredit McLaughlin on the ground that he was "that sort of young man".

- I propose now to turn to counsel for the appellant's main contention, that
- C the section did not permit of cross-examination of the accused as to character if the imputations were a necessary part of his answer to the charge. He contended that it was unsatisfactory that the liability of the accused to be subjected to such cross-examination should depend on the exercise by the trial judge of discretion, on his estimation of what was fair and what was not. Counsel for the Crown contended that, despite the observations in a number of cases, a
- D judge had no discretion to refuse or permit cross-examination of the accused as to character if the conditions prescribed by the section were satisfied. I propose to consider first the construction and interpretation to be given to the section and then to consider counsel for the Crown's argument as to discretion. This case is the latest—one dare not say the last—of a large number of cases that have come before the courts on the interpretation of the section.
- E Most of them were cited by counsel for the appellant. I do not propose to refer to all of them but it is, I think, necessary to refer to a good number.

The first case cited was *R. v. Rouse* (7). In that case LORD ALVERSTONE, C.J., refused to regard the accused's answer in cross-examination to a question whether a prosecution witness's evidence was invented, that it was a lie and the witness a liar, as anything more than a denial of the charge, and DARLING, J., said (8):

- F "Merely to deny a fact alleged by the prosecution is not necessarily to make an attack on the character of the prosecutor or his witnesses. Such a denial is necessary and inevitable in every case where a prisoner goes into the witness box, and it is nothing more than a traverse of the truth of an allegation made against him; to add in cross-examination that the prosecutor is a liar . . ."

- G In *R. v. Sheean* (9), a rape case, JELF, J., said that when a man in the accused's station of life used such terms as "he is lying" and "it is a lie", or even stronger expressions, all that is generally meant is a denial of the truth of the case for the prosecution and not a real reflection on the character of a witness. So the first question that has to be considered is whether what has been said amounts
- H in reality to more than an emphatic denial of the charge (see also *R. v. Jones* (10) per LORD HEWART, C.J.; *R. v. Clark* (11) per LORD GODDARD, C.J.). If it does and in fact involves an imputation on the character of the prosecutor or a witness for the prosecution, does the section permit such cross-examination of the accused, even when the imputation is a necessary part of the presentation of the defence?

- I There is a number of judicial observations to the effect that it does not. In *R. v. Bridgwater* (12) LORD ALVERSTONE, C.J., said that:

"... raising a defence, even in forcible language, is not of necessity casting imputations on the character of the prosecutor or his witnesses. No doubt imputations may be cast on their character quite independently of

(7) [1904] 1 K.B. 184.

(9) [1908], 21 Cox, C.C. 561.

(11) [1955] 3 All E.R. 29; [1955] 2 Q.B. 469.

(12) [1905] 1 K.B. 131 at p. 134.

(8) [1904] 1 K.B. at p. 187.

(10) (1923), 17 Cr. App. Rep. 117.



the defence raised, either by direct evidence or by questions put to them in cross-examination."

In *R. v. Sheean* (13), a rape case, JELF, J., said (14):

"Where a prisoner in order to clear himself upon a charge to which consent is a good defence in law, alleges that the prosecutrix did so consent, it would in my view be a total subversion of the Act to say such allegation exposes him to cross-examination as to previous charges made against him. To so hold would be to put an impediment in the way of a prisoner denying upon his oath, that what he did was done with the consent of the prosecutrix, when if the jury believed she did so consent, he would be entitled to an acquittal. Of course if the prisoner goes out of his way to make an attack on the prosecutrix based on matters outside the substance of the charge upon which he is being tried, it is otherwise."

Support was also given for this view in the important case of *R. v. Preston* (15). There the accused had alleged impropriety in the conduct of an identification parade by a police officer and so had made imputations on his character. It was held, nevertheless, that cross-examination of the accused as to his previous convictions was not permissible as what had happened at the identity parade was relevant to his defence. CHANNELL, J., delivering the judgment of the Court of Criminal Appeal, said in relation to the words in the section "the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution." (16):

"It appears to us to mean this: that if the defence is so conducted, or the nature of the defence is such, as to involve the proposition that the jury ought not to believe the prosecutor or one of the witnesses for the prosecution upon the ground that his conduct—not his evidence in the case, but his conduct outside the evidence given by him—makes him an unreliable witness, then the jury ought also to know the character of the prisoner who either gives that evidence or makes that charge, and it then becomes admissible to cross-examine the prisoner as to his antecedents and character with a view to showing that he has such a bad character that the jury ought not to rely upon his evidence. That is the general nature of the enactment and the general principle underlying it."

In *R. v. Wright* (17) it was, however, held that the accused's statement that he had been bribed to make a confession was an imputation on the character of the police officer involved, and cross-examination of the accused as to character was permitted even though the making of the imputation "might be the" (accused's) "only way of defending himself". On the other hand in *R. v. Westfall* (18) HAMILTON, J., delivering the judgment of the Court of Criminal Appeal held that an accusation by the accused that the constable who had arrested him had acted in an improper manner was not such as to entitle the prosecution to cross-examine him as to character. He said (19):

"Such questions often have to be asked if the evidence is to be properly tested. Instead of being an attack on the character of a witness with the view of showing that he is unreliable, they are an endeavour to elicit the facts in connection with the very matter with which the prisoner is charged. It was not such an attack as comes within the meaning of the section."

I do not see that it is possible to reconcile these two decisions. If *R. v. Westfall* (18) was rightly decided, then *R. v. Wright* (17) cannot have been, and vice versa.

Two months later the whole problem was reviewed in *R. v. Hudson* (20) by

(13) (1908), 21 Cox, C.C. at p. 561.

(15) [1909] 1 K.B. 568.

(17) (1910), 5 Cr. App. Rep. 131.

(19) (1912), 7 Cr. App. Rep. at p. 179.

(14) (1908), 21 Cox, C.C. at p. 562.

(16) [1909] 1 K.B. at p. 575.

(18) (1912), 7 Cr. App. Rep. 176.

(20) [1912] 2 K.B. 464.

A the Court of Criminal Appeal which, in view of the importance of the case, consisted of five judges presided over by LORD ALVERSTONE, C.J. It was then said that the decisions in *R. v. Bridgwater* (21), *R. v. Preston* (22) and *R. v. Westfall* (23) might well be supported on grounds which did not touch the question raised in that case, but that they could not be treated as laying down a general rule. LORD ALVERSTONE said (24):

B “We think that the words of the section ‘unless the nature or conduct of the defence is such as to involve imputations’, &c., must receive their ordinary and natural interpretation, and that it is not legitimate to qualify them by adding or inserting the words ‘unnecessarily’, or ‘unjustifiably’, or ‘for purposes other than that of developing the defence’, or other similar words.”

C This case was followed by *R. v. Watson* (25) when PICKFORD, J., said (26):

D “It has been held that to say that a witness for the prosecution was telling lies is not an imputation within the meaning of the section. There have also been observations in some cases that seem to imply that where the cross-examination is only a necessary part of the defence it is not within the section. Those cases were considered by this Court in [*R. v.*] *Hudson* (27) . . . the remarks to which I have referred were certainly held not to be of general application.”

After quoting the passage from the judgment of LORD ALVERSTONE in *R. v. Hudson* (24) set out above, he said (26): “That is a considered judgment and that is the principle we have to apply.”

E If at that time it was thought, as PICKFORD, J., appears to have thought, that the decision in *R. v. Hudson* (27) had finally settled the controversy as to the meaning of the section, that belief was destroyed by the judgment in *R. v. Biggin* (28), where despite what was said in *R. v. Hudson* (27) the EARL OF READING, C.J. (29) appears to have treated the passage of CHANNELL, J.’s judgment set out above as still good law and of general application. Also in *R. v. Roberts* (30) DARLING, J. (31) cited the same passage of CHANNELL, J.’s judgment and, following that, drew a distinction between the conduct and the evidence of a witness. In 1944 in *R. v. Turner* (32) the question again arose whether the allegation that a woman had consented to the intercourse which was the subject of a charge of rape rendered the accused liable to cross-examination as to his previous convictions. HUMPHREYS, J., delivering the judgment of a court of five judges said (33):

H “. . . it must be conceded that to allege of a woman that she permitted a man other than her husband to have intercourse with her would be regarded by most persons as an imputation on her character. In the same way in former times one of the deadliest insults which could be offered to a gentleman was to call him a liar . . . but, if an accused person refers to a witness for the prosecution as a liar, it does not follow that he is making an imputation on his character so as to render himself liable to cross-examination to character: see *R. v. Rouse* (34) . . . On a charge of rape the

(21) [1905] 1 K.B. 131.

(23) (1912), 7 Cr. App. Rep. 176.

(24) [1912] 2 K.B. at pp. 470, 471.

(25) (1913), 8 Cr. App. Rep. 249.

(26) (1913), 8 Cr. App. Rep. at p. 254.

(27) [1912] 2 K.B. 464.

(28) [1918-19] All E.R. Rep. 501; [1920] 1 K.B. 213.

(29) [1918-19] All E.R. Rep. 501 at p. 503; [1920] 1 K.B. 213 at p. 221.

(30) (1920), 15 Cr. App. Rep. 65.

(31) (1920), 15 Cr. App. Rep. at p. 68.

(32) [1944] 1 All E.R. 599; [1944] 1 K.B. 463.

(33) [1944] 1 All E.R. at p. 601; [1944] K.B. at pp. 468, 469.

(34) [1904] 1 K.B. 184.

(22) [1909] 1 K.B. 568.

Crown has to prove two things, intercourse and the non-consent of the woman. For centuries the law has jealously guarded the right of an accused person to put forward at his trial any defence open to him on the indictment without running the risk of his character, if a bad one, being disclosed to the jury. It would be strange indeed if the Act of Parliament which allowed him, in most cases for the first time, to give evidence on oath had virtually deprived him of that right in the case of one serious felony by enacting that he could only do so at the risk of having his character exposed. What is commonly referred to as the defence of consent in rape is in truth nothing more than a denial by the accused that the prosecution has established one of the two essential ingredients of the charge. It is and must be the prosecution which introduces the question of consent or non-consent. Can the legislature have intended to penalise the accused who avails himself of the right to give evidence conferred by statute by enacting that he may be cross-examined as to previous convictions if he denies one, though not if he only denies the other, of the two ingredients of the crime. In our opinion, this is one of the cases where the court is justified in holding that some limitation must be put on the words of the section since to decide otherwise would be to do grave injustice never intended by Parliament."

Counsel for the Crown argued that this case was wrongly decided. He contended that their ordinary meaning should be given to the words of the section and that Parliament had intended to provide that, if the accused attacked a prosecution witness in a certain manner, the protection given by the statute would be lifted and the accused would be attacked in the same manner.

In my opinion *R. v. Turner* (35) and *R. v. Sheean* (36) were both rightly decided. HUMPHREYS, J., did not define the limitation which he thought must be put on the terms of the statute in precise terms, but I think that it is apparent from what he said that the limitation was as to the meaning to be attached to the words "the nature or conduct of the defence" by treating the traversing of an issue raised by the prosecution, the mere denial of an allegation made by the prosecution, even if that denial necessarily involved, as did the allegation of consent in a rape case, an imputation on character as not coming within those words. Applying this test to the facts of this case it cannot, in my opinion, be said that the questions put to McLaughlin and the appellant's evidence were just a traverse or denial of an issue raised by the prosecution. However necessary it may have been to make those imputations if the appellant was to have any hope of acquittal, they were additional to a denial that the conduct alleged had taken place in the appellant's bedroom.

In *Stirland's* case (37) LORD SIMON, L.C., in formulating certain principles in relation to the section said (38):

"An accused is not to be regarded as depriving himself of the protection of the section, because the proper conduct of his defence necessitates the making of injurious reflections on the prosecutor or his witnesses."

and he cited *R. v. Turner* (35) for this proposition. In *R. v. Jenkins* (39) SINGLETON, J., delivering the judgment of the Court of Criminal Appeal, pointed out that the decision in *R. v. Hudson* (40) had not been criticised and in this case that decision was followed. In relation to the above statement of LORD SIMON, L.C., in *Stirland's* case (38) he said (41):

"It does not appear to us that the LORD CHANCELLOR [VISCOUNT SIMON] in using those words had in mind any idea of upsetting or weakening that which had been said in this Court in [*R. v.*] *Hudson* (40). If that had been the

(35) [1944] 1 All E.R. 599; [1944] K.B. 463.

(36) (1908), 21 Cox, C.C. 561.

(37) [1944] 2 All E.R. 13; [1944] A.C. 315

(38) [1944] 2 All E.R. at p. 18; [1944] A.C. at p. 327.

(39) (1945), 31 Cr. App. Rep. 1.

(40) [1912] 2 K.B. 464.

(41) (1945), 31 Cr. App. Rep. at pp. 13, 14.



- A desire of the House of Lords it would have been so stated. It is not. The House of Lords in that case had not to consider the words of the subsection which had been discussed before us at all, and *Hudson's* case (42), in consequence, was not referred to . . . We cannot think that it was intended in any sense in the House of Lords in *Stirland's* case (43) to overrule the decision of this court in *Hudson's* case (42)."
- B The problem then came before the Scottish courts. In *O'Hara v. H.M. Advocate* (44) the Lord Justice Clerk (LORD THOMSON) after reviewing the authorities came to the conclusion that the net result was that the Court of Criminal Appeal "adheres to *Hudson* (42) with certain modifications in cases of rape and subject to the discretionary power of the presiding judge". He said that in his judgment the statute warranted a distinction being drawn between two sets of cases,
- C however difficult it might be to say on which side of the line any particular case fell. He said (45):

- "Broadly the two classes are (i) where the cross-examination is necessary to enable the accused fairly to establish his defence to the indictment albeit it involves an invitation to the jury to disbelieve the witnesses so cross-examined in so far as they testify in support of the indictment, and
- D (ii) where the cross-examination attacks the general character of the witness."

- This distinction was followed in *Fielking v. H.M. Advocate* (46), where cross-examination of the accused as to character was permitted on the ground that the allegations were "no part of the essence of the defence". The Lord Justice-Clerk's conclusion in *O'Hara's* case (47) that under the section cross-examination as to the accused's character was not permitted if the cross-examination involving imputations on the character of the prosecutor or his witnesses was necessary to enable the accused fairly to establish his defence seems to me to be a restatement of what was said by CHANNELL, J., in *R. v. Preston* (48) and by LORD SIMON in *Stirland's* case (43). If the statement of LORD ALVERSTONE in *R. v. Hudson* (42) that it is not legitimate to qualify the words of the statute by
- F adding or inserting the words "for any purpose other than that of developing the defence" be accepted, as it was in *R. v. Jenkins* (49), it does not seem to me that the Lord Justice-Clerk's classification can be right.

- In *R. v. Clark* (50), it was held that the accused's allegation that a statement he signed had been dictated by a police officer was not a mere denial that he had made the statement but involved an imputation on the character of a prosecution witness. LORD GODDARD, C.J., delivering the judgment of the court, cited the passage of CHANNELL, J.'s judgment in *R. v. Preston* (51) set out above and said (52): "This was an attack by the appellant, not on the evidence of the police inspector, but on his conduct outside that evidence." It was held that the cross-examination of the accused as to character was permissible. *R. v. Jenkins* (49) does not appear to have been cited. In *R. v. Cook* (53), the question
- H was reviewed again by the Court of Criminal Appeal and again it was held following *R. v. Hudson* (42) and *R. v. Jenkins* (49) that the words of the statute should be given their ordinary and natural meaning. It was also said that nothing was to be gained by seeking to strain the words of the section in favour of the defence.

- I This completes my review of the cases to which it is necessary, in my opinion, to refer on the question of the interpretation to be given to the section. It is

(42) [1912] 2 K.B. 464.

(43) [1944] 2 All E.R. 13; [1944] A.C. 315.

(44) 1948 S.C.(J.) 90 at p. 97.

(45) 1948 S.C.(J.) at p. 99.

(46) 1959 S.C. (J.) 100.

(47) 1948 S.C. (J.) 90.

(48) [1909] 1 K.B. 568.

(49) (1945), 31 Cr. App. Rep. 1.

(50) [1955] 3 All E.R. 29; [1955] 2 Q.B. 469.

(51) [1909] 1 K.B. at p. 575.

(52) [1955] 3 All E.R. at p. 34; [1955] 2 Q.B. at p. 478.

(53) [1959] 2 All E.R. 97; [1959] 2 Q.B. 340.

apparent that over the years controversy has raged on whether the section A  
permits cross-examination of the accused as to character when the making  
of the imputations was necessary to enable the accused to establish his defence.

I agree with what was said in *R. v. Hudson* (54), *R. v. Jenkins* (55) and *R. v. Cook* (56), that the words of the section must be given their natural and ordinary meaning. Can this be reconciled with the decision in the rape cases, *R. v. Sheean* (57) and *R. v. Turner* (58), that an accused person charged with that offence B  
can without risking cross-examination as to his character allege that the woman  
consented to the intercourse, although that necessarily involves an imputation  
on her character? It may be possible to do so on the basis stated by HUMPHREYS,  
J., namely, that the issue of non-consent is one raised by the prosecution and so  
that contesting that is not something introduced by the defence. This appears  
to involve a limitation on the meaning given to the words "nature or conduct C  
of the defence". I do not think that in the light of what I am going to say later  
it is necessary to come to a final conclusion on this.

The cases to which I have referred, some of which it is not possible to reconcile,  
must in my opinion finally establish the following propositions:

1. The words of the statute must be given their ordinary natural meaning  
(*R. v. Hudson* (54); *R. v. Jenkins* (55); *R. v. Cook* (56)). D

2. The section permits cross-examination of the accused as to character  
both when imputations on the character of the prosecutor and his witnesses  
are cast to show their unreliability as witnesses independently of the  
evidence given by them and also when the casting of such imputations is  
necessary to enable the accused to establish his defence (*R. v. Hudson* (54);  
*R. v. Jenkins* (55); *R. v. Cook* (56)). E

3. In rape cases the accused can allege consent without placing himself  
in peril of such cross-examination (*R. v. Sheean* (57); *R. v. Turner* (58)).  
This may be because such cases are sui generis (per DEVLIN, J., in *R. v. Cook*  
(59)), or on the ground that the issue is one raised by the prosecution.

4. If what is said amounts in reality to no more than a denial of the  
charge, expressed, it may be, in emphatic language, it should not be regarded  
as coming within the section (*R. v. Rouse* (60); *R. v. Grout* (61); *R. v.*  
*Jones* (62); *R. v. Clark* (63)). F

Applying these propositions to this case, it is in my opinion clear beyond all  
doubt that the cross-examination of the accused was permissible under the  
statute.

I now turn to the question whether a judge has discretion to refuse to permit  
such cross-examination of the accused even when it is permissible under the  
section. Counsel for the Crown submitted that there was no such discretion  
and contended that a judge at a criminal trial had no power to exclude evidence  
which was admissible. He submitted that the position was correctly stated  
by BANKES, J., in *R. v. Fletcher* (64) when he said (65): G

"Where the judge entertains a doubt as to the admissibility of evidence,  
he may suggest to the prosecution that they should not press it, but he  
cannot exclude evidence which he holds to be admissible." H

(54) [1912] 2 K.B. 464.

(55) (1945), 31 Cr. App. Rep. 1.

(56) [1959] 2 All E.R. 97; [1959] 2 Q.B. 340.

(57) (1908), 21 Cox, C.C. 561.

(58) [1944] 1 All E.R. 599; [1944] K.B. 463.

(59) [1959] 2 All E.R. at p. 101; [1959] 2 Q.B. at p. 349.

(60) [1904] 1 K.B. 184.

(61) (1909), 74 J.P. 30.

(62) (1923), 17 Cr. App. Rep. 117.

(63) [1955] 3 All E.R. 29; [1955] 2 Q.B. 469.

(64) (1913), 9 Cr. App. Rep. 53.

(65) (1913), 9 Cr. App. Rep. at p. 56.

A Since that case it has been said in many cases that a judge has such a discretion. In *Christie v. Director of Public Prosecutions* (66), where the question was as to the admissibility of a statement made in the presence and hearing of the accused, LORD MOULTON said (67):

B “In a civil action evidence may always be given of any statement or communication made to the opposite party, provided it is relevant to the issues. The same is true of any act or behaviour of the party. The sole limitation is that the matter thus given in evidence must be relevant. I am of opinion that, as a strict matter of law, there is no difference in this respect between the rules of evidence in our civil and in our criminal procedure. But there is a great difference in the practice. The law is so much on its guard against the accused being prejudiced by evidence which, though admissible, would probably have a prejudicial influence on the minds of the jury which would be out of proportion to its true evidential value, that there has grown up a practice of a very salutary nature, under which the judge intimates to the counsel for the prosecution that he should not press for the admission of evidence which would be open to this objection, and such an intimation from the tribunal trying the case is usually sufficient to prevent the evidence being pressed in all cases where the scruples of the tribunal in this respect are reasonable. Under the influence of this practice, which is based on an anxiety to secure for every one a fair trial, there has grown up a custom of not admitting certain kinds of evidence which is so constantly followed that it almost amounts to a rule of procedure.”

E In *R. v. Watson* (68), the first case when the exercise of discretion in relation to cases coming within the section was mentioned, PICKFORD, J., said (69):

F “It has been pointed out that to apply the rule [in *R. v. Hudson* (70)] strictly is to put a hardship on a prisoner with a bad character. That may be so, but it does not follow that a judge necessarily allows the prisoner to be cross-examined to character; he has a discretion not to allow it and the prisoner has that protection.”

In *Maxwell v. Director of Public Prosecutions* (71) and in *Stirland's case* (72), it was said in this House that a judge has that discretion. In *R. v. Jenkins* (73) SINGLETON, J., said (74):

G “If and when such a situation arises [the question whether the accused should be cross-examined as to character] it is open to counsel to apply to the presiding judge that he may be allowed to take the course indicated . . . Such an application will not always be granted, for the judge has a discretion in the matter. He may feel that even though the position is established in law, still the putting of such questions as to the character of the accused person may be fraught with results which immeasurably outweigh the result of questions put by the defence and which make a fair trial of the accused person almost impossible. On the other hand, in the ordinary and normal case he may feel that if the credit of the prosecutor or his witnesses has been attacked, it is only fair that the jury should have before them material on which they can form their judgment whether the accused person is any more worthy to be believed than those he has attacked. It is obviously unfair that the jury should be left in the dark about an

(66) [1914-15] All E.R. Rep. 63; [1914] A.C. 545.

(67) [1914-15] All E.R. Rep. at p. 69; [1914] A.C. at p. 559.

(68) (1913), 8 Cr. App. Rep. 249.

(69) (1913), 8 Cr. App. Rep. at p. 254.

(70) [1912] 2 K.B. 464.

(71) [1934] All E.R. Rep. 168; [1935] A.C. 309.

(72) [1944] 2 All E.R. 13; [1944] A.C. 315.

(73) (1945), 31 Cr. App. Rep. 1.

(74) (1945), 31 Cr. App. Rep. at p. 15.



accused person's character if the conduct of his defence has attacked the character of the prosecutor or the witnesses for the prosecution within the meaning of the section. The essential thing is a fair trial and that the legislature sought to ensure by s. 1 (f)."

Similar views were expressed in *Noor Mohamed v. Regem* (75) by LORD DU PARCQ, in *Harris v. Director of Public Prosecutions* (76), in *R. v. Cook* (77), in *Jones v. Director of Public Prosecutions* (78) and in other cases.

In the light of what was said in all these cases by judges of great eminence, one is tempted to say, as LORD HEWART said in *R. v. Dunkley* (79), that it is far too late in the day even to consider the argument that a judge has no such discretion. Let it suffice for me to say that in my opinion the existence of such a discretion is now clearly established.

Counsel for the Crown posed the question, on what principle should such a discretion be exercised. In *R. v. Flynn* (80) the court said (81):

"... where ... the very nature of the defence necessarily involves an imputation against a prosecution witness or witnesses, the discretion should in the opinion of this court, be as a general rule exercised in favour of the accused, that is to say, evidence as to his bad character or criminal record should be excluded. If it were otherwise, it comes to this, that the Act of 1898, the very Act which gave the charter, so to speak, to an accused person to give evidence on oath in the witness box, would be a mere trap because he would be unable to put forward any defence, no matter how true, which involved an imputation on the character of the prosecutor or any of his witnesses, without running the risk if he had the misfortune to have a record, of his previous convictions being brought up in a court while being tried on a wholly different matter."

No authority is given for this supposed general rule. In my opinion, the court was wrong in thinking that there was any such rule. If there was any such general rule, it would amount under the guise of the exercise of discretion, to the insertion of a proviso to the statute of the very kind that was said in *R. v. Hudson* (82) not to be legitimate.

I do not think it possible to improve on the guidance given by SINGLETON, J., in the passage quoted above from *R. v. Jenkins* (83), by LORD DU PARCQ in *Noor v. Mohamed's* case (75), or by DEVLIN, J., in *R. v. Cook* (77) as to the matters which should be borne in mind in relation to the exercise of the discretion. It is now so well established that on a charge of rape the allegation that the woman consented, although involving an imputation on her character, should not expose an accused to cross-examination as to character, that it is possible to say, if the refusal to allow it is a matter of discretion, that there is a general rule that the discretion should be so exercised. Apart from this, there is not I think, any general rule as to the exercise of discretion. It must depend on the circumstances of each case and the overriding duty of the judge to ensure that a trial is fair.

It is desirable that a warning should be given when it becomes apparent that the defence is taking a course which may expose the accused to such cross-examination. That was not given in this case, but the failure to give such a warning would not, in my opinion, justify in this case the allowing of the appeal.

In my opinion the cross-examination of the accused was permissible under

(75) [1949] 1 All E.R. 365; [1949] A.C. 182.

(76) [1952] 1 All E.R. 1044; [1952] A.C. 694

(77) [1959] 2 All E.R. 97; [1959] 2 Q.B. 340.

(78) [1962] 1 All E.R. 569; [1962] A.C. 635.

(79) [1926] All E.R. Rep. at p. 190; [1927] 1 K.B. at p. 329.

(80) [1961] 3 All E.R. 58; [1963] 1 Q.B. 729.

(81) [1961] 3 All E.R. at p. 63; [1963] 1 Q.B. at p. 737.

(82) [1912] 2 K.B. 464.

(83) (1945), 31 Cr. App. Rep. at p. 15.

A the section and it cannot be said the judge exercised his discretion wrongly in allowing it to take place. As PICKFORD, J., said in *R. v. Watson* (84):

“ . . . in order to see if the conviction should be quashed, it is not enough that the court thinks it would have exercised its discretion differently. It is necessary to show that in law the cross-examination of the prisoner was inadmissible.”

B As DEVLIN, J., said in *R. v. Cook* (85):

“ It is well settled that this court will not interfere with the exercise of a discretion by the judge below unless he has erred in principle or there is no material on which he could properly have arrived at his decision.”

In my opinion the appeal should be dismissed.

C LORD HODSON: My Lords, the points of law certified by the Court of Appeal (86) as being of general public importance are:

(i) If the making of the imputation is necessary for the proper development of the defence, is the cross-examination permitted by the Criminal Evidence Act, 1898, s. 1 (f) (ii)?

D (ii) Is there a general rule as to the exercise of the judge's discretion as stated in *R. v. Flynn* (87)?

Section 1 proviso (f) of the Criminal Evidence Act, 1898, reads as follows:

“ A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless—

E “ (i) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or

F “ (ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution; or

G “ (iii) he has given evidence against any other person charged with the same offence.”

The prohibition in the first part of the section, though absolute in its terms does not prevent questions concerning his record being put to the accused in chief on the rare occasions when he wishes to volunteer evidence on the subject (see *Jones v. Director of Public Prosecutions* (88), per LORD REID (89)).

H The words which have caused difficulty in s. 1 (f) (ii) as taking away the shield provided by the prohibition are these, “ unless . . . the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution ”. The word “ character ” is used no less than four times in the section and one would naturally expect it to bear the same meaning throughout. At common law a witness could only be asked about the reputation of the accused and not about specific acts tending to show the real disposition of the accused. This was finally settled in 1865 by the Court of Crown Cases Reserved in *R. v. Rowton* (90).

The decisions given under the Act of 1898 about imputation on character

(84) [1913], 8 Cr. App. Rep. at pp. 254, 255.

(85) [1959] 2 All E.R. at p. 101; [1959] 2 Q.B. at p. 348.

(86) [1968] 1 All E.R. at p. 98.

(87) [1961] 3 All E.R. 58; [1963] 1 Q.B. 729.

(88) [1962] 1 All E.R. 569; [1962] A.C. 635.

(89) [1962] 1 All E.R. at p. 575; [1962] A.C. at p. 663.

(90) [1861-73] All E.R. Rep. 549; (1865), Le. & Ca. 520.

cannot, however, be easily fitted into the common law conception of character as limited to general reputation. As LORD HEWART, C.J., pointed out in *R. v. Dunkley* (91), a case concerned with imputations on the character of a prosecution witness (92):

"... it is not difficult to suppose that a formidable argument might have been raised on the phrasing of this statute, that the character which is spoken of is the character which is so well known in the vocabulary of the criminal law, namely, the general reputation of the person referred to; in other words, that 'character' in that context and in every part of it, in the last part no less than in the first, in the third part no less than in the second, bears the meaning which the term 'character' was held to bear, for example, in *R. v. Rowton* (93)."

He concluded, however, that it was much too late to consider such an argument in the light of the long series of decisions.

In *Stirland v. Director of Public Prosecutions* (94), VISCOUNT SIMON, L.C., speaking of the first part of s. 1, proviso (f) (ii) said (95):

"There is perhaps some vagueness in the use of the term 'good character' in this connexion. Does it refer to the good reputation which a man may bear in his own circle, or does it refer to a man's real disposition as distinct from what his friends and neighbours may think of him?"

LORD SIMON was inclined to think that both conceptions were combined in s. 1, proviso (f).

In *Jones v. Director of Public Prosecutions* (96) LORD DENNING adopted LORD HEWART'S view, but LORD DEVLIN expressed the view that the meaning intended by the draftsman was "reputation" and nothing else.

Coupled with the word "imputation", a word which generally has an evil implication, it seems that to give the word "character" the limited meaning of general reputation would rob the section of any sensible meaning, for it would then be possible to argue that someone who swore that a policeman had extracted a confession from him by violence was not casting imputations on the character of a witness for the prosecution (see PROFESSOR CROSS'S book on EVIDENCE (3rd Edn.) p. 348).

The great difficulty lies in construing the word "imputation" in its context, and this has led to great conflict of judicial authority for the cases are not reconcilable on any recognisable principle. It has been accepted, and I do not quarrel with the acceptance, that to call the prosecutor a liar is not sufficient to deprive the accused of his statutory protection (*R. v. Rouse* (97)). This decision did not, however, prevent the Court of Criminal Appeal reaching the conclusion that an assertion that the prosecutor was such a horrible liar that his brother would not speak to him deprived the accused of protection (*R. v. Rappolt* (98)). In *R. v. Jones* (99) LORD HEWART, C.J., after saying that a clear line is drawn between words which are an emphatic denial of the Crown's evidence and words which attack the character or conduct of the witness, added (100):

"It was one thing for the appellant to deny that he had made the confession, but it is another thing to say that the whole thing was an elaborate and deliberate concoction on the part of the inspector."

(91) [1926] All E.R. Rep. 187; [1927] 1 K.B. 323.

(92) [1926] All E.R. Rep. at p. 190; [1927] 1 K.B. at p. 329.

(93) [1861-73] All E.R. Rep. 549; (1865), Le. & Ca. 520.

(94) [1944] 2 All E.R. 13; [1944] A.C. 315.

(95) [1944] 2 All E.R. at p. 17; [1944] A.C. at p. 324.

(96) [1962] 1 All E.R. 569; [1962] A.C. 635.

(97) [1904] 1 K.B. 184.

(98) (1911), 8 Cr. App. Rep. 156.

(99) (1923), 17 Cr. App. Rep. 117.

(100) (1923), 17 Cr. App. Rep. at p. 120.



A The line is a narrow one and the same judge in another case said (101) that it is not possible to lay down, even if it were desirable, as the authorities stand, a series of formulae or regulations on this matter (*R. v. Dunkley* (101)).

It was at one time considered that the accused only exposes himself to cross-examination on his record when the nature or conduct of the defence is such as to involve "unnecessary" or "unjustifiable" imputations on the character of

B the prosecutor or witnesses for the prosecution. The full Court of Criminal Appeal, however, disposed of this consideration in *R. v. Hudson* (102). The judgment of the court delivered by LORD ALVERSTONE, C.J. contains this passage which should, I think, be accepted as correct. It reads (103):

C "We think that the words of the section, 'unless the nature or conduct of the defence is such as to involve imputations', etc., must receive their ordinary and natural interpretation, and that it is not legitimate to qualify them by adding or inserting the words 'unnecessarily', or 'unjustifiably', or 'for purposes other than that of developing the defence', or other similar words."

Notwithstanding this clear statement there is an apparent anomaly in the rape cases, where it has long been consistently held that allegations by someone accused of rape to the effect that the prosecutrix had been guilty of gross indecency did not deprive him of his shield. This has not been doubted since the decision of the Court of Criminal Appeal in *R. v. Turner* (104) in a judgment delivered by HUMPHREYS, J., affirmed by this House in *Stirland v. Director of Public Prosecutions* (105). VISCOUNT SIMON, L.C., there enumerated a proposition

E which he purported to found on *R. v. Turner* (104) that an accused is not to be regarded as depriving himself of the protection of the statute because the proper conduct of his defence necessitates the making of injurious reflections on the prosecutor or his witnesses. This would appear, on the face of it, to conflict with the injunction against adding words to the statute which the decision in *R. v. Hudson* (102) rightly condemns, and it may be that the rape cases may  
F be best justified by the following extract from the judgment of HUMPHREYS, J., in *Turner's* case (104). He said (106):

"... the defence of consent in rape is in truth nothing more than a denial by the accused that the prosecution has established one of the two essential ingredients of the charge. It is and must be the prosecution which introduces the question of consent or non-consent."

G It is, I think, right to say that the full width of LORD SIMON's proposition has not been followed in the Court of Criminal Appeal in the sense of detracting from the validity of what was said in *R. v. Hudson* (102) (see *R. v. Jenkins* (107) where SINGLETON, J., giving the judgment of the court expressed the opinion that LORD SIMON in using those words had not in mind any idea of upsetting or weakening what had been said in *R. v. Hudson* (102)).

H It is unnecessary, in my opinion, to refer to all the cases in which the court of Criminal Appeal have considered the meaning of the word "imputation" in the section, but mention should be made of *R. v. Cook* (108) where the judgment of a full court was delivered by DEVLIN, J., who pointed out that the subsection as a whole makes it clear that it does not intend that the introduction of a person's previous convictions should be other than exceptional. He proceeded (109):

I

(101) [1926] All E.R. Rep. 187; [1927] 1 K.B. 323.

(102) [1912] 2 K.B. 464.

(103) [1912] 2 K.B. at pp. 470, 471.

(104) [1944] 1 All E.R. 599; [1944] K.B. 463.

(105) [1944] 2 All E.R. 13; [1944] A.C. 315.

(106) [1944] 1 All E.R. at p. 601; [1944] 1 K.B. at p. 469.

(107) (1945), 31 Cr. App. Rep. 1.

(108) [1959] 2 All E.R. 97; [1959] 2 Q.B. 340.

(109) [1959] 2 All E.R. at p. 99; [1959] 2 Q.B. at p. 345.

"The difficulty about its phraseology is that, unless it is given some restricted meaning, a person's bad character, if he had one, would emerge almost as a matter of course. Counsel for the defence could not submit that a witness for the prosecution was untruthful without making an imputation upon his character; a prisoner charged with assault could not assert that the prosecution struck first without imputing to him a similar crime. The authorities show that this court has endeavoured to surmount the difficulty in two ways. First, it has in a number of cases construed the words as benevolently as possible in favour of the accused. Secondly, it has laid it down that in cases which fall within the words the trial judge must not allow as a matter of course questions designed to show bad character; he must weigh the prejudicial effect of such questions against the damage done by the attack on the prosecution's witnesses, and must generally exercise his discretion so as to secure a trial that is fair both to the prosecution and to the defence."

I would emphasise that what was said in this case on the subject of the benevolent interpretation which has been given to the subsection relates to the early authorities decided before attention was directed to the exercise of the judge's discretion to secure a fair trial.

I now turn to the matter of discretion and shall have to refer to *R. v. Cook* (110) again in this connexion. It was argued on behalf of the appellant that there was a discretion in the court under the section but that the conception of fairness in the exercise of that discretion was too imprecise and he relied on the decision of the Court of Criminal Appeal in *R. v. Flynn* (111) where it was said that where

"... the very nature of the defence necessarily involves an imputation against a prosecution witness or witnesses the discretion should, in the opinion of this court be as a general rule exercised in favour of the accused, that is to say, evidence as to his bad character or criminal record should be excluded."

It was argued that to limit the effect of the subsection to the exercise of the judge's unfettered discretion had worked in practice in an unsatisfactory manner leading to great variations in practice. The operation of the proviso should not, therefore, normally depend on the discretion of the trial judge.

The appellant, it was submitted, did not in this case throw away his shield by his imputation against the prosecution witness that the witness carried indecent photographs about with him being a homosexual who had previously that day allowed himself to be buggered for money and was offering to submit to the accused for the same purpose, also for money.

I agree with the Court of Appeal (112) that to import the general rule referred to in *R. v. Flynn* (113) would be to place an unwarranted gloss on the words of the statute and to run counter to the decision in *R. v. Hudson* (114) where such a general rule was rejected, and rightly so. If there is a discretion to admit or exclude questions where imputations are made it cannot be right to fetter that discretion by laying down rules and regulations for its exercise. "Fair", as a word, may be imprecise, but I find it impossible to define it or even to attempt an enumeration of all the factors which have to be taken into account in any given case.

The Crown, on the other hand, has contended before your lordships that the trial judge has no discretion whether to admit or exclude evidence. The words of the section are plain and define the circumstances in which the accused throws

(110) [1959] 2 All E.R. 97; [1959] 2 Q.B. 340.

(111) [1961] 3 All E.R. at p. 63; [1963] 1 Q.B. at p. 737.

(112) [1968] 1 All E.R. 94.

(113) [1961] 3 All E.R. 58; [1963] 1 Q.B. 729.

(114) [1912] 2 K.B. 464.

A away his shield. His protection having ceased, the statute clearly provides that his record may be put to the accused. Where then, he asks, is there room for discretion to be exercised to prevent this being done? The answer is twofold. First, there is a long line of authority to support the opinion that there is such a discretion to be exercised under this subsection. In the second place, which is I think more significant, there is abundant authority that in criminal cases B there is a discretion to exclude evidence, admissible in law, of which the prejudicial effect against the accused outweighs its probative value in the opinion of the trial judge.

It is true that the exercise of this discretion is not to be found until comparatively recent times. Under the subsection the matter was uncertain in the year 1913 when two conflicting decisions were given in the Court of Criminal C Appeal. In April of that year it was held that a trial judge has a discretion, with which the court will be slow to interfere, whether he will allow cross-examination as to character under s. 1, proviso (f) (ii) of the Act of 1898 (see *R. v. Watson* (115)). PICKFORD, J. pointed out (116) that the hardship on a prisoner with a bad character can be avoided, for it does not follow that a judge necessarily allows the prisoner to be cross-examined to character; he D has a discretion not to allow it and the prisoner has that protection. In June of the same year a court differently constituted came to the opposite conclusion (see *R. v. Fletcher* (117)). BANKES, J. thought (118) that a judge could go no further than suggest to the prosecution that they should not press it but he cannot exclude evidence which he held to be admissible. In your lordships' House in the next year in the case of *Christie v. Director of Public Prosecutions* E (119), LORD MOULTON, on the general question of a discretion to exclude admissible evidence, stated the position thus (120):

"The law is so much on its guard against the accused being prejudiced by evidence which, though admissible, would probably have a prejudicial influence on the minds of the jury which would be out of proportion to its true evidential value, but there has grown up a practice of a very salutary F nature, under which the judge intimates to counsel for the prosecution that he should not press for the admission of evidence which would be open to this objection, and such an intimation from the tribunal trying the case is usually sufficient to prevent the evidence being pressed in all cases where the scruples of the tribunal in this respect are reasonable. Under the influence G of this practice, which is based on an anxiety to secure for everyone a fair trial, there has grown up a custom of not admitting certain kinds of evidence which is so consistently followed that it almost amounts to a rule of procedure."

From this time onwards the position has been accepted that there is a discretion to exclude admissible evidence in all criminal cases notwithstanding the guarded H approach made by BANKES, J. (118) and LORD MOULTON (120) respectively.

In 1934 LORD SANKEY, L.C., in *Maxwell v. Director of Public Prosecutions* (121), stated baldly (122), in connexion with this section that the judge had a discretion under s. 1, proviso (f). In 1944 LORD SIMON, L.C. in *Stirland v. Director of Public Prosecutions* (123) stated in general terms, though with reference to a statement as to the accused's past record, that all was subject to the judge's I discretion to disallow any questions which in the circumstances he thinks unfair.

(115) (1913), 8 Cr. App. Rep. 249.

(116) (1913), 8 Cr. App. Rep. at p. 254.

(117) (1913), 9 Cr. App. Rep. 53.

(118) (1913), 9 Cr. App. Rep. at p. 56.

(119) [1914-15] All E.R. Rep. 63; [1914] A.C. 545.

(120) [1914-15] All E.R. Rep. at p. 69; [1914] A.C. at p. 559.

(121) [1934] All E.R. Rep. 168; [1935] A.C. 309.

(122) [1934] All E.R. Rep. at p. 174; [1935] A.C. at p. 321.

(123) [1944] 2 All E.R. 13; [1944] A.C. 315.



In 1949 in *Noor Mohamed v. Regem* (124), LORD DU PARCQ, giving the judgment of the Board used words of general application in dealing with circumstances in which a prosecution might be entitled to give evidence of guilty intent. He said (125):

"It is right to add, however, that in all such cases the judge ought to consider whether the evidence which it is proposed to adduce is sufficiently substantial, having regard to the purpose to which it is professedly directed, to make it desirable in the interest of justice that it should be admitted. If, so far as that purpose is concerned, it can in the circumstances of the case have only trifling weight, the judge will be right to exclude it. To say this is not to confuse weight with admissibility. The distinction is plain, but cases must occur in which it would be unjust to admit evidence of a character gravely prejudicial to the accused even though there may be some tenuous ground for holding it technically admissible. The decision must then be left to the discretion and the sense of fairness of the judge."

In *Harris v. Director of Public Prosecutions* (126) the question was whether or not on an indictment of larceny evidence of previous larcenies of a similar kind (on which the accused was acquitted) should have been excluded from the consideration of the jury. LORD SIMON read the passage I have cited from *Noor Mohamed's* case (125) and prefaced his reading of it by saying (127):

"It is not a rule of law governing the admissibility of evidence, but a rule of judicial practice followed by a judge who is trying a charge of crime when he thinks that the application of the practice is called for."

The last two cases were followed by the Judicial Committee of the Privy Council in *Kuruma Son of Kanu v. Reginam* (128), where an illegal search of the accused disclosed unlawful possession of ammunition. LORD GODDARD, C.J., in giving the reasons for the dismissal of the appeal, said (129):

"No doubt in a criminal case the judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against the accused."

In the same year in the Court of Criminal Appeal, LORD GODDARD, C.J., affirmed the duty to exercise discretion with regard to s. 1, proviso (f) (*R. v. Clark* (130)).

This line of authority has been followed consistently to the present time in cases which have been cited to your lordships. As recently as 1962 in *Jones v. Director of Public Prosecutions* (131) the existence of the general judicial discretion as vested in the judge not in the prosecution was affirmed in these words by LORD DENNING, M.R. (131):

"The judge was entitled in his discretion to exclude them [viz. questions] if he thought they were so prejudicial as to outweigh their probative value."

The discretionary principle of fairness to the accused has been adopted in Scotland (see *Lawrie v. Muir* (132)) and in Northern Ireland (see *R. v. Murphy* (133)).

I now refer again to *R. v. Cook* (134) in which the judgment, delivered by DEVLIN, J., pointed out (135) that the attempt to give a limited construction to the words of the subsection has led to decisions which are difficult to reconcile

(124) [1949] 1 All E.R. 365; [1949] A.C. 182.

(125) [1949] 1 All E.R. at p. 370; [1949] A.C. at p. 192.

(126) [1952] 1 All E.R. 1044; [1952] A.C. 694.

(127) [1952] 1 All E.R. at p. 1048; [1952] A.C. at p. 707.

(128) [1955] 1 All E.R. 236; [1955] A.C. 197.

(129) [1955] 1 All E.R. at p. 239; [1955] A.C. at p. 204.

(130) [1955] 3 All E.R. at p. 34; [1955] 2 Q.B. at p. 478.

(131) [1962] 1 All E.R. at p. 580; [1962] A.C. at p. 671.

(132) 1950 S.C. (J) 19.

(133) [1965] N.I. 138.

(134) [1959] 2 All E.R. 97; [1959] 2 Q.B. 340.

(135) [1959] 2 All E.R. at p. 99; [1959] 2 Q.B. at p. 345.

A with one another and, now that it is clearly established that the trial judge has a discretion and that he must exercise it so as to secure that the defence is not unfairly prejudiced, there is nothing to be gained by seeking to strain the words of the subsection in favour of the defence.

If the word "imputation" is benevolently construed in favour of the defence so as to exclude imputations of little weight or of relatively minor significance B in proportion to the character of the accused as revealed by his record, the trial judge can in the exercise of his discretion protect the accused from too severe an application of the section. I do not myself think it profitable to endeavour to give clear directions as to what should be done in particular cases. This has been done in rape cases which may be explained, as HUMPHREYS, J., did in *R. v. Turner* (136) or simply treated as sui generis as DEVLIN, J., suggested in *R. v. Cook* (137). As PROFESSOR CROSS points out in his book *EVIDENCE* (3rd Edn.) C at p. 354, the conception of a discretion which must generally be exercised in a particular way may be juridically odd, but it has the merit of providing a practical solution to the problem. Perhaps this is the best justification for the practice which is sanctified by authority in the rape cases. I would not wish, however, to extend the list of categories. Discretion ought not to be confined save by the limits D of fairness. Sense of fairness is, after all (in the authorities), always treated as the equivalent of discretion.

In this case I agree with the Court of Appeal (138) that once one escapes from the idea of a general rule introduced by *R. v. Flynn* (139) there is no ground for saying that the judge was wrong in the exercise of his discretion. Imputations of a serious nature were made and the cross-examination was rightly admitted. E The failure to prove the convictions was not important having regard to the way the appellant answered the questions put to him in cross-examination. Further, I do not think that there is any substance in the suggestion that the appellant was in any sense trapped by the learned judge into making the imputations which he did. I do not think further that there was any material defect in the directions given to the jury on the question of the relevance of the admissions and the F absence of strict proof of the convictions.

I would dismiss this appeal.

LORD GUEST: My Lords, there can be few branches of the criminal law which have given rise to so many appeals as those concerning the application of s. 1 of the Criminal Evidence Act, 1898. The reason is not far to seek. Most G defences at a criminal trial involve questions as to the credibility or character of the prosecution witnesses; a great many accused persons have previous convictions, so a clash becomes inevitable. Under what circumstances, in regard to s. 1, proviso (f) (ii) of the Act of 1898, is the accused to be cross-examined as to his previous convictions, the ordinary rule being that evidence of his bad character is not admissible?

H A very great number of authorities was referred to. Some are inconsistent and not easy to reconcile. I propose to isolate only a few. The first reported case after the Act of 1898 was *R. v. Rouse* (140). For the accused to call a prosecution witness "a liar" was held not to involve an imputation on his character. This was merely an emphatic denial of the truth of the allegation against him.

I In *R. v. Preston* (141), a rather special case, there was a challenge of the police inspector's conduct of identification parade proceedings, but which did not form part of the defence. This was held in the circumstances not to involve an imputation on the character of the inspector. After quoting s. 1, proviso (f) CHANNELL, J., said (142):

(136) [1944] 1 All E.R. 599; [1944] K.B. 463.

(137) [1959] 2 All E.R. at p. 99; [1959] 2 Q.B. at p. 345.

(138) [1968] 1 All E.R. 94.

(139) [1961] 3 All E.R. 58; [1963] 1 Q.B. 729.

(140) [1904] 1 K.B. 184.

(141) [1909] 1 K.B. 568.

(142) [1909] 1 K.B. at p. 575.

"It appears to us to mean this: that if the defence is so conducted, or the nature of the defence is such, as to involve the proposition that the jury ought not to believe the prosecutor or one of the witnesses for the prosecution upon the ground that his conduct—not his evidence in the case, but his conduct outside the evidence given by him—makes him an unreliable witness, then the jury ought also to know the character of the prisoner who either gives that evidence or makes that charge, and it then becomes admissible to cross-examine the prisoner as to his antecedents and character with the view of showing that he has such a bad character that the jury ought not to rely on his evidence."

Thereafter the decisions were confusing and a full court was assembled in *R. v. Hudson* (143). On a charge of theft the defence was that the Crown witnesses had stolen the goods and that they had planted them on the accused, and the witnesses were asked questions to show that they had committed the theft. It was held that the words of s. 1, proviso (f) (ii) must receive their ordinary and natural interpretation and must not be qualified by adding or importing the words "unjustifiably" or "for purposes other than that of developing the defence" or other similar words. In that case the nature and conduct of the defence was held to be such as to involve imputations on the character of the prosecution witnesses. In my view, this was the proper corrective for the confusion which the law had reached and the principle in this case should have formed the future guidance for the interpretation of the section.

No sooner, however, had this decision been given than we find expressions of opinion that the trial judge had a discretion in certain cases to mitigate the harsh or strict application of s. 1, proviso (f) (ii). The first mention of this occurred in *R. v. Watson* (144) where PICKFORD, J. (145) said that to apply the rule in *R. v. Hudson* (143) strictly would be to put a hardship on a prisoner with a bad character:

"That may be so, but it does not follow that a judge necessarily allows the prisoner to be cross-examined to character; he has a discretion not to allow it, and the prisoner has that protection."

In *R. v. Jones* (146) to suggest that a prosecution witness had fabricated evidence was an imputation on his character. LORD HEWART, C.J., said (147) there was a clear line between an emphatic denial of the evidence and an attack on the conduct or character of a witness which fabrication involved.

*R. v. Turner* (148), another full court case, has created difficulties. It was held that the defence of consent to a charge of rape was not an imputation on the character of the prosecutrix. The basis of the decision was that, as lack of consent was an element in the offence of rape which had to be proved by the prosecution, it was so closely connected with a denial of the charge as to form part of the defence and that some words of limitation must be put on s. 1, proviso (f) (ii) to prevent an injustice. It was said that this was in agreement with the uniform practice for the last thirty-five years. In *Stirland v. Director of Public Prosecutions* (149), a case not concerned with s. 1, proviso (f) (ii), VISCOUNT SIMON, L.C., in the course of enumerating certain propositions said (150):

"4. An accused is not to be regarded as depriving himself of the protection of the section, because the proper conduct of his defence necessitates the making of injurious reflections on the prosecutor or his witness: *R. v. Turner* (148)."

(143) [1912] 2 K.B. 464.

(144) (1913), 8 Cr. App. Rep. 249.

(145) (1913), 8 Cr. App. Rep. at p. 254.

(146) (1923), 17 Cr. App. Rep. 117.

(147) (1923), 17 Cr. App. Rep. at p. 119.

(148) [1944] 1 All E.R. 599; [1944] K.B. 463.

(149) [1944] 2 All E.R. 13; [1944] A.C. 315.

(150) [1944] 2 All E.R. at p. 18; [1944] A.C. at p. 327.



A This observation was obiter.

The next landmark is *R. v. Cook* (151) where a full court was assembled. DEVLIN, J., giving the judgment of the court, after reviewing the authorities, said (152):

B "In our opinion the difficulties created by s. 1, proviso (f) (ii) are as a general rule best dealt with in accordance with the principle in *R. v. Hudson* (153) as applied in *R. v. Jenkins* (154). The attempt to give the words a limited construction has led to decisions which it is difficult to reconcile; now that it is clearly established that the trial judge has a discretion and that he must exercise it so as to secure that the defence is not unfairly prejudiced, there is nothing to be gained by seeking to strain the words of s. 1, proviso (f) (ii) in favour of the defence. We think, therefore, that the words should be given their natural and ordinary meaning and that the trial judge should, in his discretion, do what is necessary in the circumstances to protect the prisoner from an application of s. 1, proviso (f) that would be too severe."

D This decision might have been thought to lay at rest any confusion which had previously existed, but further confusion was occasioned by *R. v. Flynn* (155), another full court case. This is the case which has given rise to great difficulty in view of SLADE, J.'s statement that where the very nature of the defence necessarily involves imputations on the character of the prosecution witness, the trial judge should as a general rule exercise his discretion in favour of the accused. He based this judgment on *R. v. Cook* (151).

E *Jones v. Director of Public Prosecutions* (156) is long and complicated and it is unnecessary to do more than say that there is approval by LORD DEVLIN (157) of *R. v. Turner* (158) and LORD SIMON's fourth proposition in *Stirland's case* (159).

F And so we reach the present decision where the Court of Appeal (criminal division) (160) followed *R. v. Hudson* (153) and declined to say that *R. v. Flynn* (155) had laid down any general rule as to the exercise of the judge's discretion under s. 1, proviso (f) (ii).

G If I had thought that there was no discretion in English law for a judge to disallow admissible evidence, as counsel for the Crown argued, I should have striven hard and long to give a benevolent construction to s. 1, proviso (f) (ii), which would exclude such cases as *R. v. Rouse* (161) "liar", *R. v. Rappolt* (162) "horrible liar", *Jones's case* (156) "fabricated evidence", *R. v. Turner* (158) rape and other sexual offences, *R. v. Brown* (163) "self defence". I cannot believe that Parliament can have intended that in such cases an accused could only put forward such a defence at peril of having its character put before the jury. This would be to defeat the benevolent purposes of the Act of 1898 which was for the first time to allow the accused to give evidence on his own behalf in all criminal cases. This would deprive the accused of the advantage of the Act. I am not persuaded, however, by the Crown's argument and I am satisfied on a review of all the authorities that in English law such a discretion does exist. It was

(151) [1959] 2 All E.R. 97; [1959] 2 Q.B. 340.

(152) [1959] 2 All E.R. at p. 101; [1959] 2 Q.B. at p. 347.

(153) [1912] 2 K.B. 464.

(154) [1945], 31 Cr. App. Rep. 1.

(155) [1961] 3 All E.R. 58; [1963] 1 Q.B. 729.

(156) [1962] 1 All E.R. 569; [1962] A.C. 635.

(157) [1962] 1 All E.R. at pp. 599, 604; [1962] A.C. at pp. 701, 708.

(158) [1944] 1 All E.R. 599; [1944] K.B. 463.

(159) [1944] 2 All E.R. at p. 18; [1944] A.C. at p. 327.

(160) [1968] 1 All E.R. 94.

(161) [1904] 1 K.B. 184.

(162) (1911), 6 Cr. App. Rep. 156.

(163) (1960), 44 Cr. App. Rep. 181.

exercised for the first time in relation to this section in *R. v. Watson* (164). A Discretion as such has the general blessing of LORD MOULTON in *Director of Public Prosecutions v. Christie* (165) and thereafter it has been the uniform practice of judges to exercise it in this class of case. Discretion was recognised in this House in *Maxwell v. Director of Public Prosecutions* (166); *Stirland v. Director of Public Prosecutions* (167); *Harris v. Director of Public Prosecutions* (168), and *Jones v. Director of Public Prosecutions* (169). Also in the Privy Council in *Noor Mohamed v. Regem* (170) and *Karuma, Son of Kaniu v. Reginam* (171). In face of this long established practice it is, in my opinion, now too late to say that the judge has no discretion. While I leave to others more versed than I am in English criminal law and practice to discuss the origin of this discretion I would assume that it springs from the inherent power of the judge to control the trial before him and to see that justice is done in fairness to the accused. B

I wish to say only this about the Scottish cases which were referred to in argument. The actual decision in *O'Hara v. H.M. Advocate* (172), followed as it was by *Fielding v. H.M. Advocate* (173), would appear to be correct and I respectfully adopt the reasoning of the Lord Justice Clerk (LORD THOMSON) in *O'Hara's* case (174). Whether the discretion in Scotland is exercised in relation to the admissibility of evidence or in relation to the disallowance of evidence is a matter of emphasis and may be open to doubt in view of *Lawrie v. Muir* (175). C

I find it unnecessary to say more on the principles on which discretion should be exercised. The guiding star should be fairness to the accused. This idea is best expressed by DEVLIN, J., in *R. v. Cook* (176). In following this star the fact that the imputation was a necessary part of the accused's defence is a consideration which will no doubt be taken into account by the trial judge. If, however, the accused or his counsel goes beyond developing his defence in order to blacken the character of a prosecution witness, this no doubt will be another factor to be taken into account. If it is suggested that the exercise of this discretion may be whimsical and depend on the individual idiosyncrasies of the judge, this is inevitable where it is a question of discretion, but I am satisfied that this is a less risk than attempting to shackle the judge's power within a straight jacket. D

On the facts of this case I have no doubt that the nature and conduct of the defence was such as to involve imputations on the character of the prosecution witness. It was suggested to him that he had been to bed with another man that afternoon and earned a £1, and that he asked the appellant for a £1 to go to bed with him, and further that he had brought indecent photographs with him to the appellant's room where they were found by the police. These suggestions were denied by McLaughlin. These were clearly imputations on the character of the prosecution witness and would entitle the prosecution to cross-examine the appellant as to his previous convictions. It should be added that the evidence of the doctor was to the effect that the condition of McLaughlin was such as to be consistent with his having had sexual intercourse with someone on that day. So that it was relevant for the defence to establish that another man might have been responsible for McLaughlin's condition. However this may be there were, apart from this, the strongest imputations against McLaughlin's character. E

I would dismiss the appeal. F

(164) [1913], 8 Cr. App. Rep. 249.

(165) [1914-15] All E.R. Rep. 63; [1914] A.C. 545.

(166) [1934] All E.R. Rep. 168; [1935] A.C. 309.

(167) [1944] 2 All E.R. 13; [1944] A.C. 315.

(168) [1952] 1 All E.R. 1044; [1952] A.C. 694.

(169) [1962] 1 All E.R. 569; [1962] A.C. 635.

(170) [1949] 1 All E.R. 365; [1949] A.C. 182.

(171) [1955] 1 All E.R. 236; [1955] A.C. 197.

(172) 1948 S.C. (J.) at p. 98.

(173) 1959 S.C. (J.) 100.

(174) 1948 S.C. (J.) 90.

(175) 1950 S.C. (J.) 19.

(176) [1959] 2 All E.R. at p. 101; [1959] 2 Q.B. at p. 347.

**A LORD PEARCE:** My Lords, ever since the Criminal Evidence Act, 1898, came into force there has been difficulty and argument about the application of the words in s. 1, proviso (f) (ii) "the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution".

**B** Two main views have been put forward. One view adopts the literal meaning of the words. The prosecutor is cross-examined to show that he has fabricated the charge for improper reasons. That involves imputations on his character. Therefore it lets in the previous convictions of the accused. The practical justification for this view is the "tit for tat" argument. If the accused is seeking to cast discredit on the prosecution, then the prosecution should be allowed to do likewise. If the accused is seeking to persuade the jury that the prosecutor behaved like a knave, then the jury should know the character of the man who makes these accusations, so that it may judge fairly between them instead of being in the dark as to one of them.

**C** The other view would limit the literal meaning of the words. For it cannot, it is said, have been intended by Parliament to make a man liable to have his previous convictions revealed whenever the essence of his defence necessitates imputations on the character of the prosecutor. This revelation is always damaging and often fatal to a defence. The high-water mark of this argument is the ordinary case of rape. In this the vital issue (as a rule) is whether the woman consented. Consent (as a rule) involves imputations on her character. Therefore in the ordinary case of rape, the accused cannot defend himself without letting in his previous convictions. The same argument extends in varying lesser degrees to many cases.

**D** The argument in favour of a construction more liberal to the accused is supported in two ways.

**E** First, it is said that character is used in the sense in which it was used in *R. v. Rowton* (177) where the full court ruled that evidence of good character must be limited solely to general reputation and not to a man's actual disposition; and no imputation on the prosecutor's general reputation is involved by allegations that he acted as a knave in matters relevant to the offence charged. So far as the meaning of "character" is concerned, there is much force in this argument. It would accord with the word "character" as used three times previously in the same subsection. (See the judgment delivered by Lord HEWART, C.J. in *R. v. Dunkley* (178), where the argument was described as formidable but was rejected (179)):

**F** "Nevertheless when one looks at the long line of cases beginning very shortly after the passing of the Criminal Evidence Act, 1898 it does not appear that the argument has ever been so much as formulated. One can only say that it is now much too late in the day even to consider that argument, because that argument could not now prevail without the revision, and indeed to a great extent the overthrow, of a very long series of decisions."

**G** A similar view was expressed by LORD DENNING in *Jones v. Director of Public Prosecutions* (180) (see also LORD DEVLIN (181)) a case which dealt with a kindred problem under s. 1, proviso (f) (i). VISCOUNT SIMON, L.C., however, in *Stirland v. Director of Public Prosecutions* (182), after discussing the two conceptions, that is reputation and real disposition, said (183), "I am disposed to think that

(177) [1861-73] All E.R. Rep. 549; (1865), Le. & Ca. 520.

(178) [1926] All E.R. Rep. 187; [1927] 1 K.B. 323.

(179) [1926] All E.R. Rep. at pp. 190; [1927] 1 K.B. at p. 329.

(180) [1962] 1 All E.R. at p. 580; [1962] A.C. at p. 671.

(181) [1962] 1 All E.R. at p. 604; [1962] A.C. at p. 709.

(182) [1944] 2 All E.R. 13; [1944] A.C. 315.

(183) [1944] 2 All E.R. at p. 17; [1944] A.C. at p. 325.



in para. (f) (where the word 'character' occurs four times) both conceptions are combined". A

Late as it may be, it might be justifiable to consider whether "character" means in the context solely general reputation, if a reassessment could lead to any clarification of the problem; but in my opinion it leads nowhere. For I cannot accept the proposition that to accuse a person of a particular knavery does not involve imputations on his general reputation. The words "involve" and "imputations" are wide. It would be playing with words to say that the allegation of really discreditable matters does not involve imputations on his general reputation, if only as showing how erroneous that reputation must be. The argument is, however, a valuable reminder that the Act of 1898 is intending serious and not trivial imputations. B

The second part of the argument in favour of a construction more liberal to the accused is concerned with the words "the conduct or nature of the defence". One should, it can be argued, read conduct or nature as something superimposed on the essence of the defence itself. In *O'Hara v. H.M. Advocate* (184), the Lord Justice-Clerk (LORD THOMSON), after a careful review of the English cases construed "conduct" as meaning the actual handling of the case by the accused or his advocate. He found difficulty with "nature" but said (185): C

"But the more general considerations which I have mentioned persuade me to the view that 'nature' is to be read, not as meaning something which is inherent in the defence, but as referable to the mechanism of the defence; nature being the strategy of the defence and conduct the tactics." D

This argument has obvious force, particularly in a case of rape, where the allegation of consent is in truth no more than a mere traverse of the essential ingredient which the Crown have to prove, namely want of consent. The argument, however, does not, and I think cannot, fairly stop short of contending that *all* matters which are relevant to the crime, i.e., of which rebutting evidence could be proved, are excluded from the words conduct or nature of the defence. E

To take the present case as an example, the evidence having established physical signs on the victim of the alleged offence, his admission that he had previously committed it with somebody else was relevant. So, too, was his admission that he had been paid £1 for it, since when the conversation was relevant it could not be right to bowdlerise it. Therefore, it is said, the putting of the allegation in cross-examination and the evidence given by the accused was an essentially relevant part of the defence and therefore was not within the words "the nature or conduct of the defence". If counsel for the appellant's forceful argument on the proper construction of the subsection is right, the story told by the accused did not let in the convictions. F

So large a gloss on the words is not easy to justify, even if one were convinced that it necessarily produced a fair and proper result which Parliament intended; but there are two sides to the matter. So liberal a shield for an accused is in many cases unfair to a prosecution. Provided it is all linked up to the defence put forward by an accused there would be no limit to the amount of mud which could be thrown against an unshielded prosecutor while the accused could still crouch behind his own shield. Counsel for the appellant relies on an alternative argument that, even if the stricter construction is correct, yet *R. v. Flynn* (186) has established something akin to a rule by which the judge except in rare circumstances should always exercise his discretion in a way which would produce an effect similar to the more liberal construction. G I

Such being the problems set by the Act of 1898, the general course of the cases was as follows. The first reported case was *R. v. Marshall* (187) where

(184) 1948 S.C. (J.) 90.

(185) 1948 S.C. (J.) at p. 98.

(186) [1961] 3 All E.R. 58; [1963] 1 Q.B. 729.

(187) (1899), 63 J.P. 38.

A the stricter view was taken. It was also taken by implication in *R. v. Rouse* (188). In *R. v. Bridgewater* (189), however, in *R. v. Preston* (190) and finally in *R. v. Westfall* (191), there were certain expressions which supported the less strict construction. These were considered by a full court in *R. v. Hudson* (192), which took the stricter view (193):

B “We think that the words of the section ‘unless the nature or conduct of the defence is such as to involve imputations’ etc. must receive their ordinary and natural interpretation and that it is not legitimate to qualify them by adding or inserting the words ‘unnecessarily’, or ‘unjustifiably’, or ‘for purposes other than developing the defence’, or other similar words.”

C That view was followed by *R. v. Watson* (194) in which PICKFORD, J., giving the judgment of the court (of which AVORY, J. was a member) quoted the above passage from *R. v. Hudson* (195) and said (196):

D “It has been pointed out that to apply the rule strictly is to put a hardship on a prisoner with a bad character. That may be so, but it does not follow that a judge necessarily allows the prisoner to be cross-examined to character; he has a discretion not to allow it, and the prisoner has that protection. But in order to see if the conviction should be upheld, it is not enough that the court should think it would have exercised its discretion differently. It is necessary to show that in law the cross-examination of the prisoner was inadmissible. The judge at the trial is in a better position to judge whether the cross-examination is to be allowed.”

E That case has never been criticised or disapproved. With one exception, that is the pattern of present practice. The courts adopt the strict interpretation but, where it would be unfair, it is modified by the discretion of the judge at the trial. Later in 1913, in *R. v. Fletcher* (197), BANKES, J. said (198):

F “where the judge entertains a doubt as to the admissibility of evidence, he may suggest to the prosecution that they should not press it, but he cannot exclude evidence which he holds to be admissible.”

G But this was not said in relation to s. 1, proviso (f) of the Act of 1898 and, as will be seen, that view has not since prevailed.

The exception is the case of rape. This had for long been treated on a different footing. *R. v. Turner* (199) decided that evidence of consent by the woman and indecencies by her which accompanied or constituted it, did not let in the previous convictions of the accused. Without embarking on other aspects of the subsection or other crimes HUMPHREYS, J. (giving the judgment of the court) said this (200):

H “For centuries the law has jealously guarded the right of an accused person to put forward at his trial any defence open to him on the indictment without running the risk of his character, if a bad one, being disclosed to the jury. It would be strange indeed if the Act of Parliament which allowed him, in most cases for the first time, to give evidence on oath had virtually deprived him of that right in the case of one serious felony by

(188) [1904] 1 K.B. 184.

(189) [1905] 1 K.B. 131.

(190) [1909] 1 K.B. 568.

(191) [1912], 7 Cr. App. Rep. 176.

(192) [1912] 2 K.B. 464.

(193) [1912] 2 K.B. at pp. 470, 471.

(194) [1913], 8 Cr. App. Rep. 249.

(195) [1912] 2 K.B. at pp. 470, 471.

(196) [1913], 8 Cr. App. Rep. at pp. 254, 255.

(197) [1913], 9 Cr. App. Rep. 53.

(198) [1913], 9 Cr. App. Rep. at p. 56.

(199) [1944] 1 All E.R. 599; [1944] K.B. 463.

(200) [1944] 1 All E.R. at p. 601; [1944] K.B. at p. 469.

enacting that he could only do so at the risk of having his character exposed. What is commonly referred to as the defence of consent in rape is in truth nothing more than a denial by the accused that the prosecution had established one of the two essential ingredients of the trial. It is and must be the prosecution which introduces the question of consent or non-consent. Can the legislature have intended to penalise the accused who avails himself of the right to give evidence conferred by statute by enacting that he may be cross-examined as to previous convictions if he denies one, though not if he only denies the other, of the two ingredients of the crime. In our opinion this is one of the cases where the court is justified in holding that some limitation must be put on the words of the section, since to do otherwise would be to do grave injustice never intended by Parliament."

He then goes on to mention a ruling to the like effect by JELF, J., in *R. v. Sheean* (201) and adds (202): "In so holding we are satisfied that we are following the uniform practice of the last thirty-five years."

The argument in the case had ranged over such cases as *R. v. Preston* (203) and *R. v. Hudson* (204), but the court deliberately confined itself to the crime of rape in respect of which there had been a uniform practice for thirty-five years and the court felt that there could only be one answer; and it was refraining from criticising *R. v. Hudson* (204) or giving guidance as to the more general aspects of the subsection. LORD SIMON's fourth proposition in *Stirland's* case (205) which gives *R. v. Turner* (206) as authority, should in my opinion be taken as relating only to rape.

In *Maxwell v. Director of Public Prosecutions* (207), a case on a somewhat different point, where VISCOUNT SANKEY, L.C. remarked (208):

"In general no question as to whether a prisoner has been convicted or charged or acquitted should be asked or, if asked, allowed by the judge, who has a discretion under proviso (f) unless . . ."

and he goes on to deal with matters which do not help the particular problem. He also pointed out the negative form in which proviso (f) is couched (209): "The Act does not in terms say that in any case a prisoner may be asked or required to answer . . . or impose any such affirmative or absolute burden upon him."

In *Stirland's* case (210) on a somewhat different point under s. 1 (f) LORD SIMON, L.C. said that the questions (211):

"... should not have been put, and, if put should have been disallowed. It must not be forgotten that the judge presiding at a criminal trial has a discretion (as LORD SANKEY said in *Maxwell's* case (207)) to disallow questions addressed to the accused in cross-examination if he considers that such questions, having regard to the issues before the jury and to the risk of the jury being misled as to what those issues really are, would be "unfair", and the judge's disallowance cannot be challenged on appeal."

There is a useful summary of the situation as it has been uniformly recognised

(201) [1908], 21 Cox, C.C. 561.

(202) [1944] 1 All E.R. at p. 602; [1944] K.B. at p. 470.

(203) [1909] 1 K.B. 568.

(204) [1912] 2 K.B. 464.

(205) [1944] 2 All E.R. at p. 18; [1944] A.C. at p. 327.

(206) [1944] 1 All E.R. 599; [1944] K.B. 463.

(207) [1934] All E.R. Rep. 168; [1935] A.C. 309.

(208) [1934] All E.R. Rep. at p. 174; [1935] A.C. at p. 321.

(209) [1934] All E.R. Rep. at p. 172; [1935] A.C. at p. 318.

(210) [1944] 2 All E.R. 13; [1944] A.C. 315.

(211) [1944] 2 All E.R. at p. 17; [1944] A.C. at p. 324.



A in practice for many years to be found in *R. v. Jenkins* (212) where SINGLETON, J. (with OLIVER and BIRKETT, JJ.) said (213):

B “There is one further matter which we think it right to mention. The subsection was intended to be a protection to an accused person. A case ought to be tried on its own facts and it has always been recognised that it is better that the jury should know nothing about an accused person’s past history if that is to his discredit. Just as it was recognised by the legislature that this was fair and proper, so it was recognised that if the nature or conduct of the defence was such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution, it was equally fair and proper that counsel for the prosecution should have the right to ask questions tending to show that the accused person has committed or been convicted of an offence other than that which is under investigation. If and when such a situation arises, it is open to counsel to apply to the presiding judge that he may be allowed to take the course indicated, as was done in this case. Such an application will not always be granted, for the judge has a discretion in the matter. He may feel that even though the position is established in law, still the putting of such questions as to the character of the accused person may be fraught with results which immeasurably outweigh the result of questions put by the defence and which make a fair trial of the accused person almost impossible. On the other hand, in the ordinary and normal case he may feel that if the credit of the prosecutor or his witnesses has been attacked, it is only fair that the jury should have before them material on which they can form their judgment whether the accused person is any more worthy to be believed than those he has attacked. It is obviously unfair that the jury should be left in the dark about an accused person’s character if the conduct of his defence has attacked the character of the prosecutor or the witnesses for the prosecution within the meaning of the section. The essential thing is a fair trial and that the legislature sought to ensure by s. 1 (f).”

F In *Noor Mohamed v. Regem* (214), LORD DU PARCQ (215), giving the judgment of the Board on a somewhat different point referred to the judge’s general power to exclude evidence which would be unfair. This was quoted with approval by LORD SIMON in *Harris v. Director of Public Prosecutions* (216):

G “There is a second proposition which ought to be added under this head. It is not a rule of law governing the admissibility of evidence, but a rule of judicial practice followed by a judge who is trying a charge of crime when he thinks that the application of the practice is called for. LORD DU PARCQ referred to it in *Noor Mohamed v. Regem* (215), immediately after the passage above quoted, when he said that ‘in all such cases the judge ought to consider whether the evidence which it is proposed to adduce is sufficiently substantial, having regard to the purpose to which it is professedly directed, to make it desirable in the interest of justice that it should be admitted. If, so far as that purpose is concerned, it can in the circumstances of the case have only trifling weight, the judge will be right to exclude it. To say this is not to confuse weight with admissibility. The distinction is plain, but cases must occur in which it would be unjust to admit evidence of a character gravely prejudicial to the accused even though there may be some tenuous ground for holding it technically admissible. The decision must then be left to the discretion and the sense of fairness of the judge.’ This second proposition

(212) (1945), 31 Cr. App. Rep. 1.

(213) (1945), 31 Cr. App. Rep. at pp. 14, 15.

(214) [1949] 1 All E.R. 365; [1949] A.C. 182.

(215) [1949] 1 All E.R. at p. 370; [1949] A.C. at p. 192.

(216) [1952] 1 All E.R. at p. 1048; [1952] A.C. at p. 707.

flows from the duty of the judge when trying a charge of crime to set the essentials of justice above the technical rule if the strict application of the latter would operate unfairly against the accused. If such a case arose, the judge may intimate to the prosecution that evidence of 'similar facts' affecting the accused, though admissible, should not be pressed because its probable effect would be out of proportion to its true evidential value' (per LORD MOULTON in *Director of Public Prosecutions v. Christie* (217)). Such an intimation rests entirely within the discretion of the judge."

It is not to be thought that LORD MOULTON or LORD SIMON were intending that this "discretion" of the judge was then to be at the discretion of the prosecutor who might accept or reject it. It is a sensible and valuable discretion left in the hands of the judge to see that a criminal is fairly tried. He can see better than counsel for the prosecution or defence where fairness lies. It is argued that fairness is too loose a concept to afford guidance. I do not agree. It has been a guiding light in criminal trials for many generations. One generation may take a different view of its application from another; but that is an advantage rather than otherwise.

In *Kuruma, Son of Kaniu v. Reginam* (218), LORD GODDARD, C.J., giving the judgment of the Board on a different matter pointed out that

"... in a criminal case the judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against an accused."

Again in *R. v. Clark* (219) he said with regard to s. 1, proviso (f):

"It should be remembered that it is always in the discretion of the judge to rule out a cross-examination and to tell counsel for the prosecution that he is not going to allow a cross-examination as to previous convictions."

Many cases from the Court of Criminal Appeal were cited falling on one side of the line or the other. The matter was well summed up in a judgment of the full court under LORD PARKER, C.J. given by DEVLIN, J. in *R. v. Cook* (220):

"In our opinion the difficulties created by s. 1, proviso (f) (ii) are as a general rule best dealt with in accordance with the principle in *R. v. Hudson* (221), as applied in *R. v. Jenkins* (222). The attempt to give the words a limited construction has led to decisions which it is difficult to reconcile; now that it is clearly established that the trial judge has a discretion and that he must exercise it so as to secure that the defence is not unfairly prejudiced, there is nothing to be gained by seeking to strain the words of s. 1, proviso (f) (ii) in favour of the defence. We think, therefore, that the words should be given their natural and ordinary meaning and that the trial judge should in his discretion do what is necessary in the circumstances to protect the prisoner from an application of s. 1, proviso (f) (ii) that would be too severe. It may be that, as indicated in *O'Hara v. H.M. Advocate*, (223) cases of rape should be regarded as sui generis; certainly the peculiar questions to which they give rise have been settled by *R. v. Turner* (224) and that case has determined how the discretion should be exercised. No equally clear guidance can be given in cases where the subject-matter is not so specialised. In particular, no firm rule has been, or can be, laid down to govern the sort of circumstances we have to consider here where the defence involves a suggestion of impropriety against a police officer. The cases on this

(217) [1914-15] All E.R. Rep. 63; [1914] A.C. 545.

(218) [1955] 1 All E.R. at p. 239; [1955] A.C. at p. 204.

(219) [1955] 3 All E.R. at p. 34; [1955] 2 Q.B. at p. 478.

(220) [1959] 2 All E.R. at p. 101; [1959] 2 Q.B. at p. 347.

(221) [1912] 2 K.B. 464

(222) (1945), 31 Cr. App. Rep. 1.

(223) 1948 S.C. (J.) 90.

(224) [1944] 1 All E.R. 599; [1944] K.B. 463.

A subject-matter—in particular *R. v. Preston* (225), *R. v. Jones* (226) and *R. v. Clark* (227)—indicate the factors to be borne in mind and the sort of question that a judge should ask himself. Is a deliberate attack being made on the conduct of the police officer calculated to discredit him wholly as a witness? If there is, a judge might well feel that he must withdraw the protection which he would desire to extend as far as possible to an accused who was endeavouring only to develop a line of defence. If there is a real issue about the conduct of an important witness which the jury will inevitably have to settle in order to arrive at their verdict, then, as SINGLETON, J. put it in *R. v. Jenkins* (228), and LORD GODDARD, C.J. repeated in *R. v. Clark* (229), the jury is entitled to know the credit of the man on whose word the witness's character is being impugned."

C Finally in *R. v. Flynn* (230) the court in a judgment of SLADE, J., allowing an appeal said (231):

"I have already emphasised that s. 1, proviso (f) (ii) of the Act of 1898, refers to both the nature and conduct of the defence. The exercise of a discretion must depend entirely on the facts of the particular case in which it falls to be exercised, but where, as in the present case, the very nature of the defence necessarily involves an imputation, against a prosecution witness or witnesses, the discretion should, in the opinion of this court, be as a general rule exercised in favour of the accused, that is to say, evidence as to his character or criminal record should be excluded. If it were otherwise, it comes to this, that the Act of 1898, the very Act which gave the charter, so to speak, to an accused person to give evidence on oath in the witness box, would be a mere trap because he would be unable to put forward any defence, no matter how true, which involved an imputation on the character of the prosecutor or any of his witnesses, without running the risk if he had the misfortune to have a record, of his previous convictions being brought up in court while being tried on a wholly different matter."

F It is argued that in view of those remarks the learned judge in the present case ought to have exercised his discretion in favour of this particular accused, since *R. v. Flynn* (230), set up something in the nature of a rule as to the exercise of the discretion; but if and in so far as *R. v. Flynn* (230) was purporting to do this, I do not accept it. The considerations which *R. v. Flynn* (230) sets out are valid factors to be weighed in the exercise of discretion. At the end of it all, however, the judge must make up his own mind.

G In the result I cannot accept the appellant's proposition that *R. v. Hudson* (232) and the many cases which have followed it were wrong in their strict construction of s. 1 (f) of the Act of 1898. Nor can I accept his contention that *R. v. Flynn* (230) laid down a rule by which, except in rare case, the judge's discretion should be used to produce the more liberal construction.

H On the other hand, I cannot accede to the contention of counsel for the Crown that the judge has no discretion and must always apply the strict rule in *R. v. Hudson* (232), in its full rigour. There is an overwhelming mass of distinguished authority that the discretion exists. It is not necessary to consider here whether that discretion has been evolved in relation to s. 1, proviso (f) from the case of *R. v. Watson* (233) onwards, or whether it comes, as in my opinion it does,

I

(225) [1909] 1 K.B. 568.

(226) [1923], 17 Cr. App. Rep. 117.

(227) [1955] 3 All E.R. 29; [1955] 2 Q.B. 469.

(228) (1945), 31 Cr. App. Rep. 1.

(229) [1955] 3 All E.R. at p. 34; [1955] 2 Q.B. at p. 478.

(230) [1961] 3 All E.R. 58; [1963] 1 Q.B. 729.

(231) [1961] 3 All E.R. at p. 63; [1963] 1 Q.B. at p. 737.

(232) [1912] 2 K.B. 464.

(233) (1913), 8 Cr. App. Rep. 249.



from the inherent power of the courts to secure a fair trial for the accused, or to use the words of LORD SIMON (234):

“... the duty of a judge when trying a charge of crime to set the essentials of justice above the technical rule if the strict application of the latter would operate unfairly against the accused.”

Moreover, it is good sense. Naturally each side seeks to establish a rule rather than a discretion, provided always that the rule is in his own favour. There is always an attraction in rules since they are so much easier to apply. It would, for instance, be easier for a judge if he did not have a discretion as to costs in civil suits. Moreover, “the demon of formalism” in the words of CARDOZO, J. “tempts the intellect with the lure of scientific order”, especially in cases like s. 1, proviso (f) where decisions in particular cases are so difficult. The courts have been right, however, in thinking that the question is whether *this* attack on the prosecution ought to let in *these* convictions on the particular facts of the case, and on such a point rules are no substitute for a discretion in producing a fair trial. I appreciate that in the result an accused cannot be certain exactly how far he can go without letting in his convictions. The many cases in the Court of Criminal Appeal have, however, given some reasonably consistent guidance; and unless there is established a rule that an accused can go to the limits of attack without letting in his convictions, there is no possibility of drawing any clearer line for every case.

On the particular facts of this case, I do not think that the judge exercised his discretion wrongly. The attack on the chief witness for the prosecution was very thorough and serious. There was even added to the attack contained in the alleged admissions of the prosecution witness a suggestion that he was inventing the whole charge because the accused would not give him £1. Granted, therefore, that this was a case where the convictions should be let in, the judge's questions at the end of the appellant's cross-examination did not affect the situation or lead the accused to say anything more than had already been put on his behalf.

I am, however, perturbed by the impression which may have been given to the jury when the appellant got at odds with the judge. I think a more detailed explanation to the jury would have been desirable to indicate in what light they should view his convictions and how this should affect their minds. This is particularly desirable when, as here, it is the judge who is initiating the cross-examination of the accused as to his previous convictions. After some doubt in the matter, however, I do not find sufficient cause of complaint on this point to allow the appeal. The failure to prove the convictions can have had no adverse effect on the accused and the jury may well have taken his answers as tantamount to admissions.

I would therefore dismiss the appeal.

**LORD WILBERFORCE:** My Lords, I have had the benefit of reading in advance the opinion of my noble and learned friend, LORD PEARCE. I agree with this, both as regards the legal principles to be applied in relation to s. 1, proviso (f) (ii) of the Criminal Evidence Act, 1898, and also as to the actual conduct of the trial. I would dismiss the appeal.

*Appeal dismissed.*

Solicitors: *Kingsley, Napley & Co.* (for the appellant); *Director of Public Prosecutions.*

[Reported by S. A. HATTEEA, Esq., Barrister-at-Law.]

A  
EMANUEL v. SMITH.    HIRD v. SMITH.  
CARASU, LTD. v. SMITH.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Ashworth and Blain, JJ.),  
March 27, 1968.]

B *Charity—House to house collection—Company selling articles on door to door basis—Part of proceeds paid to a charity—Whether a “collection”—House to House Collections Act, 1939 (2 & 3 Geo. 6 c. 44), s. 11.*

The appellant company was formed in 1964; its object was to sell articles on a door to door basis and to pay about 16·6 per cent. of the proceeds of such sales to the Children's Research Fund, the purposes of which were charitable within s. 11 (1)\* of the House to House Collections Act, 1939. No licence under the Act of 1939 was in force in respect of any of the appellants. On May 4, 1967, the appellant H., who had been engaged as an agent by the appellant company, called at the respondent's house. He was carrying a hold-all containing toilet and other articles. He asked the respondent if he would like to buy something in aid of the Children's Research Fund and showed him a pamphlet entitled “The Children's Research Fund”, which bore a picture of a young child and which described the fund as the national charity for research into all children's diseases. By s. 11 (1)\* of the House to House Collections Act, 1939, “collection” meant an appeal to the public, made by means of visits from house to house, to give, whether for consideration or not, money or other property; and by s. 11 (2)†, a collection was to be deemed to be made for a particular purpose where the appeal was made in association with a representation that the money or other property appealed for, or part thereof, would be applied for that purpose. On appeals against convictions of the appellant company and its managing director of promoting a collection for a charitable purpose, and of the appellant of acting as collector for such purpose, without licence contrary to s. 1 (2)‡ (3)§ respectively of the Act of 1939,

**Held:** the appellants had been rightly convicted, because—

(i) the appellant company and its managing director were promoting an activity and the appellant H. was acting as a collector in the course of that activity (see p. 531, letter G, and p. 532, letter B, post), and

(ii) the appellant company's activity came within the definition of “collection” in s. 11 (1) of the Act of 1939, since the definition included an appeal “to give, whether for a consideration or not”, and, if a person was induced to purchase an article on the representation that part of the proceeds would go to a charitable purpose, then the activity was a collection within the definition (see p. 532, letter A, post).

Appeals dismissed.

H [As to house to house collections, see 4 HALSBURY'S LAWS (3rd Edn.) 403, para. 838.

For the House to House Collections Act, 1939, s. 11, see 2 HALSBURY'S STATUTES (2nd Edn.) 938.]

**Cases Stated.**

I There were three Cases Stated by justices for the North East London Commission Area in respect of their adjudication as a magistrates' court sitting at Romford on Oct. 12, 1967. On July 27, 1967, informations were preferred by the respondent, John Smith, a police sergeant in the Metropolitan Police Force, against the three appellants charging that on May 4, 1967, in the County of

\* Section 11 (1), so far as material is set out at p. 531, letter H, post.

† Section 11 (2) is set out at p. 531, letter I, post.

‡ Section 1 (2) is set out at p. 531, letter E, post.

§ Section 1 (3) is set out at p. 531, letter F, post.

Essex—(i) the appellant Jack Emanuel and the appellant Carasu, Ltd. promoted a collection for a charitable purpose and on that date a collection for that purpose was made in the locality of Dury Falls Close, Hornchurch, pursuant to his and their promotion without there being in force, throughout the period during which the collection was made in that locality, a licence authorising him or them or authorising any other person under whose authority he or they may have acted to promote a collection therein for that purpose, contrary to s. 1 (2) of the House to House Collections Act, 1939; and (ii) the appellant Reginald Cyril Hird acted as a collector in the locality of Dury Falls Close, Hornchurch, for the purposes of a collection for a charitable purpose, there not being in force at the time a licence authorising the promotion under whose authority he was acting or authorising him himself to promote a collection in the locality for that purpose, contrary to s. 1 (3) of the Act of 1939. The following facts were found. At all material times, the appellant Emanuel was the managing director and secretary of the appellant Carasu, Ltd., a limited company formed in about 1964, whose object was to sell articles on a door to door basis and to pay about 16·6 per cent. of the proceeds of such sales to the Children's Research Fund, which fund was a charitable purpose within the meaning of s. 1 (2) and s. 11 (1) of the Act of 1939. The articles were sold at about seven times their wholesale price. Up to about March, 1967, the appellant Carasu, Ltd. paid over £5,000 to the fund as its share of such sales. From 1964 onwards, the appellant Carasu, Ltd. engaged between thirty and forty agents to sell articles on their behalf on a part-time basis from door to door, and the appellant Emanuel took an active part in the engaging of such agents, including the engagement of the appellant, Hird, a bricklayer, in respect of the evening of May 4, 1967. The agents were instructed by the appellant Emanuel not to accept donations for the Children's Research Fund but to sell articles. The commission for each agent was about thirty per cent. of the proceeds of sale, and about 16·6 per cent. of the proceeds would later be paid to the fund. Each agent was issued with a card entitled "Agents Authorisation card. Carasu, Ltd., 26, County Chambers, Weston Road, Southend-on-Sea, Essex, supporting the Children's Research Fund". Each agent was also provided with a supply of pamphlets entitled "The Children's Research Fund" each of which bore a picture of a young child, described the fund as being for research into all children's diseases, and listed twelve institutions, including the University of Birmingham and the Welsh National School of Medicine, as being recipients of its financial support. On May 4, 1967, at about 8.10 p.m., the appellant Hird called on behalf of the appellant Carasu, Ltd. at 17, Dury Falls Close, Hornchurch, the respondent's house. He held a pedlar's certificate but did not wear a badge nor have with him a collection box or receipt book. No licences were in force pursuant to the Act of 1939 in respect of any of the appellants. The appellant Hird was carrying a holdall containing toilet and other articles, asked the respondent if he would like to buy something in aid of the Children's Research Fund and showed him one of the pamphlets.

It was contended before the justices by the appellants Emanuel and Carasu, Ltd. that the evidence did not establish in law that they were promoting a collection for a charitable purpose and that a collection for that purpose was made in the locality of Dury Falls Close, Hornchurch, pursuant to that promotion on May 4, 1967, within the meaning of s. 1 (2) of the Act of 1939. It was contended before the justices by the respondent that the evidence did establish in law that the appellants Emanuel and Carasu, Ltd. were promoting a collection for a charitable purpose and that a collection for that purpose was made in the locality of Dury Falls Close, Hornchurch, pursuant to their promotion on May 4, 1967, within the meaning of s. 1 (2) of the Act of 1939. It was contended before the justices by the appellant Hird that the evidence did not establish in law that he was acting as a collector in the locality of Dury Falls Close, Hornchurch, for the purposes of a collection for a charitable purpose on May 4, 1967, within the



A meaning of s. 1 (3) of the Act of 1939; and it was contended before the justices by the respondent that the evidence did establish in law that the appellant Hird was acting as a collector in the locality of Dury Falls Close, Hornchurch, for the purposes of a collection for a charitable purpose on May 4, 1967, within the meaning of s. 1 (3) of the Act of 1939.

The justices convicted the appellants and the appellants now appealed.

B *A. M. Dunn* for the appellants.  
*M. D. L. Worsley* for the respondent.

C **LORD PARKER, C.J.:** These are three appeals by way of Case Stated from decisions of justices for the North East London Commission area sitting at Romford, who convicted the appellants in each case of offences against the House to House Collections Act, 1939. [His LORDSHIP stated the facts, and continued:] The House to House Collections Act, 1939, provides by s. 1 (1) that:

"Subject to the provisions of this Act, no collection for a charitable purpose shall be made unless the requirements of this Act as to a licence for the promotion thereof are satisfied."

D Section 2 of the Act deals with the licences for which application has to be made to the local police authority, and s. 1 (2) and (3) of the Act create the offences. Sub-section (2) provides that:

E "If a person promotes a collection for a charitable purpose, and a collection for that purpose is made in any locality pursuant to his promotion, then, unless there is in force, throughout the period during which the collection is made in that locality, a licence authorising him, or authorising another under whose authority he acts, to promote a collection therein for that purpose, he shall be guilty of an offence."

The appellant company and the appellant Emanuel were charged under that subsection. Section 1 (3), under which the appellant Hird was charged, provides that:

F "If a person acts as a collector in any locality for the purpose of a collection for a charitable purpose, then, unless there is in force, at all times when he so acts, a licence authorising a promotor under whose authority he acts, or authorising the collector himself, to promote a collection therein for that purpose, he shall be guilty of an offence."

G There is no doubt here that the appellant company and the appellant Emanuel were promoting an activity and that the appellant Hird was acting as a collector in the course of that activity. The sole question here is whether in each of these cases the activity promoted was a collection.

"Collection" is defined in s. 11 (1) of the Act of 1939:

H "... 'Collection' means an appeal to the public, made by means of visits from house to house, to give, whether for consideration or not, money or other property."

Section 11 (2) provides that:

I "For the purposes of this Act, a collection shall be deemed to be made for a particular purpose where the appeal is made in association with a representation that the money or other property appealed for, or part thereof, will be applied for that purpose."

Counsel for the appellants has argued that the appellant company's activities here do not amount to a collection within the meaning of the Act of 1939. He says that to say to somebody, "If you will buy our toothpaste some of the proceeds will find its way to the fund", is not a collection within the meaning of the Act of 1939. More strictly, he should say, so it seems to me, that to say, "Would you like to buy something in aid of the Children's Research Fund?", is not a collection within the meaning of the Act of 1939. In my judgment, it

plainly comes within the definition. A collection is not confined to an appeal by way of house to house visits "to give", but extends to such an appeal "to give, whether for a consideration or not"; and, if a person is induced to purchase an article on the representation that part of those proceeds will go to a charitable purpose, then, as it seems to me, the activity is plainly a collection within the meaning of the Act of 1939. I would dismiss each of these appeals. A

ASHWORTH, J.: I agree. B

BLAIN, J.: I agree.

*Appeals dismissed.*

Solicitors: *Elman, Flint & Co.*, Southend-on-Sea (for the appellants); *Solicitor, Metropolitan Police.*

[Reported by NAEEM BUTT, Esq., Barrister-at-Law.] C

### KEANEY v. BRITISH RAILWAYS BOARD.

[COURT OF APPEAL, CIVIL DIVISION (Harman, Davies and Winn, L.J.J.), January 25, 26, 29, March 13, 1968.] D

*Railway—Look-out—Statutory duty to appoint look-out—Circumstances in which "danger is likely to arise"—Ganger and two men sent to do three-man job—Line on which no train scheduled but on which engine or diverted train might come at any time—Ganger told no train scheduled—Work proving more difficult than anticipated and ganger having to stand near live line—Ganger did not send for look-out—Ganger struck by train diverted on to line—Breach of statutory duty by railway authority—Whether sole responsibility of ganger—Prevention of Accidents Rules, 1902 (S.R. & O. 1902 No. 696), r. 9.* E

Shortly after midnight on a dark night in May, 1965, a British Railways sub-inspector sent a ganger with two men, from a gang of seventeen men, to renew two bolts in the track at a point joining the down-local and up-local electrified lines. The ganger, who was in charge\*, was not familiar with those lines. The main job to which the remaining fourteen men went was not at this point. Because of other maintenance work the current in the down-local line was switched off. The up-local line was live. The sub-inspector told the ganger that no train was scheduled to run on it until 2.35 a.m. However, as all railwaymen should know, an unscheduled train or engine might come along the line at any time; and a signalman could divert a train to the line for convenience. No instructions were given to the signalman not to divert a train to the up-local line. The sub-inspector knew that renewing the bolts might, if a rail proved difficult to lift, involve one man standing in the six foot gap between the up and the down lines while lifting the rail and so being in a position of danger, if a train should come along the up-local line while the other two men would also be working on the job. Thus lifting the rail and renewing the bolts was a three-man job, if, as in fact happened, the rail proved difficult to lift. The ganger did not send to the main gang to collect a fourth man to act as look-out. An electric train was diverted by the signalman to the up-local line; the train struck and killed the ganger, who was standing in the six foot gap endeavouring to lift the rail. Rule 234 (d)† of the Railways 1950 Rule Book provided that "when work is about to be undertaken on or near lines in use for traffic and danger is likely to arise, the ganger . . . must . . . appoint one or more persons, as may be necessary, expressly to maintain a good look-out, and to give warning of any train approaching". The ganger's

\* See p. 537, letter A, and p. 541, letter B, post.

† Rule 234 (d) is set out at p. 536, letter I, post.

- A widow brought an action for damages against British Railways Board based on breach of statutory duty under r. 9\* of the Prevention of Accidents Rules, 1902, which provided that "in all cases where any danger is likely to arise" the companies (now the board) should provide persons for maintaining a good look-out or for giving warning against any train or engine approaching. On appeal against dismissal of the action on the ground that,
- B though the board were in breach of r. 9, the sole responsibility for the breach was the deceased ganger's,

**Held:** (i) the board were in breach of duty under r. 9 of the Prevention of Accidents Rules, 1902 (see p. 536, letter G, post), for the following reasons (per DAVIES and WINN, L.J.J.)—

- C (a) because, on the evidence, "danger was likely to arise" for the purposes of r. 9 (which per DAVIES, L.J., at p. 538, letter I, post, imposed an objective test) from an approaching unscheduled train or engine and, as the sub-inspector sent three men to do a job which would require all three to do it, the board being responsible for his acts, were then in breach of statutory duty under r. 9 (see p. 539, letter E, p. 543, letter H, and p. 544, letter B, post).

- D *Hutchinson v. London and North Eastern Ry. Co.* ([1942] 1 All E.R. 330) considered.

(b) because, when the men were working on the points, then likelihood of danger became more obvious and the failure of the deceased ganger at that time to obtain a look-out from the main gang constituted a second breach of statutory duty by the board under r. 9 (see p. 539, letter F, and p. 544, letter C, post).

- E (ii) (a) (per HARMAN, L.J.) there were two contributory causes of breach of statutory duty and the deceased should not have been held alone responsible (see p. 538, letter D, post).

(b) (per DAVIES and WINN, L.J.J.) the deceased owed a duty to the board under r. 234 (d) to comply with r. 9 of the regulations of 1902, but his blameworthiness in failing to go or send for a look-out (at the later stage, see (i) (b) above) was not the sole cause of the accident; accordingly the blame apportioned to him would be fifty per cent., and his widow would, therefore, be entitled to one half of the total agreed amount of damages (see p. 540, letter A, and p. 544, letters D and G, post).

Appeal allowed.

- G [As to the liability of railway undertakers for accidents to their servants, see 31 HALSBURY'S LAWS (3rd Edn.) 656, para. 1019; as to the obligation to provide a look-out, see *ibid.*, 660, 661, para. 1026 text and notes (h)-(m); and for cases on the subject, see 38 DIGEST (Repl.) 297-299, 66-76.

For a summary of the Prevention of Accidents Rules, 1902, see 26 HALSBURY'S STATUTORY INSTRUMENTS (First Re-Issue) 259.]

- H Cases referred to:

*Cade v. British Transport Commission*, [1958] 2 All E.R. 615; [1959] A.C. 256; [1958] 3 W.L.R. 118; 38 Digest (Repl.) 298, 73.

*Caswell v. Powell Duffryn Associated Collieries, Ltd.*, [1939] 3 All E.R. 722; [1940] A.C. 152; 108 L.J.K.B. 779; 161 L.T. 374; 33 Digest (Repl.) 907, 1352.

- I *Ginty v. Belmont Building Supplies, Ltd.*, [1959] 1 All E.R. 414; Digest (Cont. Vol. A) 597, 333a.

*Hutchinson v. London and North Eastern Ry. Co.*, [1942] 1 All E.R. 330; [1942] 1 K.B. 481; 111 L.J.K.B. 369; 166 L.T. 228; 38 Digest (Repl.) 297, 68.

*Miraflores, The, and The Abadesa*, [1967] 1 All E.R. 672; [1967] 1 A.C. 826; [1967] 2 W.L.R. 806; Digest (Repl.) Supp.

*Ross v. Associated Portland Cement Manufacturers, Ltd.*, [1964] 2 All E.R. 452; [1964] 1 W.L.R. 768; Digest (Cont. Vol. B) 303, 277d.

\* Rule 9, so far as material, is set out at p. 536, letter D, post.



*Vincent v. Southern Ry. Co.*, [1926] All E.R. Rep. 60; [1927] A.C. 430; 96 A L.J.K.B. 597; 136 L.T. 513; 38 Digest (Repl.) 297, 67.

*Walker v. Bletchley Flettons, Ltd.*, [1937] 1 All E.R. 170; 24 Digest (Repl.) 1054, 212.

### Appeal.

This action was brought by the widow and administratrix of Thomas John Keaney, who was killed in the night of May 7/8, 1965, while working on the permanent way near Earlsfield in Surrey. He was a ganger and a highly experienced railwayman whose usual place of work was the Nine Elms Yard near Battersea. He had been called on to work for the night in question near Earlsfield. On that night, for the purpose of carrying out some work of ballasting near Earlsfield Station some seventeen men had been assembled who came under the control of a Mr. Tuomey, a sub-inspector. Among the seventeen were three, namely the deceased with whom this case is concerned, who was not very familiar with this particular stretch of line, and two experienced lengthmen, Mr. Burnicle and Mr. Vesey, who had great experience of this particular length. It occurred to the sub-inspector that this was a good opportunity to effect a different and minor repair, namely the renewal of two bolts at the acute angle formed by the point of the cross-over line at the opposite end of the station, the cross-over being from the down-local to the up-local electrified lines, which latter line continued live. The sub-inspector detailed Mr. Burnicle and Mr. Vesey to carry out this job and as an afterthought added the deceased to their number, telling him to go along with them and look after them and then to bring them down to the main job at the other end of the station. This main job could be done, as it was, from the verge east of the down-local line and the men doing it were therefore safe enough, but the cross-over job would or might involve at least one man standing in the six-foot gap between the up-local and the down-local lines and so in a position of danger if a train should come along the up-local line. The sub-inspector was evidently conscious of this for he told the deceased that there should be no more trains on the up-local till 2.35 a.m. He said this before midnight and added that the job should have been completed well before 2.35 a.m. He described this in the witness-box as being a warning. The three men set off, got some tools from a shed very near the job and went to work.

The relevant section of railway track lay on the Clapham Junction or Waterloo side of Earlsfield Station; on the Waterloo side of a platform at that station is a platelayers' hut. On one side of that platform were two tracks, the up-through and the down-through line: on the other side were the up-local and the down-local line. There were points on the down-local and up-local lines, enabling trains to be switched between these lines. These were known as "spring" points. There was a rail which, after bearing to the left, came to an end; this was a "wing" rail and was not fixed to any other rail or to any sleeper along its terminal section; accordingly it was to some extent springy. Close to this "wing" rail and to the right of it were two rails which came together at an acute angle forming what was called an "acute" or a "nose". These two rails were bolted tightly together, but in the course of use the bolts required to be replaced. When bolts were replaced in the "nose" the old bolts had to be removed on the side nearer the "wing" rail and the new bolts had to go in from the same side; to enable this operation to be performed the "wing" rail had to be lifted at the end and sprung away from the "nose" in order that the bolts might be inserted between the two below the top flange, which projected outwards on the "wing" rail, the recess beneath which afforded clearance permitting insertion of the bolts before the "wing" rail sprang back to afford a snug fit. In preparation for work on the down local permanent way, at the position described and on the Wimbledon side of Earlsfield Station, the down-local line was made dead by switching off the current from the conveyor line. The up-local line was left live, but no train was scheduled to run on it

A through Earlsfield between 12.20 and 2.30 a.m. All railwaymen should know that at any time unscheduled movements might take place on any line which was open. Unfortunately, neither the deceased, to whom this particular stretch of line and its traffic conditions were not known, nor the two local men who were with him when he was killed, nor Mr. Tuomey, knew that a train would be switched from the up-through to the up-local line. This was what in fact  
B happened: it happened for no reason of emergency, nor because of the development of any abnormal situation, but merely as a matter of convenience and efficiency in the operation of the system of traffic control.

To do their job the three men had taken a jack with them, but they found that they could not make use of it and that the job was much more difficult than anticipated. The only way which they saw of raising the "wing" rail was by a  
C cross-lift with two bars at each side of the wing rail. This obliged one of the men operating the lift to stand in the six-foot gap between the up-local and down-local lines and to lever up the wing rail from that side; thus he would bring the end of his bar foul of the up-line. This part was taken by the deceased. The second man was lifting from between the down rails, where the third man was also standing with a lamp waiting to get the old bolts out and the new ones  
D in. No look-out had been appointed. While these three men were intent on this job the slow passenger train from Portsmouth to London came along the up-local line taking them by surprise, and the deceased, who was standing in the six-foot gap, was struck and killed. The other two men, standing in the four-foot of the down-local line, escaped. The train had been diverted at Wimbledon by the signalman there from the up-through to the up-local line. This was  
E done on the directions of the signalman at Clapham Junction in the exercise of his discretion in order not to delay the passenger train.

The plaintiff widow, Mrs. Mary Agnes Keaney, brought this action for damages under the Fatal Accidents Acts, 1846 to 1959, and the Law Reform (Miscellaneous Provisions) Act, 1934, against British Railways Board (herein called "the board"); she alleged common law negligence on their part and breach of their  
F statutory duty under r. 9 of the Prevention of Accidents Rules, 1902. WALLER, J., on May 4, 1967, held that the board were not guilty of common law negligence; that they were in breach of their statutory duty under r. 9, but that this breach of statutory duty was the fault of the deceased and of no-one else, and he dismissed the plaintiff's claim. The plaintiff now appealed against so much of the judgment as held that the board's breach of statutory duty was the fault of the  
G deceased. Damages were agreed at £8,000 general damages, plus £92 5s. 6d. special damages.

*D. G. A. Lowe, Q.C., and N. F. Irvine for the plaintiff.*

*Tudor Evans, Q.C., and R. A. Gatehouse for the board.*

*Cur. adv. vult.*

H Mar. 13. The following judgments were read.

HARMAN, L.J., stated the nature of the appeal and, having summarised the facts, referred to the slow passenger train from Portsmouth to London having been diverted onto the up-local line by the signalman, Mr. Orton, in the exercise of his discretion and in order not to delay the passenger train, and continued:]

I The explanation which Mr. Orton, the Clapham Junction signalman, gave was that in the first place there was work going on at a bridge at Clapham Junction and that to send the train on the up-through line would necessitate the delay involved in getting the men working on the bridge to remove themselves and their tools. This was the reason accepted by the judge. It appears, however, from Mr. Orton's evidence that this process was actually being performed at the time when the passenger train was due at Wimbledon for the purpose of sending on the up-through line a freight train bound for Nine Elms which was travelling on that line. Apparently in order to get into Nine Elms it had to

pursue this course. The Clapham Junction signalman could have kept the passenger train waiting while the freight train went through, but he thought it better, in order not to make the passenger train late by say ten minutes, to divert it on to the up-local, with the fatal consequences which I have mentioned. Which of these two was the correct explanation may be in some doubt, but in either event the diversion of the passenger train on to the up-local was a routine matter in the discretion of the Clapham Junction signalman and not a step which could be said to be wholly unexpected. No suggestion was made of negligence in this respect, nor that to switch the train without warning was an unsafe system of work sanctioned by the respondents ("the board"). As Mr. Orton said, experienced railwaymen would know that unscheduled trains or engines or a special train might at any time be so diverted. This would be known to the three men, though they seem to have forgotten it owing perhaps to their interest in the job they were doing, and it should also have been present to the mind of Mr. Tuomey when he sent the men off.

The Prevention of Accidents Rules, 1902 (1), r. 9, provides:

"With the object of protecting men working singly or in gangs on or near lines of railway in use for traffic for the purpose of relaying or repairing the permanent way of such lines, the railway companies shall, after the coming into operation of these rules, in all cases where any danger is likely to arise provide persons or apparatus for the purpose of maintaining a good look-out or for giving warning against any train or engine approaching such men so working . . ."

This is a duty which is absolute but not unconditional and only becomes absolute where the conditions are satisfied (see the headnote and the speech of LORD MORTON OF HENRYTON in *Cade v. British Transport Commission* (2)). The questions thus raised are three. First, were these men working "near lines of railway in use for traffic"? Second, were they working "for the purpose of repairing the permanent way"? Third, was this a case "where any danger is likely to arise"? In my judgment the judge rightly held that all three conditions were satisfied. They were or would be near a line of railway in use for traffic, namely the live up-local. Their purpose was to repair the permanent way of the line, and danger was likely to arise. This last point was strongly contested by the board, arguing that as there were to be no scheduled trains during the period danger was not likely, and this seems to have been Mr. Tuomey's view, but the up-local was live and it was admitted either that a diverted train might come along, as indeed it did, or that a single or shunting engine might use the line. Indeed it was proved that all railwaymen know that any live line is liable to be used at any time. These factors, together with the pitch darkness of the night, seem to me to bring danger out of the realm of possibility into that of likelihood. On this footing there was an absolute duty on the board under the rule to provide a look-out, and of this they were in breach.

The next question is, whose function was it as a servant of the board to perform the duty? It is, of course, true that the board can perform a duty of this sort only through an agent, and they seek to discharge it by reference to r. 234 of the 1950 Railways Rule Book, which constitutes a contract between the board and their employees. Sub-paragraph (d) of r. 234 reads as follows:

"When work is about to be undertaken on or near lines in use for traffic and danger is likely to arise, the ganger or man in charge must, except as shown in cl. (i), appoint one or more persons, as may be necessary, expressly to maintain a good look-out, and to give warning of any train approaching."

Who, then, was the "ganger or man in charge" on whom the duty fell? Here again there was a conflict, it being argued for the board that the deceased was the man in charge, he having been put in that position by Mr. Tuomey. The

(1) S.R. & O. 1902 No. 616.

(2) [1958] 2 All E.R. 615; [1959] A.C. 256.



A judge held that this was right, and I agree with him. It is true that Mr. Tuomey did not actually use the words "You are in charge", but by sending the deceased, who was a ganger, to look after the other two I think that he was put in charge of them.

B It was argued for the widow that Mr. Tuomey was the man in charge because work ordered by him was "about to be undertaken" (see the rule) near lines in use for traffic where danger was likely to arise, but I think that Mr. Tuomey was not to be expected to know the exact method of work which would be found to be necessary, and that he was entitled to delegate the responsibility to the man whom he put in charge on the spot and leave it to his judgment to decide on the necessity for a look-out man when he was in a position to judge having regard to the procedure to be adopted. If the lift of the wing rail could C have been accomplished by the jack or by a lift from within the down line alone it might rightly be thought that danger was not likely to arise.

D On this footing the judge held that the breach of the board's duty was entirely due to the deceased himself and to no one else. The judge relied on the speech of VISCOUNT CAVE, L.C., in *Vincent v. Southern Ry. Co.* (3), where VISCOUNT CAVE pointed out that this obligation must be performed by someone and that if that someone fails in his duty and is himself the victim of his own failure he cannot recover, although if that failure resulted in injury to other members of the gang for which he was responsible they might recover, but it is not enough for the board to say that they appointed someone to perform the task if he fails himself to do so. In the headnote to that case I find this (4):

E "Per VISCOUNT CAVE, L.C., (with the concurrence of LORD ATKINSON and LORD SHAW OF DUNFERMLINE): Semble, the duty of the railway company under the rule in any case of danger is an absolute duty to provide a look-out man and to see that he is instructed to act. The company does not comply with the rule by merely making regulations under which the foreman of a gang is entrusted with the duty of appointing a look-out man; F and, if the foreman fails in that duty, the company may be made liable for injury happening to a member of the gang other than the foreman himself."

VISCOUNT CAVE said (5):

G "I am disposed to agree with the view, which was expressed by ATKIN, L.J., in his judgment on the appeal, that it is a mistaken view of the rule to say that the company have complied with it by merely making regulations under which a foreman is entrusted with the duty of seeing that there is a look-out man, and that the company have not performed their duty unless in pursuance of that delegated task the foreman does in fact provide and appoint a look-out man. The duty of a company in any case of danger is an absolute duty to provide a look-out man and to see that he is instructed to act; and if in any case it were proved that the foreman to whom, under the H company's regulations, this duty was entrusted had failed in his duty and had not appointed a look-out man, the company might well be held liable for injury happening to any member of the gang other than the foreman himself. This does not mean that, in my opinion, the company in charging the foreman or ganger with the duty of deciding whether danger exists and of appointing a member of his gang to act as a look-out is taking an unreasonable course. Being a corporation, they must necessarily entrust that I duty to some agent, and I see no sufficient reason why the foreman or ganger (who will be on the spot) should not be selected for that duty; but nevertheless if he should fail in that duty, the company may be liable for the consequences of the default to any person not concerned in it."

(3) [1926] All E.R. Rep. 60; [1927] A.C. 430.

(4) [1927] A.C. at pp. 430, 431.

(5) [1926] All E.R. Rep. at p. 64; [1927] A.C. at p. 436.

See also LORD REID's speech in *Ross v. Associated Portland Cement Manufacturers, Ltd.* (6). A

I would agree with the result reached by the judge, namely, that the plaintiff could recover nothing, if I thought that the failure was due to the deceased and to him alone, but in the circumstances of this case I do not think that the board can altogether escape responsibility. A contributory cause was the conduct of their sub-inspector, who first lulled the precautions of the deceased by telling him that he need expect no trains on the line and secondly sent only three men to do what was on all sides agreed to be a three-man job. It should, I think, have been present to the inspector's mind that this was a job which would or might probably require the men who were doing it, or at least one of them, to stand in the dangerous position between the lines and that this would involve the provision of a look-out man. Mr. Tuomey could not be sure that danger would be involved and therefore I think that while it was not for him himself to station a look-out man he should have foreseen that the dangerous situation probably would arise and have sent another man who could act as look-out man if need be and have added perhaps some real word of warning. B C

I am of opinion, therefore, that there were two contributory causes of this breach of regulations and the deceased should not have been held to be alone responsible. Nevertheless I think that far the greater part of the blame must fall on the deceased, who, as Mr. Burnicle said in evidence, joined in "using our own discretion" and was, in effect, by an error of judgment the main cause of the accident. I would attribute the blame as to one-quarter to the board and as to three-quarters to the deceased and would therefore hold that the damages should be divided accordingly, allowing the widow to have £2,000, one-quarter of the sum agreed. D E

**DAVIES, L.J.:** I have had the advantage of seeing the judgment which WINN, L.J., is about to deliver and I agree with it. But, as we are differing from the judge and as HARMAN, L.J., takes a somewhat different view, it is probably desirable that I should state, albeit shortly, in my own words my reasons for that agreement. F

In the first place it would appear that there would have been a good deal to be said for the proposition that the plaintiff widow had made out a case of common law negligence; but the judge thought little of this, and that claim has not been persisted in in this court. The case, therefore, turns entirely on the interpretation and application of r. 9 of the Prevention of Accidents Rules, 1902, which has already been read. It is, in my view, clear that the deceased and his two companions, Mr. Burnicle and Mr. Vesey, were working "on or near lines of railway in use for traffic", since on any view of the matter they were working, and the task which they had to perform would necessitate their working, near the up-local line. It is not seriously disputed that they were working "for the purpose of . . . repairing the permanent way of such lines", namely the crossing between the up-local and the down-local. The real questions are: (i) whether and at what stage danger was likely to arise and (ii) if at any stage danger was likely to arise so that the absence of a look-out constituted a breach by the board of their absolute obligation, the deceased was, as the judge has held, entirely responsible for or the sole cause of that breach. G H

It is to be observed that the board do not discharge their duty by making rules such as r. 234 (d). The making of such a rule is merely the machinery by which they seek to carry out their duty (see per VISCOUNT CAVE, L.C., in *Vincent v. Southern Ry. Co.* (7) and LORD GREENE, M.R., in *Hutchinson v. London and North Eastern Ry. Co.* (8). Secondly, the question whether danger is likely to arise is a purely objective one. It does not turn on whether the man I

(6) [1964] 2 All E.R. 452 at p. 455.

(7) [1926] All E.R. Rep. at p. 64; [1927] A.C. at p. 436.

(8) [1942] 1 All E.R. 330 at p. 335; [1942] 1 K.B. 481 at p. 487.

A on the spot or for that matter the board itself thought or would have thought that in the circumstances danger was likely to arise. It is entirely a question of fact to be decided by the court on the evidence.

In the present case there were two stages at which the question whether danger was likely to arise falls to be considered. The first stage was when Mr. Tuomey, the sub-inspector, instructed the deceased, Mr. Keaney, and his two  
B companions to repair the crossing. The second was when the men in the course of doing the work found that it was necessary for the deceased to stand with his long pole in the six-foot near to, indeed close to, and with his back to, the open up-local.

As I understand the judgment of the judge, he has found that at the first stage no danger was likely to arise and that it was only at the second stage that that situation existed. In any event, he held that the sole responsibility in regard to the posting of a look-out was on the deceased himself. The responsibility, of course, is and remains that of the board themselves, and it is only if, given a breach of their absolute duty, they can show that that breach was entirely caused by the deceased himself that they can escape liability in accordance with the principles enunciated by PEARSON, J., in *Giddy v. Belmont Building  
D Supplies, Ltd.* (9).

I turn now to consider whether at what I have called the first stage danger was likely to arise. The mechanics of the job assigned to the deceased and the other two men by Mr. Tuomey will be described by WINN, L.J. For the reasons to be indicated by him, I am quite satisfied that even at that stage danger was likely to arise. The work which the men had to do would in all likelihood make  
E it necessary for one of them to stand in the six-foot. The up-local was an open line and, although no scheduled train was expected until 2.35 a.m., it was emphasised by the board that all railwaymen know that at any time an unscheduled train or, as here, a diverted train or a light engine may come along unexpectedly. It necessarily follows from this that at the second stage, when the deceased and his two companions were about to embark on or were actually engaged in their  
F task in the manner in which they carried it out, danger was likely to arise, and that accordingly the deceased as the ganger or man in charge of the small gang ought under r. 234 (d) to have posted a look-out. The crucial question, however, in this case is whether his failure so to do was the sole cause of the board's breach of duty.

To return to stage one. The board's submission is that even if, which they  
G dispute, at that stage danger was likely to arise, under r. 234 (d) the responsibility for appointing a look-out was that of the deceased as the ganger or man in charge and that Mr. Tuomey, the sub-inspector in general charge of the work in this neighbourhood that night, was not concerned with the matter at all. It is, in my view, impossible to accept that contention. As a matter of machinery the rule (10) provides that the ganger or other man in charge normally appoints  
H the look-out; but, if in any given case a more senior official, such as Mr. Tuomey in the present case, is present, it is not in my view permissible for him to wash his hands of the matter entirely and to leave all the precautions to his junior. Here Mr. Tuomey, who knew this length of track very much better than did the deceased, sent three men to do what all the witnesses agreed was a three-man job, so that no fourth man was available to act as a look-out. He said  
I nothing whatsoever to the deceased about a look-out: and his final words to the deceased to the effect that there would be no scheduled train on the up-local until 2.35 a.m. were, so far from being a "warning", as he himself described them, more in the nature of an assurance that all would be safe until that time and could tend to lull the deceased to sleep in regard to the matter of a look-out.

These actions of Mr. Tuomey, for whom, of course, the board are responsible,

(9) [1959] 1 All E.R. 414.

(10) I.e., r. 234 (d) of the 1950 Railways Rule Book; see p. 536, letter I, ante.



were in my opinion a contributory cause of the breach of duty, and in these circumstances, despite the deceased's subsequent action, the board cannot escape some measure of liability. I agree with WINN, L.J., that the proper apportionment of blame is fifty per cent., which was the amount provisionally fixed by the learned judge; and I would allow the appeal accordingly.

WINN, L.J., after reviewing particularly the nature of the job to which the three men were sent and the circumstances (see p. 534, letters G to I, ante), continued: The judge in his judgment set out his understanding of the reason for this diversion of a train from the up-through, but with respect to him I am unable to accept that he properly understood why this was done; and I venture to think that it is largely a result of this misunderstanding that the judge arrived at his conclusion in this case. It is quite right, as the judge said, that repairs were being done to a bridge at Clapham Junction and that before a train could go through that bridge on the up-through line it would have been necessary to take all the men working on it away to a position of safety, which would have involved an expenditure of their time. It is not, however, in my opinion, correct to say, as did the judge, that the train which killed the deceased was switched to avoid this difficulty.

Mr. Orton, who was on duty at the Clapham Junction signal box at the material time, as a class "A" signaller, said the Wimbledon "A" signal box to divert a passenger train, No. 81, which left Portsmouth at 23.00, from the up-through to the up-local: he gave as his reason for deciding on this diversion the reason accepted by the learned judge, in the following two answers:

"(Q.) If you had permitted the train to come through on the up-through what would have had to be done? (A.) The procedure was that the permanent way man would sign for the occupation. He would have to go down to the road level, to the workmen underneath, and ask them to remove their things, and send me word to state that the line was clear. I would open the line and then the train would go through. (Q.) You would have to stop the train, clear the workmen away and let the train through? (A.) That is right."

However, in the second of those answers Mr. Orton went on to say:

"This was actually being done for a freight train which was going up the up-through to my home signal. This was actually being done for a freight train for Nine Elms, when this passenger train was due through Wimbledon."

He went on to explain that owing to the lay-out of the track affording entrance to Nine Elms Yard the freight train could not be diverted since if it once got on to the up-local it could not get back again across the through lines to the yard, and he said:

"This passenger train was waiting at Wimbledon so I requested Wimbledon to divert it up the local to save any delay to the passenger train."

Three things appear to me to emerge plainly from the evidence quoted—first, that the repairs to the bridge at Clapham Junction were not a sudden event of brief duration; second, that the effect of those repairs on convenient user of the up-through must have been readily capable of appreciation by all representatives of the railway concerned with any operations on the lines between Clapham Junction and Wimbledon; and third, that Mr. Orton had had no warning that there was any objection to using the up-local for unscheduled traffic.

In my opinion, once the diversion of the Portsmouth train had been made or ordered, danger was not only likely but virtually certain to arise for the deceased and the men working with him. It was Mr. Tuomey who decided that whilst the down-local was dead for the purposes primarily of the ballasting operations near Wimbledon, he would have the bolts changed in the points to which I have already referred. At about a quarter to midnight, the deceased and two men called Mr. Burnicle and Mr. Vesey, together with some fourteen others, reported to him near the platelayers' hut at Earlsfield; he detailed Mr. Burnicle and

- A Mr. Vesey to change the bolts in the "acute" of these points, and said to the deceased: "Tom, you go along with these two lads and look after them, and when you have finished bring them down on the main job."

I am not myself disposed to dissent from the judge's finding that these somewhat equivocal words sufficed, between men who had known one another for fourteen years, to make it understood that Mr. Tuomey intended the deceased

- B to be in charge of the other two as ganger for a sub-gang. Mr. Tuomey knew, as he said in cross-examination, that the job to be tackled was quite uncommon, might involve difficulties and really needed three men to perform it; he expected that the deceased would, if necessary, lend a hand, though he did not instruct him to take any active part. Before the deceased left him Mr. Tuomey said to him, according to his own evidence, "The last train has gone up and you should not
- C have any train on the up until 2.35". He actually said "up-main" but must have been understood to mean "up-local". Mr. Tuomey described this statement as "just a sort of parting warning to him". In my opinion it was not a warning but a misleading, inaccurate assurance, which was in the circumstances most unfortunate.

- When Mr. Tuomey sent the three men to deal with the points he knew: (a)
- D that the end of the wing rail would have to be lifted; (b) that if a jack were used for this lift it would probably—or as I think certainly—have to be placed in the six-foot between the down-local and the up-local; (c) that if the jack failed to afford the required lift it would be necessary to prise up the rail; (d) that owing to the tightness of the wing rail against the nose a sideways thrust would have to be applied to it by one man; (e) that another man would have to insert
- E a rod under the wing rail from the side nearer the nose and apply an upward force to it but would be unable thus readily to achieve sufficient lift; and (f) that for these reasons one of the men might well have to assist in lifting with a rod placed under the wing rail from the other side, a cross lift.

Men standing within the four-foot of the down-local should be safe from traffic passing on the up-local but any man within the points, where there is

F not even a full six-foot, would be materially closer to such traffic, in proportion to his distance from the nose and according to the stance he might take up to apply force to his rod. It has to be remembered that a train overhangs the six-foot, perhaps by eighteen inches.

Rule 9 of the Prevention of Accidents Rules, 1902 (S.R. & O. 1902 No. 616), provides:

- G "With the object of protecting men working singly or in gangs on or near lines of railway in use for traffic for the purpose of relaying or repairing the permanent way of such lines, the railway companies shall, after the coming into operation of these rules, in all cases where any danger is likely to arise, provide persons or apparatus for the purpose of maintaining a good
- H look-out or for giving warning against any train or engine approaching such men so working, and the persons employed for such purpose shall be expressly instructed to act for such purpose, and shall be provided with all appliances necessary to give effect to such look-out."

In my opinion the up-local was at the time of the accident "in use for traffic". In fact it was then used by the Portsmouth train. However, it is more important to decide whether it was "in use for traffic" at any time when it was possible for the duty imposed by the rule to be performed. I would hesitate long before saying that there could be a breach of this rule where the only use of a line for traffic occurred simultaneously with or so immediately before a danger arose that no opportunity could possibly have existed for performance of the duty imposed. In my opinion, even if the time when the Portsmouth train was diverted was very close to the time of the accident, which is not clear on the evidence, the use made of the up-local for this diversion was, on the evidence of Mr. Orton, not an abnormal use in the circumstances which undoubtedly had prevailed for some

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time at Clapham Junction. It seems to me right to regard the up-local as having been during the evening and night of May 7/8 "in use" for traffic which it might seem convenient to divert to it from the up-through. Furthermore the board were concerned at the trial to assert and emphasise that there was a "possibility"—falling short, they maintained, of probability—that a train might come along the up-local (cf., two passages of cross examination of Mr. Burnicle and Mr. Vesey). It was stressed that the up-local was "open for traffic"; that "a failure on the track would cause a diversion"; that there "might be a relief train"; "a light engine could have come along at any time, or special trains".

In my judgment the rule applied, on any construction of the phrase "in use for traffic" consistent with its intention and with the realities of working conditions, to the up-local at Earlsfield and to the positions in which men would be working on the points where the deceased was killed which were, I think, "near" to that line; it so applied at all times material for this appeal. It is important to consider what were those times, having in mind what was said in *Cade v. British Transport Commission* (11) by VISCOUNT KILMUIR, L.C.:

"... the question which must be asked in every case when men are or a man is so working, or rather (for the question must be asked and answered in time) going to work, on or near the railway lines, is: 'will any risk or injury to them or him be likely to arise from approaching trains or engines?'"

In my opinion that question should have been put to himself by Mr. Tuomey before he sent the sub-gang off to the points and should have been answered in the affirmative. The judge thought it was not Mr. Tuomey's responsibility to arrange for a look-out but solely that of the deceased: he based this view on the terms of r. 234 (d) of the board's rule book. For myself I am not much concerned at this stage of my judgment with any such question of responsibility for as I see the real question it is: did the board, through Mr. Tuomey, contravene the regulation at the time when he sent the three men off to do a three-man job without providing any additional man to act as look-out for them? The rule book is only a method of complying with the rules of 1902, not itself a performance of the duty that they impose.

It must be remembered that the claim in this action was not asserted, in any relevant respect, on any ground of negligence. Whether there was a breach of statutory duty at the time when the sub-gang went off depends solely, if what I have said about the line being in use for traffic and the working places or one of them being near it is correct, on whether then "any danger was likely to arise" from any train or engine approaching them whilst working.

The phrase in r. 9 "danger is likely to arise" is capable, as a matter of connotation of language, of at least three meanings. First, that in all the relevant circumstances actually prevailing there is likelihood of danger. Second, that in the totality of such circumstances as are known to agents of the railway company, some to one in the course of his duties, others to others in the course of their duties, there is such a likelihood. Third, that to some individual representative of the railway company having an opportunity to take the precaution required by the rule such a likelihood was or should have been apparent.

It is relevant to the issues in this appeal to distinguish these three suggested constructions, which would impose liability on the railway company with different degrees of strictness, descending in the order in which I have set them out. Unfortunately in the sixty-five years since rule 9 of the rules of 1902 came into force no directly pertinent guidance to the proper construction, of an authoritative kind, has been given.

Two features of r. 9 are noteworthy. First, it imposes the duty to provide the prescribed precaution on the company, not on any individual. In this respect it is more analogous to the Coal Mines Act, 1911, than to its modern



A successor, which imposes duties on the manager, and it is comparable with s. 14 of the Factories Act (12), which related to moving parts which *are* (scilicet in fact) dangerous. Second, it does not expressly relate to or manifestly contemplate any positive mental recognition, made or which should be made, of such likelihood.

Compare the two quite distinct concepts expressed by the statements:  
B A. In the summer of 1939 war with Germany was likely to arise. B. (At that time) the cabinet realised, or should have realised, that war with Germany was likely to arise.

It does not seem open to doubt, and is, I think, common ground in the appeal that if the condition that danger is likely is satisfied, the obligation to post a look-out is absolute and is not merely a duty to take all reasonable care to ensure that this is done. In this respect the s. 14 duty is analogous since wherever the moving parts are, by the *Walker v. Bletchley Flettons, Ltd.* (13) test, dangerous, secure fencing must be provided: it is not sufficient to provide what is reasonably thought to be secure or to take all reasonable steps to provide secure fencing. The difficulty is to ascertain the meaning and effect of the condition "is likely to arise". Clearly it is not satisfied where there is no more than a possibility of danger or in circumstances where the occurrence of danger would be wholly abnormal or due to some quite extraneous, fortuitous occurrence; beyond that point relative obscurity prevails as to the meaning to be attributed to the words "likely to arise".

The problem arose for consideration by this court, constituted by LORD GREENE, M.R., MCKINNON, L.J., and GODDARD, L.J., in 1942 in a form which  
E did very nearly, but unfortunately not quite, involve the specific point which arises in this appeal. This was in *Hutchinson v. London and North Eastern Ry. Co.* (14). Where LORD GREENE said:

"For instance, it is clear that, if there were a branch line with only two or three trains a day at long intervals, during those intervals no danger would be likely to arise, and, had the words under consideration not been  
F inserted in the rule, it would have been obligatory on the company to provide a look-out even on such a line during such intervals, which would be absurd."

It would have been extremely interesting to know what LORD GREENE would have said had there been on the branch line, not only "two or three trains a day at long intervals", but, as a matter of probability and likelihood, also from time to time unscheduled trains or engines.

*Vincent v. Southern Ry. Co.* (15), affords no relevant assistance on this matter of construction.

For myself I would say that in each and all of the possible meanings of the phrase which I have suggested, danger *was* "likely to arise" when Mr. Tuomey despatched the sub-gang because, first, the circumstances as a whole which in  
H fact existed made this likely; second, anyone who knew of the diversion, and the practice of making such diversions and of the job to be done on the points would have realised it was likely; third, without that knowledge, but knowing the other relevant facts which I have mentioned, Mr. Tuomey should have realised that it was likely.

I I am content in the instant case to rest my judgment on an application of the third and last of the possible meanings, since I feel some doubt whether reliance on either of the others would be entirely consistent with some observations made by LORD KILMUR, obiter I think, in *Cale's case* (16) where he said:

(12) See the Factories Act, 1961, s. 14; 41 HALSBURY'S STATUTES (2nd Edn.) 256.

(13) [1937] 1 All E.R. 170.

(14) [1942] 1 All E.R. at p. 333; [1942] 1 K.B. at p. 484.

(15) [1926] All E.R. Rep. 60; [1927] A.C. 430.

(16) [1958] 2 All E.R. 615 at p. 618; [1959] A.C. at p. 266.

"... the vital words 'any danger is likely to arise' ... import, inevitably, an estimate of likelihood; not of what might possibly be foreseen, but of what should be expected to occur ... in the light of all relevant circumstances known at the material time ..."

It is therefore in this sense that I prefer, for the purposes only of the present case, to interpret the question: was danger likely to arise at the time when Mr. Tuomey sent off the deceased and the other two men to rebolt the points? This is a question not of what did seem likely to Mr. Tuomey, but is to be answered by the court. I would give an affirmative answer.

If this be right, the board then were in breach of r. 9 of the rules of 1902. Subsequently when the men were working on the points there was a further and perhaps more obvious opportunity for the deceased and the board acting through him to appreciate that danger was likely and to post a look-out, albeit at the expenditure of time and effort in going to collect one from the main gang. There was then, in my opinion, a second breach of the rule.

Rule 9 of the rules of 1902 did not impose any duty on the deceased, as the learned judge seems erroneously to have supposed, but under r. 234 (d) of the 1950 Railways Rule Book he owed a duty to the board, as ganger in charge, to comply with r. 9 of the rules of 1902; he also owed a duty to himself to take care of his own safety. It is not to be doubted, now, that contributory negligence affords a defence, wholly or partially, to a claim based on a breach of statutory duty (cf., per LORD WRIGHT in *Caswell v. Powell Duffryn Associated Collieries, Ltd.* (17)), but, as LORD WRIGHT said (17):

"What is all-important is to adapt the standard of what is negligence to the facts, and to give due regard to the actual conditions under which men work ..."

In those "conditions" he included "his pre-occupation in what he is actually doing at the cost perhaps of some inattention to his own safety".

The deceased was necessarily bending down at his task of lifting the guide rail with his back to the up-local: it was an electric train which hit him and this came along quietly, unnoticed by either of the other two men, in the dark. He was not familiar with local traffic conditions and may well, in my opinion, have been lulled into unjustified ease of mind by Mr. Tuomey's parting words. I have in mind the instructive passage in LORD PEARCE's speech in *The Miraflores and The Abadesa*, (18), stressing that any investigation of degrees of negligence must have regard to blameworthiness as well as causative potency.

Since it is my view that the deceased was not seriously blameworthy in failing to go for or send for a look-out or in concentrating on his task, I do not think that his contributory negligence should deprive his widow of more than fifty per cent. of the damages, agreed at £8,000, to which the board's two breaches of statutory duty gave rise.

*Appeal allowed accordingly. Apportionment of blame equally between deceased and the board, and, judgment entered for plaintiff for £4,000, being half agreed figure of damages, plus £46 2s. 9d. funeral expenses. Leave to appeal to House of Lords refused.*

Solicitors: *Pattinson & Brewer* (for the plaintiff); *M. H. B. Gilmour* (for the board).

[Reported by HENRY SUMMERFIELD, Esq., Barrister-at-Law.]

(17) [1939] 3 All E.R. 722 at p. 739; [1940] A.C. 152 at p. 178.

(18) [1967] 1 All E.R. 672 at p. 678; [1967] 1 A.C. 826 at p. 845.

# A PETT v. GREYHOUND RACING ASSOCIATION, LTD.

[COURT OF APPEAL, CIVIL DIVISION (Lord Denning, M.R., Davies and Russell, L.J.J.), April 4, 5, 1968.]

*Tribunal—Procedure—Legal representation—Inquiry into matter affecting licence-holder's reputation and livelihood—National club rules silent as to procedure—Stewards of dog racing track inquiring into doping of dog and requiring trainer's presence at inquiry—Whether trainer entitled to oral hearing—Whether entitled to be represented by counsel and solicitor.*

Track stewards of a greyhound racing stadium owned by the defendants proposed to hold an inquiry into the withdrawal of a trainer's dog from a race at a stadium licensed by the National Greyhound Racing Club. The inquiry involved the question whether drugs had been administered to the dog. The trainer held a licence from the National Greyhound Racing Club entitling him to race dogs on tracks licensed by the club, and thus the result of the inquiry might involve the trainer's reputation and livelihood. The rules of the club, to which the trainer had agreed when he obtained his licence, did not prescribe the procedure to be followed by track stewards at their inquiries, and did not exclude legal representation. The procedure in fact followed at such an inquiry allowed the trainer to be present, to hear the evidence and to have an opportunity to question witnesses. The trainer sought to be represented by counsel and solicitor at the inquiry, but the track stewards decided ultimately not to allow legal representation. On appeal from the grant of an interlocutory injunction restraining the inquiry from being held unless the trainer were allowed to be represented,

**Held:** prima facie the trainer was entitled to an oral hearing and, the inquiry being one of serious importance to him, to be represented at it by counsel and solicitor, for he was entitled not only to appear himself but also to appoint an agent on his behalf, and so was entitled to appoint lawyers to represent him (see p. 549, letter D, and p. 551, letter G, post).

*R. v. St. Mary Abbots, Kensington Assessment Committee* ([1891] 1 Q.B. 378) applied.

Dictum of MAUGHAM, J., in *Maclean v. Workers Union* ([1929] All E.R. Rep. at p. 471) not followed.

Dictum of VISCOUNT HALDANE, L.C. in *Local Government Board v. Arlidge* ([1914-15] All E.R. Rep. at p. 8) distinguished.

Per LORD DENNING, M.R.: where a tribunal is dealing with matters affecting a man's reputation and livelihood or other matters of importance, natural justice requires that he shall be allowed to be defended by counsel and solicitor (see p. 549, letter I, post; cf. per DAVIES, L.J., at p. 551, letter B, post).

Appeal dismissed.

[As to the right to be represented by an agent before a domestic tribunal, see 3 HALSBURY'S LAWS (3rd Edn.) 20, para. 24 text and note (e), and as to a solicitor's right of audience, see 36 HALSBURY'S LAWS (3rd Edn.) 45, para. 66; and for cases on counsel's right of audience, see 3 DIGEST (Repl.) 357, 58-70. and on a solicitor's right of audience, see 43 DIGEST (Repl.) 46, 47, 340-347.

As to the basis of jurisdiction of domestic tribunals, see 9 HALSBURY'S LAWS (3rd Edn.) 577, para. 1349, text and note (a).]

Cases referred to:

*Jackson & Co. v. Napper, Re Schmidt's Trade Mark*, (1886), 35 Ch.D. 162; 56 L.J.Ch. 406; 55 L.T. 836; 46 Digest (Repl.) 83, 460.

*Local Government Board v. Arlidge*, [1914-15] All E.R. Rep. 1; [1915] A.C. 120; 84 L.J.K.B. 72; 111 L.T. 905; 79 J.P. 97; 38 Digest (Repl.) 102, 733.



*Maclean v. Workers Union*, [1929] All E.R. Rep. 468; [1929] 1 Ch. 602; 98 L.J.Ch. 293; 141 L.T. 83; 45 Digest (Repl.) 541, 1222.

*Macqueen and Nottingham Caledonian Society, Re*, (1861), 9 C.B.N.S. 793; 142 E.R. 312; 2 Digest (Repl.) 564, 983

*R. v. St. Mary Abbots, Kensington Assessment Committee*, [1891] 1 Q.B. 378; 60 L.J.M.C. 52; 64 L.T. 240; 55 J.P. 502; 38 Digest (Repl.) 697, 1362.

### Interlocutory Appeal.

By writ issued on Nov. 3, 1967 the plaintiff, David Pett, sued the defendants, Greyhound Racing Association, Ltd., for a declaration that they were acting ultra vires in refusing to allow the plaintiff to appear and be heard by counsel at an inquiry which they proposed to hold into the alleged drugging on Sept. 9, 1967, of a greyhound, "Dogstown Star", owned and trained by the plaintiff and entered for a race at White City Stadium on that date; for an injunction to restrain the defendants and their servants or agents from holding an inquiry into the alleged drugging unless the plaintiff were allowed to appear and to be represented by counsel at any such inquiry, and for further relief not material to this report. The facts are stated in the judgment of LORD DENNING, M.R., at p. 547, letter D, post, et seq. By summons dated Nov. 3, 1967, the plaintiff applied for an interlocutory injunction restraining the holding of the proposed inquiry unless the plaintiff were allowed to appear and to be represented by counsel at any such inquiry.

By para. 1 of the conditions contained in a certificate of licence granted by the National Greyhound Racing Club it was provided that the applicant to be licensed agreed to be subject to the rules of racing of the club for the time being. The plaintiff was a private greyhound trainer licensed by the club, and the club had licensed the racecourse which was owned and operated by the defendants at White City Stadium.

The National Greyhound Racing Club was a members' club, the number of members being limited by the rules to fifty. It was controlled by its stewards, who were in effect the management committee of the club. The purpose of the club, as summarised by the secretary in his affidavit, was to frame and administer a code of rules for greyhound racing, to license racecourses, trainers, kennelmen and officials, and other purposes. The duties of the stewards of the club were to foster, protect and preserve the good name and reputation of the sport. The club was not concerned with the conduct of individual race meetings, which were in the hands of local stewards, but were concerned to see that the rules relating to the conduct of meetings were observed. A trainer's licence was valid for one year after which the trainer applied for renewal. Local stewards were appointed to conduct each meeting at a licensed track; they conducted the meetings under the rules of racing of the club. Local stewards had power to hold official inquiries, and the result of their findings were automatically referred to the club stewards, who acted as an appellate body from the local stewards' decisions. The proposed inquiry with which the present proceedings were concerned was an inquiry by local stewards, viz., the track stewards of White City Stadium.

By order dated Feb. 22, 1968 CUSACK, J., ordered that the defendants, Greyhound Racing Association, Ltd., by themselves their agents their servants or otherwise be restrained from holding an inquiry into the alleged drugging unless the plaintiff were allowed to appear and to be represented by counsel at any such inquiry until after the trial of the action or until further order. By notice dated Mar. 5, 1968, the defendants gave notice of appeal. In this they specified, among other grounds of appeal, the ground that the judge was wrong to interfere with the absolute discretion of the defendants in the determination of inquiries of the type that was the subject of the action.

- A *E. W. Eveleigh, Q.C.*, and *R. Johnson* for the defendants, who were appealing.  
*G. Cohen* for the plaintiff.

LORD DENNING, M.R.: The plaintiff, Mr. Pett is a trainer of greyhounds. He holds a licence from the National Greyhound Racing Club. He pays £25 a year for that licence. It entitles him to train greyhounds for races on all tracks which are licensed by the club. The club is rather similar to the Jockey Club which we have had several times in this court (1). The stewards of the club license racecourse tracks, track stewards, trainers, and so forth. The club may not have a complete monopoly, but they certainly have an important control over a large part of the greyhound racing industry. The livelihood of a trainer such as the plaintiff may depend a good deal on his having and retaining his licence. The White City Stadium is owned by the defendants, the Greyhound Racing Association, Ltd. They employ track stewards. The racecourse is licensed by the club. So are the track stewards.

- B In September, 1967 the plaintiff had a dog called Dogstown Star. He entered it for the seven hundred yards open race at the White City Stadium on Saturday, Sept. 9, 1967. The race was due to start at 7.45 that night. He sent the dog with his kennelhand, Mr. Hewlett, to the stadium for the race. In accordance with the usual practice, the dog was tested to see whether it had been drugged or not. At about half past five the kennelhand took a sample of urine from Dogstown Star and handed it to the security officer. He sent it off for examination. At 7.30 a report was received that the test showed positive for barbiturates. In consequence the track stewards decided to withdraw the dog from the race. Afterwards a second sample of urine was taken from the dog. The kennelhand was present. He asked for a part of this second sample, but his request was refused.

- C On Monday, Sept. 11, parts of the two samples were sent to Glasgow university for examination. On Wednesday, Sept. 13, a report was received that the samples showed positive for barbiturates and that the barbiturate appeared to be phenobarbitone. On Sept. 14 the racing manager of the stadium telephoned to the plaintiff saying that there was to be an inquiry with respect to the drugging of the dog and it was to be held on the following Tuesday. This was followed up by a letter of Sept. 16 which said:

- D "The official inquiry concerning the withdrawal of Dogstown Star from the fourth race on Saturday, Sept. 9 will be held at White City Stadium, London, at 11 a.m. on Tuesday, Sept. 19, your presence together with your kennelhand who was present at the meeting on Sept. 9 will be required."

G He added that the analysis by Glasgow university of the sample had proved positive.

- H The plaintiff got that letter on the morning of Monday, Sept. 18. The inquiry was to be held the next day. He immediately went to see his solicitor. His solicitor on that very day wrote to the secretary of the White City Stadium saying:

"This notice is much too short for [the plaintiff] to give instructions for him to be represented, and we shall be glad, therefore, if you will give us an alternative appointment in say fourteen days' time."

- I It is plain from that letter that the plaintiff desired to be represented by his lawyers at the inquiry, and that is why they requested an adjournment. The general manager replied saying:

"We are agreeable to postpone the date of the inquiry to Tuesday, Oct. 3. Please advise [the plaintiff] that he is required to attend the inquiry at White City Stadium at 11 a.m. Oct. 3, 1967, together with his kennelman, Mr. Hewlett."

(1) See e.g., *Nagle v. Feilden*, [1966] 1 All E.R. 689.

On that day the plaintiff and his kennelman went to the stadium. He went together with his solicitor and counsel. The general manager and the stewards were taken aback by the presence of counsel and solicitor. They were quite nonplussed. They did not know what to do. They did not want counsel or solicitors at the inquiry. They suggested that they might stay outside and pass messages in and out; but that was obviously impracticable. Eventually they decided to take time to consider the point. They adjourned the inquiry to Oct. 10, and then it was adjourned to Oct. 31. On the day before the hearing, the general manager telephoned to the plaintiff's solicitor saying that he would not be allowed to be legally represented at the inquiry. Thereupon on Nov. 3 the plaintiff's solicitor issued a writ asking for a declaration that he was entitled to be represented by counsel at the inquiry and an injunction to restrain them holding the inquiry unless he was allowed to be represented. They moved the court for an injunction. CUSACK, J. granted an interlocutory injunction. Now there is an appeal to this court. A B C

The disciplinary powers of the club are contained in a book of Rules of Racing which they issue. The plaintiff, when he got his licence, agreed to the rules. They are not very precise, but the relevant rules seem to be r. 48 and r. 49. They give these powers to "The Stewards", meaning the track stewards employed by the owners of the racecourse. These rules provide: D

"48. The stewards shall regulate, control, take cognisance of, and adjudicate upon, the conduct of all officials, and of all owners, trainers, kennelhands, and persons attendant on the greyhounds.

"49. The stewards shall have power to punish at their discretion any person, subject to their control, with a fine not exceeding £20, and with suspension, and shall report all such facts and remit the amount of the fine to the stewards of the National Greyhound Racing Club, who may at their discretion hold a further inquiry into the matter and make such order as they think fit. A right of appeal against the stewards of the meeting will lie if leave to appeal is given by the stewards of the National Greyhound Racing Club." E F

The appellant is to deposit £10 on the appeal and the stewards may "after hearing the appeal" make such order as to the deposit as they think fit.

Those rules contain nothing about the procedure on an inquiry. I think it clear law, however, that, before disciplinary action could be taken against a trainer, notice would have to be given to him of the charge against him: and he would have to be given a fair opportunity of meeting the charge and of contradicting or correcting any statement prejudicial to his interests. G

We have been told of the procedure which is adopted by the stewards. It seems to me in general to meet the requirements of the law. The general manager states in para. 8 of his affidavit: H

"As a steward of the defendants' stadium, I have been present at numerous stewards' inquiries and am conversant with the procedure involved. The trainer, whose greyhound is the subject of the inquiry, is informed of the date, time and place of the inquiry and is told that he and his kennel-hand may attend to give evidence. If the inquiry is as a result of a positive urine test, the stewards receive written statements from the security officer, the chromatography analyst, the veterinary surgeon and the racing manager, and they consider the analyst's report from Glasgow. The trainer is present to hear all the evidence given by witnesses and is given the opportunity to question the witnesses. There is now produced to me a bundle containing copies of statements that were made for the purposes of the inquiry in relation to the plaintiff's greyhound, Dogstown Star. The stewards then receive evidence from the trainer, and usually ask the trainer a number of questions. They may also ask the security officer or the veterinary surgeon questions. I



- A On this information the stewards then prepare an opinion, which is submitted to the club with the stewards' recommendations."

That appears to provide a fair hearing, provided that the trainer sees all the written statements and is able to comment on them.

- B Now the point arises: has the trainer a right to be legally represented? The club object to any legal representation. Their secretary states in his affidavit:

"If legal representation were allowed as of right, the delay and complications that this would cause would largely frustrate the stewards' intention to conduct their meetings expeditiously and with complete fairness."

- C Counsel for the defendants, says that the procedure is in the hands of the stewards. If they choose to say: "We will not hear lawyers", that is for them, he says, and it is not for the courts to interfere.

I cannot accept this contention. The plaintiff is here facing a serious charge. He is charged either with giving the dog drugs or with not exercising proper control over the dog so that someone else drugged it. If he is found guilty, he may be suspended or his licence may not be renewed. The charge concerns his reputation and his livelihood. On such an inquiry, I think that he is entitled not only to appear by himself but also to appoint an agent to act for him. Even a prisoner can have his friend. The general principle was stated by STIRLING, J. in *Jackson & Co. v. Napper, Re Schmidt's Trade Marks* (2):

- E "... that, subject to certain well-known exceptions, every person who is sui juris has a right to appoint an agent for any purpose whatever, and that he can do so when he is exercising a statutory right no less than when he is exercising any other right."

This was applied to a hearing before an assessment committee in the case of *R. v. St. Mary Abbots, Kensington Assessment Committee* (3). It was held that a ratepayer had a right to have a surveyor to appear for him. Once it is seen that a man has a right to appear by an agent, then I see no reason why that agent should not be a lawyer. It is not every man who has the ability to defend himself on his own. He cannot bring out the points in his own favour or the weaknesses in the other side. He may be tongue-tied or nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it every day. A magistrate says to a man: "You can ask any questions you like"; whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him; and who better than a lawyer who has been trained for the task? I should have thought, therefore, that when a man's reputation or livelihood is at stake, he not only has a right to speak by his own mouth. He has also a right to speak by counsel or solicitor.

- H I am aware that MAUGHAM, J. once expressed a different view. In *Maclean v. Workers Union* (4) speaking of domestic tribunals, he said:

"Before such a tribunal counsel have no right of audience and there are no effective means of testing by cross-examination the truth of the statements which may be made."

- I All I would say is that much water has passed under the bridges since 1929. The dictum may be correct when confined to tribunals dealing with minor matters where the rules may properly exclude legal representation. (*Re Macqucen and Nottingham Caledonian Society* (5), seems to have been such a case.) The dictum does not apply, however, to tribunals dealing with matters which affect a man's reputation or livelihood or any matters of serious import. Natural justice then requires that he can be defended, if he wishes, by counsel or solicitor.

(2) (1886), 35 Ch.D. 162 at p. 172.

(3) [1891] 1 Q.B. 378.

(4) [1929] All E.R. Rep. 468 at p. 471; [1929] 1 Ch. 602 at p. 621.

(5) (1861), 9 C.B.N.S. 793.

Counsel for the defendants also submitted that the stewards were not bound to hold an oral hearing. He cited the speech of VISCOUNT HALDANE, L.C. in *Local Government Board v. Arlidge* (6), where he said:

“I do not think that the board was bound to hear the respondent orally, provided it gave him the opportunities which he actually had.”

That again may be true in some matters; but I should have thought that it depended on the nature of the inquiry. In a case such as this, fairness may require an oral hearing; and with an oral hearing, then legal representation.

This being an interlocutory application, it is only necessary for us to see if there is a *prima facie* case for counsel and solicitor. I think that there is. In addition, the balance of convenience is very much in favour of maintaining the injunction which the judge granted. It would be most unfortunate if the inquiry should be held without the plaintiff being legally represented; and then later on at the trial it was found that the proceedings had been quite irregular and were upset.

On the whole I would be in favour of upholding the judge's decision and I would dismiss the appeal.

**DAVIES, L.J.:** I agree. It is very curious that there is no express provision in the rules of the National Greyhound Racing Club for the holding of an inquiry by the track stewards. Rule 48 and r. 49 provide:

“48. The stewards shall regulate, control, take cognisance of, and adjudicate upon, the conduct of all officials and of all owners, trainers, kennelhands, and persons attendant on the greyhounds.

“49. The stewards [the track stewards] shall have power to punish at their discretion any person, subject to their control, with a fine not exceeding £20, and with suspension, and shall report all such facts and remit the amount of the fine to the stewards of the National Greyhound Racing Club, who may at their discretion themselves hold a further inquiry into the matter and make such order as they think fit.”

The only reference by implication to an inquiry by the stewards comes from the words “a further inquiry” by the club stewards. I will return to r. 49 in a moment. Rule 54 provides:

“For the infringement of any of these rules or for any undesirable conduct, the stewards may fine or suspend any official, owner, trainer or kennelhand and shall report forthwith to the Secretary of the National Greyhound Racing Club and the Stewards of the National Greyhound Racing Club may make such order as they think fit.”

There is nothing about a £20 limit to the fine mentioned in r. 54. Then, returning to r. 49, the second part of the rule states:

“A right of appeal against the decision of the stewards of the meeting will lie if leave to appeal is given by the stewards of the National Greyhound Racing Club.”

Then it proceeds to say that the appeal must be in writing and must be accompanied by a cash deposit. Then it states that the stewards of the club

“may, after hearing the appeal, make such order as to the deposit as they think fit, and shall decide by whom the expenses of the appeal shall be defrayed.”

Curiously enough, there appears to be no express rule as to what the stewards may do on the hearing of the appeal, apart from the deposit and the costs.

It is I think implicit (as indeed is conceded by counsel for the defendants) in those passages of the rules to which I have referred that there must be an

- A inquiry and a hearing before those powers are exercised. What is said, however, is that although there is an implied right of audience, there is no right to representation. It is to be observed that, just as the rules do not provide for any inquiry by the stewards, so they do not lay down any rules of procedure or say anything about whether the person concerned can be represented or not. The evidence filed on behalf of the defendants shows, however, that it is in fact
- B the practice to conduct the inquiry by an oral hearing. I agree, for the reasons that LORD DENNING, M.R. has stated, that in the circumstances of an inquiry such as this, which may mean a great deal to a person who is licensed by the club as to his future and livelihood, unless express words are there denying him the right of representation, he should be entitled to have it. At any rate, there is a *prima facie* arguable case that he should be entitled to have it.
- C We were told at the hearing of the appeal that CUSACK, J.'s reason for granting the injunction was that the dismissal of the application would have the effect of determining the main issue to be heard at the trial of the action, and that he considered that the plaintiff had an arguable case to support the granting of a permanent injunction in the terms sought. I agree with that view in the circumstances of this case. The overwhelming balance of convenience is in favour
- D of continuing this injunction.

I, therefore, agree that the appeal fails and should be dismissed.

- RUSSELL, L.J.: As at present advised, I think that a sufficient *prima facie* case is made out to support this interlocutory injunction; and the balance of convenience is certainly in favour of the injunction, for no sort of case is made out yet that legal representation on an occasion such as this will make the
- E system unworkable. The affidavit evidence shows that the standing procedure in a case such as this is to hold the official inquiry by the local stewards, involving a hearing at which the defendant may attend, question witnesses and address the stewards. Indeed, I should have thought that it would be contrary to natural justice for any other course to be taken in a case such as this, even if
- F r. 49 may not cover the situation. I say "in a case such as this". It involves, be it noted, a decision by the stewards as to the culpability of the plaintiff, the fault being either that of being party to the drugging of a dog or of taking insufficient security measures. There is, as it seems to me, nothing in the contract to overcome or deny what appears to be the common law right of the plaintiff to do by agent or representative, including counsel, that which under the procedure he is entitled to do, namely, question witnesses and address the stewards;
- G and I refer to the authorities referred to by LORD DENNING, M.R. How the case may ultimately turn out, I know not, but as an interlocutory matter, I too would dismiss the appeal.

*Appeal dismissed.*

- H Solicitors: *Herbert Smith & Co.* (for the defendants); *Shindler & Co.* (for the plaintiff).

[Reported by F. GUTTMAN, ESQ., *Barrister-at-Law.*]



**BERSEL MANUFACTURING CO., LTD.  
AND ANOTHER v. BERRY.**

[HOUSE OF LORDS (Lord Reid, Lord Morris of Borth-y-Gest, Lord Hodson, Lord Pearce and Lord Wilberforce), April 8, May 8, 1968.]

*Company—Directors—Life directors—Power to remove other directors—Joint power conferred on two permanent life directors—Construction of articles of association—Power not conferred by way of joint confidence but for securing the interests of the life directors—Whether power exercisable by survivor.*

The appellant B. and his wife were the first directors of a private company and were appointed permanent life directors by the articles of association. Article 16 (H)\* of the articles provided that the permanent life directors "shall have power to terminate forthwith the directorship of any of the ordinary directors by notice in writing". B.'s wife died having the question arose whether this power was exercisable by B., who survived her.

**Held:** (i) the power conferred by art. 16 (H) on the permanent life directors was not vested in them as recipients of a joint confidence but for the securing of their joint interests, and the principle that a bare power could not be exercised by the survivor of joint holders did not apply (see p. 554, letter I, p. 555, letter I, to p. 556, letter A, p. 556, letter F, and p. 557, letter G, post).

(ii) moreover the principle that a power annexed to an office passed to successive holders of the office was not conclusive that this power, which was conferred on the two life directors was exercisable by the survivor, on whose death the office would cease (see p. 555, letters C, E and I, p. 556, letter C, and p. 557, letter H, post).

(iii) on the true construction of the articles of association the power conferred by art. 16 (H) remained exercisable by B. after the death of his wife (see p. 555, letters D and G, and p. 558, letters F and I, post).

Appeal allowed.

[As to the survivorship of powers, see 30 HALSBURY'S LAWS (3rd Edn.) 230, 231, paras. 421, 422; and for cases on the subject, see 37 DIGEST (Repl.) 264, 265, 220-226.]

As to the conferring of powers on directors by the articles of association, see 6 HALSBURY'S LAWS (3rd Edn.) 293, 294, para. 596.

For the Companies Act, 1948, Sch. 1, Table A, art. 77, see 3 HALSBURY'S STATUTES (2nd Edn.) 811.

For a precedent concerning appointment of life directors, see 5 ENCYCLOPAEDIA OF FORMS AND PRECEDENTS (4th Edn.) 373.]

Case referred to:

*Bacon, Re, Toovey v. Turner*, [1907] 1 Ch. 475; 76 L.J.Ch. 213; 96 L.T. 690; 47 Digest (Repl.) 375, 3355.

**Appeal.**

This was an appeal by the appellants Bersel Manufacturing Co., Ltd. and Ben Hubert Berry from an order of the Court of Appeal (LORD DENNING, M.R., and DIPLOCK, L.J.; DANCKWERTS, L.J., dissenting) dated Oct. 4, 1967, allowing the appeal by the respondent Irene Eleanor Berry from an order of STAMP, J., dated June 15, 1967. STAMP, J., had made a declaration on a preliminary point of law in an action brought by the appellants by writ issued on Dec. 15, 1965, and had declared that the power conferred by art. 16 (H) of the articles of association of the appellant company became exercisable, on the death of Margaret Ann Berry, the wife of the second appellant, on Dec. 6, 1962, by the second appellant alone. The facts will be found stated in the opinion of LORD WILBERFORCE at p. 556, letters G to I, post.

\* Article 16 (H) is set out at p. 554, letter B, post.

A *Allan Heyman* for the appellants.  
*M. W. Jacomb* for the respondent.

Their lordships took time for consideration.

May 8. The following opinions were delivered.

B **LORD REID:** My Lords, I agree with my noble and learned friend, LORD WILBERFORCE, that this appeal should be allowed.

**LORD MORRIS OF BORTH-Y-GEST:** My Lords, I agree with your lordships that this appeal should be allowed.

C **LORD HODSON:** My Lords, the question of law raised by the respondent in the action is whether or not the power conferred by art. 16 (H) of the articles of association of the Bersel Manufacturing Co., Ltd. is only exercisable during the joint lives of the appellant Ben Hubert Berry (to whom I shall refer as "Mr. Berry") and his late wife Margaret Ann Berry (to whom I shall refer as "Mrs. Berry") and ceased to be exercisable on her death. Article 16 (H) provides: "The permanent life directors shall have power to terminate forth-

D with the directorship of any of the directors by notice in writing."

In order to understand the position it is necessary to make some reference to the admitted facts.

E The company was incorporated by Mr. Berry, one of the two signatories of the memorandum and articles of association of the company, which was at all material times managed by him and carries on a successful business with net assets in excess of £30,000. The company is a private company with a share capital of £10,000 divided into ten thousand shares of £1 each, all issued. Mr. Berry holds 4,050 shares; three employees who support him hold between them 450 shares. Mrs. Berry, one of the first directors named in the articles, died on Dec. 6, 1962. She held 3,500 shares and it is her death which gives rise to the question to be determined, since her shares were left under her will to three individuals. These are supporters of the respondent, Irene Eleanor Berry, the widow of a deceased son of Mr. Berry, who holds two thousand shares. Thus Irene Eleanor Berry, the daughter-in-law, with her supporters holds the majority of the shares.

F The articles provide inter alia as follows:

G "11. The first directors shall be Mr. Ben Hubert Berry and Mrs. Margaret Berry, both of 137, Powys Lane, Palmers Green, and each of them shall be entitled, subject to cl. 16, to retain office so long as he holds shares in the company of the nominal value of £1, and whilst holding office by virtue of this provision shall be called a permanent life director. Articles 73, 74 and 80 of Table A shall not apply to a permanent life director.

H "12. The directors, including the permanent life directors, shall not be less than two nor more than five. Article 77 of Table A shall not apply. The permanent life directors shall have power to appoint additional directors if they shall so desire and shall have power to decide whether they shall be permanent or ordinary directors so that the total number of directors shall not exceed five . . .

I "16. The office of a director shall be vacated:—

(A) If he ceases to be a director by virtue of s. 141 of the Companies Act, 1929.

(B) If he becomes prohibited from being a director by reason of any order made under s. 217 or s. 275 of the Companies Act, 1929.

(C) If he becomes bankrupt or insolvent or compound with his creditors.

(D) If he become of unsound mind or be found a lunatic.

(E) If he be convicted of an indictable offence and the other directors resolve that in their opinion such offence involved fraud or dishonesty on his part.

"(F) If he absent himself from the meetings of the directors for a period of six months, except through illness, without special leave of absence from the other directors.

"(G) If he gives the directors one month's notice in writing that he resigns his office.

"(H) The permanent life directors shall have power to terminate forthwith the directorship of any of the ordinary directors by notice in writing."

The situation created by the effect of art. 16 (H) with its power to dismiss directors coupled with the power of the shareholders to elect directors has always been, so long as the power to dismiss subsists, what has been described as a revolving door situation. Thus the daughter-in-law, appointed by a general meeting to be a director, can be immediately dismissed under the power contained in art. 16 (H). Mr. Berry purports to have exercised this power as the survivor of himself and his wife and it is his right so to do which is challenged.

The question may be stated this: has the power been given to these two persons as individuals in order that they may act together, and not otherwise, or in circumstances in which it is proper to read the power as passing to the survivor after the death of one of the two persons?

Much of the argument has been directed to the rule found in FARWELL ON POWERS (3rd Edn.), p. 514 to be applicable (apart from the provisions of the Conveyancing and Trustees Acts) to the survivorship of powers. This is stated to be "A bare power, given to two or more by name, cannot be executed by the survivor". The learned author added:

"This is not because there is anything in the power incompatible with its surviving, but if a man says he will trust two, the law will not say he shall trust one; it is a joint confidence."

On p. 516 one finds the next rule (stated to be the better opinion) that:

"When a power is annexed to an office (e.g., if it be given to executors) all persons who fill the office can exercise the power; but if the power be given to persons named officially (e.g., to my executors named officially) (e.g., to my executors A and B) it is in each case a question of intention whether the power is given to the person or annexed to the office—sed qu."

The learned author in another passage on p. 517 uses the words "It is incumbent on the court to ascertain . . . whether the power is given to the executor or the person".

The authorities considered as the basis of these rules are concerned with executors and trustees and there is no case concerning directors, although a director may properly be regarded as being to a large extent in the position of a trustee for the shareholders of a company. The difficulty of the question which falls to be decided is illustrated by the acute division of judicial opinion so far expressed.

It may be that the answer is not readily to be found simply by an attempt to apply the above rules. The first rule which was treated as applicable by the majority of the Court of Appeal does not seem to me to solve the problem in favour of the respondent for this reason. Mr. and Mrs. Berry were not, in my opinion, in the position of persons identified by name as being the recipients of a joint confidence. They were rather persons who were securing their own interests in the company by reserving to themselves a power which could be used to protect themselves against a majority vote of the shareholders of the company. This would apply to Mr. Berry as events have shown and would, if Mrs. Berry survived him, have been of value to her if she had found herself likewise in a minority position. The power is coupled with an interest and distinguishable from a bare power: cf., *Re Bacon, Toovey v. Turner* (1). There are accordingly



A A practical reasons for the continued existence of the power on the event of either Mr. or Mrs. Berry surviving the other.

B The second rule dealing with office holders is also difficult of strict application. Mr. and Mrs. Berry were given special offices as permanent life directors to hold office as permanent life directors subject to art. 16 whilst they (he or she) held shares of the nominal value of £1. This gave them a special position which no one else can hold, for none else can be appointed a permanent life director. This, no doubt, is an argument which can be and was prayed in aid by the respondent, for the conception of an office is normally one that can be filled by a succession of persons. This office dies at latest with the death of the survivor of the two occupants of the power and does not, therefore, fit the conception of an office as mentioned in the second rule which I have cited from FARWELL ON POWERS. Moreover, as DIPLOCK, L.J., said, the special powers given to the two persons are not directors' powers in the ordinary sense. They are not exercised in directors' meetings but as special powers simply to appoint and dismiss other directors. Even so, the power is vested in the holder of an office who loses his office not only on death but also, amongst other circumstances, if he becomes bankrupt; and there does not seem to be any reason why the power should not survive to the other when it is lost by one of two joint holders.

D However evenly balanced the arguments may be, my conclusion on the whole question of construction is, notwithstanding the powerful arguments to the contrary which have been addressed to your lordships, that the opinion of STAMP, J., and DANCKWERTS, L.J., is to be preferred to that of LORD DENNING, M.R., and DIPLOCK, L.J.

E I cannot regard the power as vested in these two persons by way of personal confidence. The power was, it seems, given to them in order that it might serve their own interests in preserving their position in the company. Notwithstanding that the office of permanent life director which each of them filled was of a different kind from the office normally filled by an executor or trustee I am of opinion that it matters not that the office is not of a perpetual character: F the power survives so long as the qualification exists in the individual holding the office of life director.

Rejecting, as I do, the view that the power was given to the two persons as personal confidants, there is no contrary intention shown so as to exclude the rule contained in s. 1 (1) of the Interpretation Act, 1889, that words in plural include the singular.

G I would allow the appeal and restore the order of STAMP, J.

LORD PEARCE: My Lords, in my opinion the construction put on the articles of association by STAMP, J., is to be preferred. The draftsman has deliberately set up a special office of permanent life director with special tenure of office, special qualification, and special powers. In all these three respects H it differs from the office of an ordinary director. Whether or not there is yet another office of "permanent" director does not affect the problem. So far as language is concerned the draftsman has created an office of permanent life director. It is true that it is an office to which, as the articles now stand, there can be no successors, a fact which tends against its being an office and in favour of the title of permanent life director being a mere description of Mr. and Mrs. I Berry as individuals; but this is not enough, in my opinion, to displace the indications that an office was intended.

Where a bare power is given to two jointly in their individual capacities the survivor cannot execute it, since trust in two persons jointly is not the same as trust in either alone; but where the power is annexed to an office, a survivor in that office can execute it. The relevant cases are set out in FARWELL ON POWERS (3rd Edn.) pp. 514-520. They deal with trustees, executors and the like. Even on the analogy of these cases, Mr. Berry is, in my opinion, entitled as survivor to execute his power. That analogy, however, is not conclusive, or indeed very

eogent in deciding the construction which should be adopted in the case of a document concerned with commerce such as the articles of association of a private company. Here one should look in the document for indications of what the draftsman was really intending to achieve. A

It is not unusual in a private company to find provisions which transfer to certain persons in their position as special directors some of the powers which would normally reside in the votes of the shareholders in general meeting. In a private company the position and rights of a minority shareholder, whether he be a director or not, are precarious. Unless special provisions are made, the founder or founders of a family company (such as this was) are safe only so long as he or they keep their majority shareholding. Yet he or they may well wish, as the years go on, to divest themselves of a large part of the equity to others and in particular to the next generation without thereby losing all control of the business or risking the loss of such benefits as they may wish to retain for themselves. The only way to attain this end is for power to be divorced from shareholding or voting rights. This was plainly the object of the creation of the permanent life directorships. They were intended to secure Mr. and Mrs. Berry in their position even if they should part with their majority shareholding. B

Was it, then, intended that husband and wife should only have joint security and that as separate individuals they should have none? If so, there were several situations which could have destroyed the security of tenure given by the permanent life directorships. The death of one was not the only factor which could produce this result. The security of one could also be destroyed by the insolvency, unsoundness of mind, conviction, absence for six months without leave, or even the mere resignation of the other. Reading the relevant articles I cannot think that this was intended. Had this been envisaged, I would have expected some (perhaps limited) form of protection for the survivor. C

In my opinion, the strong inference to be drawn from the articles is that husband and wife (each of whom in fact had a large stake in the company) were each intended by virtue of the office of permanent life director to be secured in such control as that office gave them regardless of whether the other spouse died or resigned or ceased for any of the other named events from being a director. D

I would therefore allow the appeal. E

**LORD WILBERFORCE:** My Lords, this appeal requires your lordships to construe certain of the articles of association of a private limited company—Bersel Manufacturing Co., Ltd. [His LORDSHIP read arts. 11, 12 and 16, as set out at p. 553, letters G to I, et seq., ante, and continued:] The facts which gave rise to the litigation are that the appellant, Mr. Ben Hubert Berry, who was one of the signatories to the company's memorandum of association, was, as art. 11 shows, one of the two first directors, the other being his wife, Mrs. Margaret Berry. Of the issued share capital of ten thousand £1 shares, Mr. Berry held 4,050, Mrs. Margaret Berry 3,500 and the respondent, Irene Eleanor Berry, a daughter-in-law of the appellant, two thousand. The remaining 450 were divided between three small holdings. Mrs. Margaret Berry died in 1962 and bequeathed her 3,500 shares to three individuals who later allied themselves with the respondent. The respondent became a director of the company about 1959. She and the appellant failed to agree, and on Sept. 27, 1962, the appellant, purporting to act under the power conferred by art. 16 (H), removed her from office. She took no action on this removal. At the annual general meeting held on Dec. 10, 1965, she was re-elected a director by the voting power of her own shares, supported by the holders of the 3,500 shares mentioned above; the appellant voted against the election. The appellant thereupon purported again to remove her from office under the power conferred by art. 16 (H). This led to the present proceedings, which the respondent commenced, claiming that the power conferred by art. 16 (H) ceased to be exercisable on the death of Mrs. Margaret Berry. The judges in the courts below are equally divided as to whether her contention is correct. F

**A** The question for decision has been presented as a point of law directed to be separately tried before the trial of the action. This, in my opinion, is unfortunate. Documents, including articles of association, ought to be interpreted in the light of the circumstances in which they were drawn up. To require the court to construe them in isolation, purely as words printed on paper, as this procedure does, is to put the court in blinkers and to deprive it of legitimate and necessary assistance. It would, in this case, have been relevant, and of use, to know the circumstances in which the company was incorporated; whether it was formed to take over a pre-existing business; to whom that business belonged, what part the appellant and his wife respectively played in it, and what consideration was given for their shares. We know nothing of these matters and it is not surprising that the courts below found some difficulty in extracting their meaning and intention from the articles alone.

The articles not being explicit, and the background of them unknown, it was very natural that both STAMP, J., and the Court of Appeal should search, as a solvent of the difficulty, for a rule of law. They found this in a distinction drawn in that admirable work, FARWELL ON POWERS, between a bare power given to two or more by name and a power annexed to an office. A bare power, it is said, cannot be executed by the survivor, because "if a man says he will trust two, the law will not say he shall trust one; it is a joint confidence" (3rd Edn., p. 514). If, on the other hand, a power is annexed to an office, all persons who fill the office can exercise the power (3rd Edn., p. 516). But though all the judges agreed on the tools to be used, they achieved, by the use of them, different results, for while LORD DENNING, M.R., and DIPLOCK, L.J., thought that the power was one conferred on Mr. and Mrs. Berry, the words "permanent life directors" being merely a convenient way of describing them as individuals, DANCKWERTS, L.J., and STAMP, J., read it as conferred on them as holders of an office, viz., that of permanent life director. The rival views were forcefully urged on us by counsel in this House.

I should certainly be grateful for any authoritative aid in the difficult task of construction of these articles: but unfortunately, I cannot find that either of the keys offered to us unlocks the door. The conception of a joint confidence in two persons seems to relate to a world far removed from that of the powers of directors of a commercial private company: "if a man says he will trust two, the law will not say he shall trust one"—but where, or whose, is the "trust" here, or the "confidence"? The formula cannot be fitted to the facts either literally or by any adaptation that I can devise. It is true, of course, that while both permanent life directors survive, and hold office, the power of removal must be jointly exercised. But, on analysis, this does not imply any joint confidence, or joint trust; it is simply a reflection or statement of the reality that if two holders of equal voting power disagree, no result is achieved. The necessity of agreement during their joint tenure of office is no indication that, when one office holder remains, the separate power which he previously had is come to an end.

The alternative, annexation to an office, though nearer to the situation, does not fit it; for, though it meets the case where an office (including in the term such positions as trustees or executors) is by its nature held by persons in succession, or, if one of several holders dies, by the survivors, here the "office"—that of permanent life director—can only be held by Mr. and Mrs. Berry. Certainly it can be held by the survivor of them, but then the question remains, which is the whole question in the case, whether the power to appoint or remove directors can be exercised by the survivor. There is no external principle, apart from what one finds in the articles, to which one can appeal for an answer.

I find it, then, necessary to concentrate attention on the relevant articles—regretting that the somewhat faint indications which these contain are not strengthened by adequate knowledge of the background against which they were framed. Mr. Berry was one of the incorporators of the company: he and his wife the first directors. Between them they controlled the company, but



neither of them had a majority of the votes. The first step—taken by art. 11—was to make them directors for life and there are two significant points about the method they adopted. Their appointment was not conditional on retention of their shareholdings—they remained permanent life directors so long as they held shares of the nominal value of £1. They thus enabled themselves, if they wished, to pass on their shares (over £1) to others in their lifetime without giving up their control of the board. Secondly, the definition of their position as permanent life directors and of their rights as such is expressed by the use of the words “each of them . . . so long as he” [sc. or she] “holds shares . . . shall be called ‘a permanent life director’.” The use of the singular seems deliberate, and to point away from any conception of joint power, or joint position. Each might dispose of his (or her) shares—less £1—or altogether: the position of each in either eventuality is separately provided for.

Article 12 contains no indication which I find helpful. I do not stop to examine the obscure distinction between permanent and ordinary directors because there is no relevance in it for present purposes, but art. 16 is significant. It provides for vacation of office in a number of events; its provisions operate separately in relation to each and every director including each permanent life director. Under it, either of the permanent life directors would vacate office during his or her life, if becoming insolvent, or of unsound mind, or through absence from directors’ meetings, or by resignation. Perhaps this is really the main argument in another form, but I find nothing reasonable in the suggestion that, if one of the permanent life directors vacates office under one of these provisions, the powers of the other should come to an end; yet, if they continue in these events, why should they not continue in the case of vacation by death? So far, in fact, from finding any business reason why the existence of the special powers should be conditional on the survivorship of both the permanent life directors, I would think it surprising, whether the company was effectively founded by Mr. Berry, or by Mr. Berry and Mrs. Berry, or by Mrs. Berry, if, after the creation of a special right of control over the board, which right was expressed to continue even after voting control had been relinquished, one should lose his or her powers over the board the moment the other died. The language of art. 21, so far from supporting such a conclusion, to my mind points the other way.

One other argument should be mentioned, because it appealed to LORD DENNING, M.R. He pointed out that if the appellant was right, and he retained his power of removal, this created a “revolving door”, in the sense that the moment after a director had been appointed by his shareholders he could be removed by Mr. Berry. The metaphor is illuminating but inconclusive, because precisely the same situation might have arisen during the joint life-time of the permanent life directors the moment that they jointly ceased to possess a majority of the voting shares; but art. 11 clearly contemplates that the power of removal would survive this event. The reality is that the power of appointing (art. 12) and of removing directors (art. 16 (H)) operates as a suspension, while it lasts, of the powers of the shareholders. The door may revolve, but it leads only to an exit, and the existence of it does not reveal for how long it is to operate.

I conclude on a construction of the articles that the special power of removal conferred by art. 16 (H) remains exercisable by Mr. Berry notwithstanding the death of his wife and that the appeal should be allowed.

*Appeal allowed.*

Solicitors: *Curwen, Carter & Evans* (for the appellants); *Thornton, Lynne & Lawson* (for the respondent).

[Reported by S. A. HATTEEA, Esq., Barrister-at-Law.]

A

## Re J. RUSSELL ELECTRONICS, LTD.

[CHANCERY DIVISION (Pennycuik, J.), April 4, 1968.]

B

*Company—Winding-up—Voluntary winding-up—Petition for compulsory liquidation—Official Receiver's petition—Standard of proof of condition provided by s. 224 (2)—Misapplication of one sum by wrong payment out of company's assets—Dilatory conduct of liquidation—Liquidation nearly complete—Liquidator undertaking to pay into assets amount wrongly paid out and to complete liquidation with due despatch—Burden of proof that voluntary liquidation could not be continued with due regard to interests of creditors not discharged—Companies Act, 1948 (11 & 12 Geo. 6 c. 38), s. 224 (2).*

C

In order that the court should have jurisdiction under s. 224 (2)\* of the Companies Act, 1948, to order the compulsory winding-up of a company that was in voluntary liquidation it was sufficient that the court should be satisfied on a balance of probabilities that the condition laid down in s. 224 (2) was fulfilled, viz., the condition that the voluntary winding-up could not be continued with due regard to the interests of the creditors (see p. 562, letter B, post).

D

Dictum of WRIGHT, J., in *Re 1897 Jubilee Sites Syndicate* ([1899] 2 Ch. at pp. 205, 206) not followed.

Dictum of BUCKLEY, J., in *Re Ryder Installations, Ltd.* ([1966] 1 All E.R. at p. 455) considered.

E

On Apr. 27, 1959, a company, incorporated in 1955, passed resolutions for a creditors' voluntary winding-up and a liquidator was appointed. The liquidator realised various assets and incurred expenses in the liquidation which almost equalled the amount realised. B. was a solicitor who was engaged by a committee of creditors to arrange the calling of the meetings to wind-up the company. For this work the liquidator paid B. £200. It was accepted that, apart from any question of the amount of the charge, fees for this work were not properly payable out of the assets of the company. Moreover, apart from the £200, the fees paid to B. appeared to be high. It was admitted that the liquidator had been dilatory in the conduct of the liquidation, in particular he had consistently failed to convene the annual meetings of creditors. The Official Receiver presented a petition under s. 224 (2) of the Companies Act, 1948, for the compulsory winding-up of the company. At the date of the hearing the liquidation was for all practical purposes complete, and there was no reason why the liquidator should not convene a final meeting under s. 300. The liquidator was willing to give undertakings to pay the £200 into the assets of the company and to complete the liquidation with all due despatch.

F

G

H

**Held:** in the circumstances and on the liquidator's giving the two undertakings mentioned above, the burden of showing that the liquidation could not be continued with due regard to the interests of creditors was not discharged and the petition would be dismissed (see p. 562, letter I, and p. 563, letter A, post).

I

[As to a winding-up petition by the Official Receiver, see 6 HALSBURY'S LAWS (3rd Edn.) 543, para. 1045; and for cases on the subject, see 10 DIGEST (Repl.) 1112, 7701-7706.

For the Companies Act, 1948, s. 224 (2), see 3 HALSBURY'S STATUTES (2nd Edn.) 643.]

\* Section 224 (2) provides, so far as is material: "Where a company is being wound-up voluntarily . . . a winding-up petition may be presented by the Official Receiver attached to the court as well as by any other person authorised in that behalf under the other provisions of this section, but the court shall not make a winding-up order on the petition unless it is satisfied that the voluntary winding-up . . . cannot be continued with due regard to the interests of the creditors . . ."

## Cases referred to:

- 1897 Jubilee Sites Syndicate, Re*, [1899] 2 Ch. 204; 68 L.J.Ch. 427; 80 L.T. 869; 10 Digest (Repl.) 1112, 7705.
- Ryler Installations, Ltd., Re*, [1966] 1 All E.R. 453, n.; [1966] 1 W.L.R. 524; Digest (Cont. Vol. B) 119, 7706a.

## Petition.

J. Russell Electronics, Ltd. ("the company") was incorporated in 1955. It was one of a number of subsidiaries of a parent company and had a nominal capital of £6,000 and a paid-up capital of £5,331. On Apr. 27, 1959, resolutions were passed for a creditors' voluntary winding-up, and E. was appointed liquidator. E. was a chartered accountant and carried on his practice in Leicestershire; the company carried on business at Hythe, near Southampton. The amount of the estimated assets and liabilities of the company at the commencement of the winding-up, as shown by the liquidator's account (under s. 342 of the Companies Act, 1948), was £9,115; secured creditors' debts amounted to £2,228 and unsecured creditors' debts to £28,525. In the course of the liquidation assets were realised, but many of them for much less than originally estimated. The amounts realised were—£300 for machinery, less a payment of £200 to a Mr. Sutton; part of stock, less cost of drawings purchased to facilitate sale, £175; furniture £40; balance of stock, less transport, £39 1s. 8d.; cash from unknown source £20; first dividend in liquidation of Easipower, Ltd. £524 5s.; and second dividend in liquidation of Easipower, Ltd. £190 0s. 10d.—total £1,288 7s. 6d. Easipower, Ltd. was an associated company. In the course of the liquidation the liquidator incurred expenses almost equalling the total amount realised. The expenses were as follows—fees and expenses £1,077 18s. 8d.; bank charges and interest £69 2s. 10d.; cost of Messrs. Child & Child (solicitors) in relation to a claim made in the liquidation of Easipower, Ltd. £25; and a few other items making a total of £1,215 7s. 3d. Particulars of the fees and expenses were—£349 6s. for fees and £78 6s. 6d. for expenses to a Mr. Buckley, total £427 12s. 6d.; fees to the liquidator himself £200 (which, the court found, did not appear on the face of it to be unreasonable) and expenses £171 16s. 8d., making a total of £371 16s. 8d.; to the liquidator and Mr. Buckley joint expenses £118 15s.; fees to Mr. Sutton £80 10s. and expenses £41 8s. 6d., making a total of £121 18s. 6d. Those fees and expenses appeared to be very large in proportion to the realisation.

Mr. Buckley was formerly a solicitor practising in Leicestershire. He was engaged by a committee of creditors of the company before the liquidation to make the arrangements for the calling of the meetings to wind-up the company. He was also engaged by the liquidator after the winding-up resolutions to assist him in connexion with the affairs of the company which were in some confusion. Mr. Buckley had since been struck off the rolls as a solicitor, and in 1965 he was adjudicated bankrupt. The liquidator said that the services which he rendered were unsatisfactory. Of Mr. Buckley's fees of £349 6s. no less than £200, according to the documents emanating both from himself and from the liquidator, represented a fee which was paid to him for his work in connexion with the meetings summoned to propose the winding-up resolutions. The amount of that figure was, on the face of it, extravagantly large, but, apart from that, it was accepted on behalf of the liquidator that fees for that work could not properly have been paid out of the assets of the company in liquidation.

The claim against Easipower, Ltd., had involved protracted negotiations. His Lordship intimated the liquidator's expenses in regard to it were not on the face of them extravagant, that it was for the Board of Trade to make out a prima facie case in that respect, and that, as regards both the liquidator's fees and expenses and those of Mr. Buckley, it had not done so. There was raised a matter of the purchase of machinery by a Mr. Sutton from the liquidator. Mr. Sutton, a former employee of the company, was employed, with the consent of



A the committee of inspection, to negotiate for the sale of the company's machinery. In regard to this His LORDSHIP intimated that in the circumstances the liquidator could not be said to have been guilty of any misfeasance in accepting an amount which Mr. Sutton paid for purchasing himself a part of the machinery. He accordingly found that the liquidator had by common consent paid £200 to Mr. Buckley to which Mr. Buckley was not entitled, and that, apart from the £200, the fees paid to Mr. Buckley appeared to be high; but that no other *prima facie* case had been made out as regards the application of the company's assets.

B It was admitted that the conduct of the liquidation had been dilatory throughout. In particular the liquidator had consistently failed to convene the annual meetings of creditors, which he was bound to convene under s. 299 of the Companies Act, 1948. One order had been made against the liquidator to make a return; that was an order made by PLOWMAN, J., on June 19, 1964. On May 20, 1963, the Board of Trade had directed, pursuant to r. 201 of the Companies (Winding-up) Rules, 1949, that the chief auditor of the companies liquidation branch of the Board should audit the account of the liquidator submitted to Board pursuant to prior order. The order of PLOWMAN, J., was made for non-compliance with the Board's order. On Apr. 15, 1965, a report pursuant to such audit was submitted to the Board.

D The Official Receiver presented on Feb. 13, 1968, a petition seeking that the company might be wound-up by the court under the provisions of the Companies Act, 1948, on the ground, pursuant to s. 224 (2), that owing to the conduct of the liquidator the voluntary winding-up could not be continued with due regard to the interests of the creditors.

E *Martin Nourse* for the petitioner, the Official Receiver.  
*D. M. Burton* for the liquidator.

F PENNYCUICK, J., having stated the nature of the proceedings and read s. 224 (2) of the Companies Act, 1948, reviewed the relevant facts and the charges and the fees raised in question, and, having reached the conclusion stated at letter A, above, continued: the position in the present case is this. The Official Receiver has made good one claim against the liquidator for misapplication of the company's assets, namely the payment of £200 to Mr. Buckley. He has not made out the other claims against the liquidator.

G I have now to consider whether on those facts it would be right to make the order sought under s. 224 (2). On that point I was referred to some authorities. The first is *Re 1897 Jubilee Sites Syndicate* (1), where there was a petition under s. 14 of the Companies (Winding-up) Act, 1890, which corresponds to s. 224 (2) of the Companies Act, 1948. In the course of his judgment WRIGHT, J., said this (2):

H "This is a case of great importance. It is very desirable that a person in the position of the Official Receiver should in a proper case be able to interfere with effect for such a purpose as is here suggested. There are two questions for my decision—namely, What is the real meaning of s. 14 of the Companies (Winding-up) Act, 1890? and, has a sufficient case been shown to justify an order being made under the section when its meaning has been ascertained? I have had a great doubt as to what the section means, but I think a reasonably wide construction ought to be given to it . . ."

I WRIGHT, J., then proceeds to say that it includes a particular matter with which he was there concerned and which is quite different from anything which arises in the present case. He concluded by saying this (3):

"I may add that I do not think an order should be made as a matter of course under s. 14. As here, a very strong case must be made out to justify the interference of the court under that section."

(1) [1899] 2 Ch. 204.

(2) [1899] 2 Ch. at pp. 205, 206.  
(3) [1899] 2 Ch. at p. 206.

Counsel for the Official Receiver pointed out to me that the language of s. 224 (2) is merely "unless it is satisfied" and the words "very strong case to answer" are not to be found in the section. I accept the contention of counsel for the Official Receiver on that point, i.e., that in order to give the court jurisdiction under sub-s. (2) it must merely be satisfied on a balance of probabilities that the statutory condition is satisfied, i.e., "that the voluntary winding-up . . . cannot be continued with due regard to the interests of the creditors".

It is quite clear that the court is entitled to be so satisfied if the circumstances are that on the evidence there appears to be a claim against the liquidator himself or a claim which the liquidator ought to bring against some third party, and that unless the official receiver takes over the liquidation it is unlikely that such a claim would be pursued. If that is the position, then I think that it is true to say that the voluntary winding-up cannot be continued with due regard to the interests of the creditors because it is to their interest that all the assets of the company should be got in, including whatever might result from the successful prosecution of a claim against the liquidator or third party.

The present section was considered by BUCKLEY, J., in *Re Ryder Installations, Ltd.* (4), where, however, the facts were entirely different from those here. According to the report there had been repeated failures on the part of the liquidator to comply with the various requirements of the Companies Acts as to returns and so forth, involving various orders both of a magistrates' court and of this court. Further, there was an allegation in the petition, which was not challenged, that the audit disclosed what appeared to be irregularities by the liquidator in the conduct of the winding-up which he had failed to explain to the auditor's satisfaction. The auditor had therefore concluded that no useful purpose would be served by continuing his inquiries. The winding-up was still continuing and there is nothing in the report to suggest that it was due for immediate termination. In those circumstances BUCKLEY, J., after setting out the facts, said (5):

"In those circumstances, the Official Receiver petitions this court for an order under s. 224 (2). It seems to me that the evidence which has been filed in support of this petition and has been read to me, does establish a clear and strong case to the effect that the voluntary liquidation by this voluntary liquidator cannot be continued with due regard to the interests of the persons concerned with that liquidation, and I think that it is a case in which it is proper for me to make the order asked for."

If the winding-up of this company were not now almost completed that case would be much more closely in point. But the liquidation is now for all practical purposes completed, and so far as appears from the evidence there is no reason why the liquidator should not convene the final meeting under s. 300 of the Companies Act, 1948, with a view to the dissolution of the company. It appears extremely doubtful whether there will be any assets at all available for distribution, but in so far as there are any assets they can be immediately distributed, as far as I can see, as a first and final dividend without delay.

If the liquidator had not been willing to give an undertaking with regard to the £200 misapplied by him, I should have thought that on that single ground it would be right to make an order under s. 224 (2). The position would, I think, then be that only by means of a compulsory winding-up could that sum be recovered in the interests of the creditors. However, counsel for the liquidator in the course of the hearing gave a firm undertaking on behalf of the liquidator to pay that sum of £200 into the assets of the company. If that misappropriated sum is replaced I do not think that there is anything in the evidence which would justify me in taking the view that the voluntary winding-up cannot be brought to completion with due regard to the interests of the creditors.

Counsel for the Official Receiver made the point that once one finds that the

(4) [1966] 1 All E.R. 453, n.

(5) [1966] 1 All E.R. at p. 455.

A liquidator has been guilty of misfeasance in one particular respect then one should look more jealously at the other items in his account, in particular the fees to Mr. Buckley and his own fees, and that on that ground alone, even though the £200 is replaced, it would be right to make the compulsory order. I do not think that in all the circumstances a sufficient case is made out against the liquidator to justify that course, having regard to the words which I have quoted so often from s. 224 (2).

It seems to me that in addition to the undertaking which he has already offered the liquidator should give an undertaking to complete the liquidation with all due despatch (6). That, of course, will involve making returns, and so forth, which he has not already made. On those undertakings by the liquidator I propose to dismiss the petition.

*Petition dismissed.*

Solicitors: *Solicitor, Board of Trade* (for the petitioner); *Freeth, Cartwright & Sketchley*, Nottingham (for the liquidator).

[*Reported by JENIFER SANDELL, Barrister-at-Law.*]

## MOHAMED v. KNOTT.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Ashworth and Blain, JJ.), March 28, 1968.]

*Children and Young Persons—Protection—Recognition of foreign marriage—Potentially polygamous marriage—Fit person order—Nigerian girl of thirteen validly married by Nigerian Moslem law—Whether marriage recognised in England—Whether girl, living with her husband, exposed to moral danger or in need of care and protection—Children and Young Persons Act, 1933 (23 Geo. 5 c. 12), s. 62—Children and Young Persons Act 1963 (c. 37) s. 2.*

*Criminal Law—Carnal knowledge—Girl under sixteen—Married according to foreign law—Intercourse with husband—Prosecution should not be brought—Sexual Offences Act, 1956 (4 & 5 Eliz. 2 c. 69), s. 6 (1).*

The appellant, who was a Nigerian Moslem married in Nigeria a girl, then aged a little over thirteen, who was also a Nigerian Moslem. The marriage was a valid marriage according to Moslem law of the domicile. It was a potentially polygamous marriage. The appellant and the girl came to London. On application to the juvenile court, the justices held that the girl's marriage was not one that was recognised in England, and that accordingly or alternatively because she had not a parent or guardian in England, she was exposed to moral danger, and was not receiving such protection and guidance as a good parent might be expected to give, for the purposes of s. 2\* of the Children and Young Persons Act 1963. Pursuant to s. 62 of the Children and Young Persons Act, 1933, the justices made a fit person order committing her to the care of the London Borough of Southwark. On appeal,

**Held:** the marriage would be recognised by the English court as a valid marriage giving the wife the status of wife (see p. 567, letter C, post); and in considering whether the wife was in moral danger in living with the appellant the justices had misdirected themselves by ignoring the way of life in which the parties to the marriage had been brought up, and the fit person order should be revoked (see p. 568, letter D, and p. 569, letter B, post).

(6) The undertaking was given by the liquidator.

\* Section 2, so far as material, is set out at p. 565, letter H, post.



Per CURIAM: (a) a fit person order may be made in appropriate circumstances in respect of a wife validly married to her husband (see p. 567, letter D, post).

(b) in such circumstances as those in the present case, where a wife validly married to a husband by foreign law was under sixteen years of age, a prosecution should not be brought under s. 6 (1)\* of the Sexual Offences Act, 1956, for sexual intercourse between the parties, nor did the existence in English law of the criminal offence of unlawful sexual intercourse with a person under the age of sixteen render the wife a person who was exposed to moral danger for the purposes of s. 2 (2) (a) of the Children and Young Persons Act 1963 (see p. 568, letter G, and p. 568, letter I, to p. 569, letter A, post).

*Baindail (otherwise Lawson) v. Baindail* ([1946] 1 All E.R. 342) followed.

[As to children and young persons in need of care and protection, see 21 HALSBURY'S LAWS (3rd Edn.) 255, para. 554; and for cases on the subject, see 28 DIGEST (Repl.) 727, 728, 2329, 2330.]

As to the recognition by the English courts of marriages contracted abroad, see 19 HALSBURY'S LAWS (3rd Edn.) 810, para. 1318; and for cases on the subject, see 11 DIGEST (Repl.) 455-458, 906-922.

For the Children and Young Persons Act, 1933, s. 62, see 12 HALSBURY'S STATUTES (2nd Edn.) 1015, and for the Children and Young Persons Act 1963 s. 2, see 43 *ibid.*, p. 529. For the Sexual Offences Act, 1956, s. 6, see 36 *ibid.*, 219.]

#### Cases referred to:

*Baindail (otherwise Lawson) v. Baindail*, [1946] 1 All E.R. 342; [1946] P. 122; 115 L.J.P. 65; 17 L.T. 320; 11 Digest (Repl.) 457, 921.

*Hyde v. Hyde and Woodmansee*, [1861-73] All E.R. Rep. 175; (1886), L.R. 1 P. & D. 130; 35 L.J.P. & M. 57; 14 L.T. 188; 11 Digest (Repl.) 455, 906.

*R. v. Chapman*, [1958] 3 All E.R. 143; [1959] 1 Q.B. 100; [1958] 3 W.L.R. 401; 122 J.P. 462; 42 Cr. App. Rep. 257; Digest (Cont. Vol. A) 438, 10,147a.

#### Case Stated.

This was a Case Stated by the justices for the Inner London Area sitting at the Southwark North juvenile court.

On June 27 and 28, 1967, a complaint was preferred by W.P.C. Knott (the respondent) under s. 62 of the Children and Young Persons Act, 1933, that Rabi Mohamed Musi was in need of care, protection or control in that she was not receiving such care, protection and guidance as a good parent might reasonably be expected to give and was exposed to moral danger within s. 2 of the Children and Young Persons Act 1963. The relevant facts are set out in the judgment of LORD PARKER, C.J. (see p. 565, letters B to E, post). The justices, having heard the complaint, determined that it was proved and ordered that Rabi Mohamed Musi be committed to the London Borough of Southwark as a fit person. The questions for the opinion of the High Court were as follows:—

(i) whether the justices were right in law in concluding that the marriage between the appellant (Alhaji Mohamed) and Rabi Mohamed Musi was not one recognised as valid by the English courts for the purposes of the question before them; (ii) whether there was evidence on which the justices were entitled to find that the appellant had sexual intercourse with Rabi Mohamed Musi at a time when puberty had almost certainly not begun; and (iii) whether the justices were right in holding that in all the circumstances Rabi Mohamed Musi was in need of care, protection or control within s. 2 of the Children and Young Persons Act 1963.

\* Section 6, so far as material, is set out at p. 568, letter F, post.

- A *P. K. Archer* for the appellant.  
*M. D. L. Worsley* for the respondent.  
*N. M. Butler* for Rabi Mohamed Musi.

LORD PARKER, C.J.: The short facts are as follows. The girl, Rabi Mohamed Musi, was born on Jan. 1, 1954. There was some doubt as to her age, but the justices accepted her evidence and that of the present appellant, Alhaji Mohamed, that she was born on that day. The appellant, Alhaji Mohamed, is twenty-six and both he and the girl are Nigerian Moslems of the Hausa tribe, and both were at all material times domiciled in Nigeria. On Jan. 15, 1967, that is when the girl was aged thirteen years and two weeks, the two of them went through a ceremony in Nigeria according to Moslem law. There was evidence before the justices as to the relevant law and custom among Nigerian Moslems, and it was held on ample evidence that under the ceremony that they underwent in Nigeria, these two persons were validly married according to their law. The marriage, however, was a polygamous marriage, since the present appellant could have up to four wives. On Apr. 16, the appellant, who was studying medicine in this country, brought his wife Rabi (herein referred to as "the wife") over here and they were admitted by the immigration authorities. The appellant's intention is, after he has completed his studies, to take the wife back to Nigeria. It so happens that when he arrived in this country, he was suffering from gonorrhoea and within five days of arrival he went to a doctor in this country to be cured. A few days later he took the wife to a doctor to have a contraceptive fitted. It was the result of that visit to the doctor that the doctor took the view that the wife was an extremely young girl, and the matter was finally reported to the authorities and these proceedings were commenced.

The first point which fell to be dealt with by the justices was how far, if at all, the law in this country would recognise the marriage, being a polygamous marriage, that these two persons underwent. The justices held that since the marriage was potentially polygamous it was not a marriage recognised by this country. If that were right, it followed that this young girl of thirteen was living with and sleeping with a man twice her age, they not being married in English eyes at all. On that basis, the justices held that she was exposed to moral danger, and did not have the care, protection and guidance that a good parent would be expected to give.

I should, before going further, read the relevant provisions of the Children and Young Persons Act 1963; there are few that need to be referred to. Section 2 (1) provides that:

"A child or young person is in need of care, protection or control within the meaning of this Act if—(a) any of the conditions mentioned in sub-s. (2) of this section is satisfied with respect to him, and he is not receiving such care, protection and guidance as a good parent may reasonably be expected to give; . . ."

One of the conditions there referred to is the condition to be found in s. 2 (2) (a), namely that he is falling into bad associations or is exposed to moral danger. Accordingly the justices, having come to the conclusion that this was not a marriage which would be recognised in English law, came also to the conclusion that she was exposed to moral danger and was not receiving such care, protection and guidance.

In my judgment, however, the justices in this difficult realm of the law came to a wrong conclusion. The courts have advanced, one might say, step by step in this matter, and I find it unnecessary to go through all the decisions. Perhaps the position is best set out in the judgment of LORD GREENE, M.R., in *Baindail (otherwise Lawson) v. Baindail* (1). The question that arose there concerned the validity of a marriage which the respondent had gone through with the

appellant in 1939 at a London register office, the appellant being described as a bachelor and the respondent as an English woman. The validity of that marriage came in question as the result of proof that in 1928, some eleven years earlier, he had been lawfully married to a Hindu woman according to Hindu rites in India and his Hindu wife was still alive. It was held there that the court was bound to recognise that Indian marriage as valid, albeit it was potentially polygamous, and that it was an effective bar to the subsequent marriage in England. LORD GREENE, M.R., said this (2):

"I do not propose to go through all the cases cited to us but I will take what I think has been properly described as the high-water mark, the well known decision of LORD PENZANCE in *Hyde v. Hyde and Woodmansee* (3). The headnote starts with this general proposition: 'Marriage as understood in Christendom is the voluntary union for life of one man and one woman, to the exclusion of all others.' But that, of course, does not enable any general answer to be given to the question: what is to be understood by 'marriage' for the purpose of the various branches of English law in which the question of marriage is relevant? For the purpose of enforcing the rights of marriage, or for the purpose of dissolving a marriage, it is no doubt the case (at any rate, it has always been accepted as the case following LORD PENZANCE's decision) that the courts of this country exercising jurisdiction in matrimonial affairs do not and cannot give effect to, or dissolve, marriages which are not monogamous marriages."

LORD GREENE then goes on to refer to the reason for that, namely, that our Matrimonial Causes Act and Acts dealing with marriage are based purely on monogamous marriages. He goes on to point out that in the case then before him, the court did not have to consider the construction of any words such as "marriage", "husband and wife", such as one finds in the Acts concerned with marriage, and points out that the real question is how far English law recognises a polygamous marriage as creating a status.

LORD GREENE, M.R., continued (4):

"The practical question in this case appears to be: will the courts of this country, in deciding upon the question of the validity of this English marriage, give effect to what was undoubtedly the status possessed by the appellant? That question we have to decide with due regard to common sense and some attention to reasonable policy. We are not fettered by any concluded decision on the matter. The judge set out in a striking manner some of the consequences which would flow from disregarding the Hindu marriage for present purposes. I think it is certainly a matter which we must bear in mind that the prospect of an English court saying that it will not regard the status of marriage conferred by a Hindu ceremony would be a curious one when the Privy Council might come to a precisely opposite conclusion as to the validity of such a marriage on an Indian appeal. I do not think we can disregard that circumstance. We have to apply the law in a state of affairs in which this question of the validity of Hindu marriages is necessarily of very great practical importance, in the every day running of our Commonwealth and Empire."

I read that because it seems to me that everything that LORD GREENE there said applies equally today in relation to a Moslem marriage in Nigeria such as took place in the present case.

As I have said, I do not propose to go through all the authorities; it seems to me that the present position is correctly set out in DICEY'S *CONFLICT OF LAWS* (7th Edn.), where in r. 37 it is said:

(2) [1946] 1 All E.R. at pp. 344, 345; [1946] P. at p. 125.

(3) (1886), L.R. 1 P. & D. 130; [1861-73] All E.R. Rep. 175.

(4) [1946] 1 All E.R. at pp. 346, 347; [1946] P. at p. 129.



A "A marriage which is polygamous under r. 34 and not invalid under r. 35 or r. 36 will be recognised in England as a valid marriage unless there is strong reason to the contrary."

B The editor then goes on to refer to certain cases where there is some strong reason to the contrary, they all being cases which involve the construction in a statute of some such words as "marriage", "wife", "husband", and where one has to decide whether those statutes have in mind merely a monogamous marriage in which case for the purpose of that statute the polygamous marriage will not be recognised; or whether they are statutes which clearly cover marriages whether monogamous or polygamous. In my judgment the justices came to a wrong conclusion in this case, and that for the purposes of ascertaining the status of this wife, the courts here will recognise the marriage as a valid marriage giving her that status.

C That, however, does not conclude the matter, because the justices go on to find that even if they are wrong, and our courts would recognise this marriage as a valid marriage, nevertheless Rabi was in moral danger, and did not have the care, protection and guidance which it could be expected that a good parent would give. Let me say at once that in my view it is perfectly possible to make a fit person order in respect of a wife validly married to a husband. One can think of many illustrations; there might have been evidence that he constantly assaulted her; there might be evidence that he deserted her, in this case a girl who spoke no English, leaving her on the streets of London. There might be evidence that he introduced her to undesirable characters, that he introduced her to drugs, matters of that sort, which would undoubtedly be justification for making a fit person order. The question here really is whether there was evidence in this case justifying the making of such an order.

E It has been pressed on this court that that is a matter of fact for the justices, and that this court should not interfere unless it could be said to be a decision which no reasonable bench of justices properly applying their minds to the law could arrive at.

F What did the justices find? They found in the first place that prior to marriage the appellant had lived with another woman by whom he had had three illegitimate children; that was before the marriage. They found that immediately after the marriage, at a time when, as they put it, Rabi had almost certainly not reached the age of puberty, he had intercourse with her. They found that that is something which, if not a crime, is looked on as a serious matter in Nigeria. G The age of puberty is not less than nine; its limits are nine to fifteen, and on the evidence here the justices said that when intercourse first began, when the marriage took place, almost certainly there had not been development of puberty. They then find that after the marriage and after intercourse had begun, he slept in Nigeria with a prostitute and contracted gonorrhoea. They H go on to find that while suffering from that disease he abstained from any intercourse with the wife, that he has now been cured, and that as a result he now intends, once she is fitted with a contraceptive, to begin intercourse again.

It is in those circumstances that the justices in their written decision, which is annexed to the case, say this:

I "Here is a girl, aged thirteen or possibly less, unable to speak English, living in London with a man twice her age to whom she has been married by Moslem law. He admits having had sexual intercourse with her at a time when according to the medical evidence the development of puberty had almost certainly not begun. He intends to resume intercourse as soon as he is satisfied that she is adequately protected by contraceptives from the risk of pregnancy. He admits that before the marriage he had intercourse with a woman by whom he has three illegitimate children. He further admits that since the marriage, which took place as recently as January of this year, he has had sexual relations with a prostitute in Nigeria

from whom he contracted venereal disease. In our opinion a continuance of such an association notwithstanding the marriage, would be repugnant to any decent minded English man or woman. Our decision reflects that repugnance."

I would never dream of suggesting that a decision by this bench of magistrates with this very experienced chairman, could ever be termed perverse; but having read that, I am convinced that they have misdirected themselves. When they say that "a continuance of such an association notwithstanding the marriage, would be repugnant to any decent minded English man or woman", they are, I think, and can only be, considering the view of an Englishman or woman in relation to an English girl and our western way of life. I cannot myself think that decent minded English men or women, realising the way of life in which Rabi was brought up, and the appellant for that matter, would inevitably say that this is repugnant. It is certainly natural for a girl to marry at that age. They develop sooner, and there is nothing abhorrent in their way of life for a girl of thirteen to marry a man of twenty-five. Incidentally it was not until 1929 that, in this country, an age limit was put on marriage. Granted that the appellant may be said to be a bad lot, that he has done things in the past which perhaps nobody would approve of, it does not follow from that that the wife, happily married to the appellant, is under any moral danger by associating and living with him. For my part, as it seems to me, it could only be said that she was in moral danger if one was considering somebody brought up in and living in, our way of life, and to hold that she is in moral danger in the circumstances of this case can only be arrived at, as it seems to me, by ignoring the way of life in which she was brought up, and the appellant was brought up.

There is one other point which has given me some trouble, and that is the suggestion that every time the appellant in England has intercourse with the wife he is committing a criminal offence, because s. 6 (1) of the Sexual Offences Act, 1956, provides:

"It is an offence, subject to the exceptions mentioned in this section [which do not apply] for a man to have unlawful sexual intercourse with a girl... under the age of sixteen."

So it is said that every time in this country he has intercourse with the wife, he is committing an offence, and that in those circumstances the offence being committed against her, she is exposed to moral danger. It is a point which was apparently not before the magistrates; they certainly do not base their decision on any such consideration. Nor, for my part, do I think that the police could ever properly prosecute in a case such as that if the marriage is a marriage recognised by this country. It may be, of course, that the word "unlawful" will govern this case in the sense that it might be said that it was lawful as between man and wife, and some slight support is given to that view by the decision of the Court of Criminal Appeal, as it then was, in *R. v. Chapman* (5). The word "unlawful" was being considered there not in relation to s. 6 (1), but in relation to s. 19 (1) of the Sexual Offences Act, 1956. That section provides:

"It is an offence, subject to the exception mentioned in this section, for a person to take an unmarried girl under the age of eighteen out of the possession of her parent or guardian against his will, if she is so taken with the intention that she shall have unlawful sexual intercourse with men or with a particular man."

It was said that the appellant's intention was to have sexual intercourse with a girl but only after he had married her. It was held by the court that unlawful sexual intercourse in the above subsection meant illicit intercourse, that is intercourse outside the bonds of marriage.

Whether or not that applies here, it does seem to me that it is not right to say

**A** that the participation in a crime necessarily exposes a person to moral danger. If, as I think, this is a case of husband and wife validly married, recognised as validly married according to the law of this country, I certainly would not say that the wife was exposed to moral danger merely because she carried out her wifely duties.

**B** I have come to the conclusion in this case that for the reasons I have endeavoured to state, the magistrates came to a wrong conclusion on points of law, and that accordingly I would allow the appeal and revoke the fit person order.

**ASHWORTH, J.:** I agree.

**BLAIN, J.:** I agree.

**C** *Appeal allowed and fit person order revoked.*

Solicitors: *Alexander A. Kassman* (for the appellant); *Solicitor, Metropolitan Police* (for the respondent); *Official Solicitor* (for Rabi Mohamed Musi).

[*Reported by ELLEN B. SOLOMONS, Barrister-at-Law.*]

**D**

## FEENEY v. RIX.

[CHANCERY DIVISION (Cross, J.), April 2, 10, 1968.]

**E** *Pleading—Particulars—Condition of mind—Plaintiff's state of mind—Absence of intention to make a gift to woman with whom plaintiff lived as his wife—Particulars of facts relied on—House conveyed into name of defendant, the unmarried wife—Plaintiff claimed half share in proceeds of sale of house—Alleged that contributions made by him towards purchase of house were never intended as gift to the defendant—Whether particulars of allegation of absence of intention would be ordered—R.S.C., Ord. 18, r. 12 (1), (4).*

**F** In June, 1955, the plaintiff and defendant, who had lived together for many years as man and wife, went to live in a house in London which was conveyed to the defendant. A dispute having arisen as to the ownership of the house, the plaintiff issued a writ claiming a declaration that the defendant held the property on trust, as to a half share, for him. By para. 3 of the statement of claim the plaintiff alleged that he never intended or proposed that any contribution made by him from a joint account of the parties therein referred to should be a gift and that none of his contributions was or ever became a gift. On application by the defendant for particulars under para. 3 of "never intended" particularising the overt acts of the plaintiff and the facts relied on to show that any contributions of the plaintiff were made with no intention of being a gift to the defendant,

**G** **Held:** under the new rule, R.S.C., Ord. 18, r. 12\*, a party must plead the facts relied on to support an allegation of a condition of mind of any person; this applied to an allegation by a plaintiff of the condition of his own mind, including an allegation that he did not have a particular intention, and accordingly the defendant was entitled to particulars under para. 3 of the statement of claim (see p. 572, letters G and H, post).

**I** *Burgess v. Beethoven Electric Equipment, Ltd.* ([1942] 2 All E.R. 658) no longer applicable.

[As to pleading a condition of mind under the former R.S.C., see 30 HALSBURY'S LAWS (3rd Edn.) 11, para. 20, and as to the function of particulars, see *ibid.*, pp. 18, 19, para. 37; for cases under the former R.S.C. on pleading a condition of mind, see 50 DIGEST (Repl.) 37, 38, 289-293, and as to particulars, see *ibid.*, p. 201, 1672-1676, pp. 206-213, 1701-1755.]

\* R.S.C., Ord. 18, r. 12, so far as material, is set out at p. 571, letter I, to p. 572, letter B, post.



Cases referred to:

*Burgess v. Beethoven Electric Equipment, Ltd.*, [1942] 2 All E.R. 658; [1943] 1 K.B. 96; 112 L.J.K.B. 195; 168 L.T. 105; 50 Digest (Repl.) 37, 290.  
*Fox v. H. Wood (Harrow), Ltd.*, [1962] 3 All E.R. 1100; [1963] 2 Q.B. 601; [1962] 3 W.L.R. 1513; 50 Digest (Repl.) 37, 293.

### Procedure Summons.

This was an application by summons for particulars under the statement of claim in the action. The plaintiff, Robert Bartley Feeney, and the defendant Stella Rix, lived together for many years as man and wife, the defendant being known generally as Mrs. Feeney. In June, 1955, they went to live at 11, Hollingbourne Gardens, London, W.13. The conveyance was taken in the name of the defendant. Some years before the commencement of these proceedings relations between them had deteriorated and, though continuing to live under the same roof, they lived separate lives. By writ issued on Mar. 29, 1965, beginning the present action, the plaintiff claimed against the defendant a declaration that she held the property on trust for the plaintiff as to one half share thereof, an order for its sale, and that the plaintiff should recover out of the net proceeds of sale his one half share. The statement of claim, delivered on Apr. 6, 1965, was as follows:

"1. On a date in June, 1955, there was conveyed into the defendant's name the freehold property situate at 11, Hollingbourne Gardens, London, W.13, in respect of the purchase of which property the plaintiff and the defendant contributed in equal shares to the deposit (being in the sum of £600) and to the repayments to date of the mortgage of £2,000 taken out with the Ealing Borough Council in the name of Mrs. Stella E. Feeney towards discharge of the purchase price of the said property (being in the sum of £2,750), as well as the parties contributing in equal shares to the legal fees and stamp duties of and in connexion with the said transactions. 2. The said contributions in equal shares by the plaintiff and the defendant were made from time to time as required by one or other of the parties from the joint account or fund of the parties standing in the name of the defendant at Lloyds Bank, Ltd., Camden Town, London, N.W.1, which joint account or fund consisted of and represented the joint savings of the plaintiff and the defendant during the period commencing in June, 1952. 3. The plaintiff never intended or proposed that any contribution by him to the said joint account or fund or to any of the transactions or matters referred to in para. 1 hereof should be a gift and none of his contributions was or ever became a gift. 4. In the premises the defendant holds the said property on trust for the plaintiff as to a half share thereof and the plaintiff was and is entitled to an account of all rents, profits and financial benefits received by the defendant from the said property and to payment of his just share thereof."

The plaintiff claimed a declaration that the defendant held the property on trust for him as to one half share thereof, an order that the property be sold, that he should recover one half of the net proceeds, and an account of all rents, profits and payment to the plaintiff of his just share thereof. The defence, delivered on May 28, 1965, ran as follows:

"1. The defendant admits that from and since Aug. 30, 1955, she has been and is registered proprietor at H.M. Land Registry under Title No. MX200260 of the freehold property known as and situate at 11, Hollingbourne Gardens, London, W.13, and that the said property was charged by her to Ealing Borough Council but save as to this denies para. 1 of the statement of claim. 2. The defendant admits that she formerly had an account with Lloyds Bank, Ltd. at Camden Town, London, N.W.1, but save as to this denies para. 2 of the statement of claim. 3. Paragraph 3 of the statement of claim is not admitted, the plaintiff never made any contribution as there alleged or

A at all. 4. Paragraph 4 of the statement of claim is denied. 5. If (which is  
denied) the plaintiff made any contributions as alleged in para. 3 of the  
statement of claim the defendant will claim to set-off the amount of her  
counterclaim against the value of such contributions (if any) or such part  
thereof as may be sufficient to disentitle the plaintiff to judgment on his  
claim. 6. Save as hereinbefore expressly admitted each and every allegation  
B contained in the statement of claim is denied as if herein set forth and  
traversed seriatim. 7. In the premises the plaintiff is not entitled to the  
relief claimed."

By her counterclaim the defendant made claims not material to this report. A  
reply and defence to counterclaim was served on June 14, 1965; particulars of  
the defence and counterclaim and of the reply and defence to counterclaim were  
C given on Apr. 28, 1966, and Aug. 24, 1966. The defendant requested particulars  
under para. 2 and para. 3 of the statement of claim. The plaintiff refused to give  
those sought under para. 3, which were as follows:

"Of 'never intended'. Particularising any overt acts of the plaintiff  
and any other facts relied on to show that the contributions (if any) of the  
D plaintiff when made by the plaintiff (if at all) were made with no intention of  
being made as a gift to the defendant."

By summons dated Feb. 13, 1968, the defendant sought an order that the plaintiff  
should give the further and better particulars above-mentioned. The summons  
was adjourned to the judge (CROSS, J.) as a procedure summons.

E *Ian McCulloch* for the defendant, the applicant for particulars.  
*I. Finestein* for the plaintiff.

*Cur. adv. vult.*

Apr. 10. CROSS, J., read the following judgment in which, after having  
stated the nature of the dispute between the plaintiff and the defendant and  
having read the statement of claim, and the defence, and the particulars sought  
F under para. 3 of the statement of claim, as hereinbefore set out, he continued:  
There is no doubt that under the old rules of court which were operative until  
the end of 1963 the defendant would not have been entitled to these particulars,  
for R.S.C., Ord. 19, r. 22 provided as follows:

"Wherever it is material to allege malice, fraudulent intention, knowledge,  
or other condition of the mind of any person, it shall be sufficient to allege the  
G same as a fact without setting out the circumstances from which the same  
is to be inferred. Provided that where in an action for libel or slander the  
defendant pleads that any of the words or matters complained of are fair  
comment on a matter of public interest or were published upon a privileged  
occasion, the plaintiff shall, if he intends to allege that the defendant was  
H actuated by express malice, deliver a reply giving particulars of the facts  
and matters from which such malice is to be inferred."

I It appears that before 1943 a practice had grown up of ordering particulars of  
intention or knowledge, but in *Burgess v. Beethoven Electric Equipment, Ltd.* (1),  
the Court of Appeal pointed out that the rule in question meant what it said and  
that to order particulars of an allegation of intention or knowledge would be to  
compel the pleader to plead, not simply the fact on which he relied, but the  
evidence by which he proposed to prove it.

However, the new rules have altered the position completely. The matter is  
now governed by R.S.C., Ord. 18, r. 12 which, so far as relevant, runs as follows:

"(1) Subject to para. (2), every pleading must contain the necessary partic-  
ulars of any claim, defence or other matter pleaded including, without  
prejudice to the generality of the foregoing words—(a) particulars of any  
misrepresentation, fraud, breach of trust, wilful default or undue influence

on which the party pleading relies; and (b) where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies.

“(4) Where a party alleges as a fact that a person had knowledge or notice of some fact, matter or thing, then, without prejudice to the generality of para. (3), the court may, on such terms as it thinks just, order that party to serve on any other party—(a) where he alleges knowledge, particulars of the facts on which he relies, and (b) where he alleges notice, particulars of the notice.”

It follows, therefore, that if a party alleges that the other party intended on some occasion to make a gift of some item of property he must plead the facts on which he relies in support of the allegation. Further, if he alleges that the other party did not intend on some occasion to make a gift of some item of property he must plead the facts on which he relies in support of that allegation, for to say that someone did not intend to do something is just as much an allegation of a condition of mind as to say that he intended to do something. If authority for that is required, it can be found in the judgment of DIPLOCK, L.J., in the case of *Fox v. H. Wood (Harrow), Ltd.* (2).

In para. 3 of the statement of claim, however, the plaintiff is making an allegation as to his own state of mind, and counsel submitted on his behalf that R.S.C., Ord. 18, r. 12 (1) and (4) did not apply to such an allegation, that is to say that one ought to read in the words “other than himself” after the word “person” in the two sub-rules. I might be prepared to do that if I thought that to construe the rules literally would lead to an absurdity; but I cannot see that it does. If a man’s mistress, who alleges that he intended to make a gift to her of the contents of a flat in which he has installed her, must plead the facts on which she relies in support of that allegation, I cannot see why a husband who alleges that he did not intend to make a gift to his wife of a diamond necklace of which he has put her in possession should not be obliged to plead the facts on which he relies in support of that allegation. The unwillingness of the law to allow self-serving statements to be given in evidence may limit the matters on which the husband can rely, but that circumstance does not seem to have any bearing on the problem in hand. In this case, of course, the plaintiff is not the husband of the defendant, and it might have been enough for him simply to plead the fact that he had contributed to the purchase of the house, leaving it to the defendant to allege that if he had contributed anything it had been by way of gift. However, as they had been living together as man and wife for many years, it is quite understandable that his counsel should have alleged a positive intention not to make a gift. The consequence of doing so is, however, as I see it, that this defendant is entitled to the particulars for which she asks. What, of course, she wants to know is whether the plaintiff is simply saying that he contributed to the purchase and that in his own mind he did not intend his contributions to be gifts, or whether he is also saying that he let the defendant know that he did not intend his contributions to be gifts.

For those reasons I propose to allow the particulars requested with the alteration of “the overt acts” to “any overt acts” and “the facts” to “any facts”.

*Particulars allowed. Leave to appeal.*

Solicitors: *Lovell, White & King*, agents for *Machin Smith & Brown*, Ealing (for the applicant the defendant); *John Wood & Co.* (for the respondent, the plaintiff).

[Reported by JACQUELINE METCALFE, Barrister-at-Law.]



A

## MARFANI &amp; CO., LTD. v. MIDLAND BANK, LTD.

[COURT OF APPEAL, CIVIL DIVISION (Danckwerts and Diplock, L.J.J., and Cairns, J.), March 19, 20, 21, 1968.]

B

*Bank—Cheque—Conversion—Protection of bank acting in good faith and without negligence—New customer opening account using assumed name of payee of cheque—Reference of trustworthiness given to bank—Passport not required—Sufficiency of bank's enquiries and practice—Cheques Act, 1957 (5 & 6 Eliz. 2 c. 36), s. 4 (1).*

C

Having as instructed drawn a crossed cheque for £3,000 in favour of E. with whom the plaintiff company had business dealings, and having got it signed by the company's Pakistani managing director, who then went abroad, K. the Pakistani office manager of the company, went to a branch of the defendant bank where considerable business was done with Pakistanis. He called himself E. and sought to open a new account in that name. He told the securities officer, who had authority to open new accounts, that he was thinking of going into business as a restaurateur, signed the particulars required by the bank with the name of E., and gave two restaurateurs as referees. He paid in £80 on Jan. 24, 1966, to open the account and said that the majority of the funds would come later, and the following day he paid in the £3,000 cheque, which he had endorsed (unnecessarily) in the name of E., together with £35 9s. 6d. in cash. The bank had the cheque specially cleared the same day without being asked to, and credited the proceeds to the new account in E.'s name, although they would not have allowed the account to be operated without a satisfactory reference. On Jan. 26, 1966, the bank was visited by Mr. Ali, one of the referees (the other did not reply to the bank's inquiry), a Pakistani who had been known to the bank since about 1961, had had an account with them for some years and had previously introduced satisfactory Pakistani customers to the bank. He told the bank's branch manager that E. (as K. was known to both of them) had been known to him "for some time" (he was not asked how long), that he, Mr. Ali, believed that E. intended starting a restaurant and that in Mr. Ali's opinion he (i.e., K. known as E.) was all right for the conduct of a bank account. Mr. Ali had in fact known K. for only a month as a customer at his restaurant and was in no position to vouch for his trustworthiness or even his identity. Payments out of the account started at the end of January, 1966; viz., a few days after Mr. Ali's reference was given. All the money in K.'s account was withdrawn in the course of the first week of February, 1966, and he left for Pakistan. The plaintiff company brought an action for conversion of the £3,000 cheque against the defendant bank.

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**Held:** (i) the bank had, on the evidence, acted in accordance with the current practice of bankers, and had discharged the onus of proving that they had acted without negligence, the factors particularly relevant being those mentioned in (ii) below; accordingly the bank were protected by s. 4\* of the Cheques Act, 1957, from liability (see p. 581, letter C, p. 585, letters A and B, and p. 586, letter F, post).

(ii) (a) when the reference had been given by Mr. Ali as to K.'s suitability, which was before money was paid out of the newly opened account, the bank were not negligent in enquiring no further of Mr. Ali than they did or in acting on only the one reference (see p. 582, letter H, p. 583, letter B, p. 585, letter G, and p. 586, letter E, post); (b) the fact that the bank had not asked for identification by production of a document (e.g., a passport) or inquired as to K.'s employment was not lack of care in view of Mr. Ali's reference concerning him (see p. 581, letters F and I, and p. 585, letter C and

\* Section 4 (1) is set out at p. 578, letter E, post.

p. 586, letter E, post); and (c) the clearing of the cheque before any reference was received had made no difference to anyone (see p. 583, letter C, p. 581, letter I, and p. 586, letter B, post).

Dictum of LORD WRIGHT in *Lloyd's Bank, Ltd. v. E. B. Savory & Co.* ([1932] All E.R. Rep. 106) considered.

Per DIPLOCK, L.J., and CAIRNS, J.: to refrain from making inquiries which are unlikely to lead to detection of a potential customer's purposes if he is dishonest, but may offend him if he is honest, or to refrain from taking a precaution which, if taken, will probably be unavailing, is not lack of reasonable care such as to deprive a bank of the protection afforded by s. 4 of the Act of 1957 (see p. 582, letter E, and p. 584, letter H, post).

Dictum of DEVLIN, J., in *Baker v. Barclays Bank, Ltd.* ([1955] 2 All E.R. at p. 584, letter F) considered and applied.

Per DIPLOCK, L.J.: the relevant time at which to determine whether the bank had discharged their duty of care towards the true owner of the cheque, which duty did not arise until the cheque was presented to the bank, was when the bank started to pay out the proceeds of the cheque (see p. 579, letter E, and p. 580, letter I, to p. 581, letter A, post; cf., per CAIRNS, J., at p. 583, letter I, post, and per DANCKWERTS, L.J., at p. 586, letter B, post).

[As to the protection of a banker acting in good faith and without negligence in collecting the proceeds of crossed cheques, see 2 HALSBURY'S LAWS (3rd Edn.) 180, para. 343; and for cases on the subject, see 3 DIGEST (Repl.) 266-271, 762-788.

For the Cheques Act, 1957, s. 4 (1), see 37 HALSBURY'S STATUTES (2nd Edn.) 54.]

Cases referred to:

*Baker v. Barclays Bank, Ltd.*, [1955] 2 All E.R. 571; [1955] 1 W.L.R. 822; 3 Digest (Repl.) 265, 761.

*Capital and Counties Bank, Ltd. v. Gordon, London, City and Midland Bank v. Gordon*, [1900-03] All E.R. Rep. 1017; [1903] A.C. 240; 72 L.J.K.B. 451; 88 L.T. 574; 3 Digest (Repl.) 218, 507.

*Lloyds Bank, Ltd. v. E. B. Savory & Co.*, [1932] All E.R. Rep. 106; [1933] A.C. 201; 102 L.J.K.B. 224; 148 L.T. 291; *affg.*, [1932] 2 K.B. 122; 101 L.J.K.B. 499; 146 L.T. 530; 3 Digest (Repl.) 270, 785.

### Appeal.

The plaintiff company had brought an action for £3,000 damages for conversion of a cheque for £3,000 drawn on the Bank of India and collected by the defendant bank, the proceeds being credited to an account newly opened by the plaintiff company's former office manager at a branch of the defendant bank and soon afterwards withdrawn from the account; alternatively the plaintiff company claimed £3,000 as money had and received to its use. The defendant bank by their defence admitted that a customer opened an account on Jan. 24, 1966, in the name of Sheik Eliasade. The defendant bank pleaded further that they took the cheque in good faith and without negligence, and they relied on s. 4 of the Cheques Act, 1957.

The plaintiff company carried on business as import and export merchants; the chairman and managing director was Mr. Ameen Marfani, who came to England from Pakistan in about 1953. The plaintiff company's bankers were the Bank of India, Booth Street, Manchester. In March, 1964, a Pakistani, Anwar Kureshy, became employed by the plaintiff company as clerk. He had come to the United Kingdom in 1952. He seemed competent and trustworthy and in the spring of 1965 he was promoted to be office manager. It was a small office, the only other member of the staff being a girl clerk. In January, 1966, Mr. Marfani was proposing to visit Pakistan, and before leaving England it was necessary to pay £3,000 to a London firm called Eliasade, who were import and export merchants with whom the plaintiff company did business. Kureshy

A made out a cheque for this amount in favour of Eliaszade. It was dated Jan. 17, 1966, drawn on the Bank of India, and crossed. Mr. Marfani signed it. On Jan. 21, 1966, Mr. Marfani left for Pakistan. Kureshy remained in charge of the office.

During December, 1965 and January, 1966, or thereabouts, Kureshy, calling himself Eliaszade, visited the Taj Mahal Restaurant in All Saints, Manchester.

B He lunched there on four or five occasions. The proprietor of the restaurant was Akaddas Ali. Kureshy asked Mr. Ali how long he had been there, saying that he, Kureshy, intended to open a restaurant. After some conversation Kureshy asked Mr. Ali about his bank, which it was and whether he were satisfied. Mr. Ali told Kureshy about his bank, saying "find your restaurant first and I will recommend you", meaning, recommend Kureshy to the bank. Mr. Ali in evidence C said that he had known Kureshy, whom he knew as Eliaszade, only for about a month around Christmas, 1965. Mr. Ali had been a customer of the defendant bank's Rusholme branch since about 1961. His account had been operated satisfactorily, and he had introduced several satisfactory Pakistani customers to the bank. It was not known to the bank that he had been convicted of a crime and sent to prison.

D On Jan. 24, 1966, Kureshy went to the Rusholme branch of the defendant bank and there saw the securities clerk, a Mr. Meakin, who had authority to open new accounts. There was evidence that Kureshy was well-dressed, spoke courteously and appeared business-like, that his English was good and that his appearance was consistent with being a man of some substance. The Rusholme branch did thirty to forty per cent. of its business with Pakistanis. At the E interview which followed Kureshy, calling himself Eliaszade, told Mr. Meakin that he, Kureshy, wanted to open an account. Mr. Meakin asked him what type of account he required. Kureshy said that it would be a trading account and that he was thinking of going into business as a restaurateur. He said that the majority of funds for the account would come later. Kureshy paid in cash the sum of £80 with which to open an account. Mr. Meakin produced a form and F himself made out the particulars, which included the name, Mr. Sheikh Eliaszade, 51, Manley Road, Whalley Range, Manchester 16, Restaurateur. This address was the address of a house which Kureshy rented from Mr. Marfani. On Jan. 24, 1966, Eliaszade (i.e., Kureshy posing as Eliaszade) purported to sign his usual signature and his signature in full, Sheikh Eliaszade, in printed lettering and in ordinary handwriting; and the names and addresses of persons to whom G the bank should make reference were set out, viz., A. Ali of the Taj Mahal Restaurant, Manchester, and A. Syeed, Kismet Restaurant, Bolton, Lancashire. Kureshy filled in the usual signature and the signature in full. The two words "Sheikh" written by him, were differently spelt, the first having one "h" and the second having two.

H On Jan. 25, 1966, Mr. Meakin had two letters sent, one to each of the referees. The first was as follows:

"Dear Mr. Ali,

"We have been asked to open an account for Sheikh Eliaszade and your name has been given as a reference. Would you kindly inform us, therefore, whether in your opinion he may be considered trustworthy and likely to prove a satisfactory customer at the bank."

I This letter was addressed personally to Mr. Ali. The other letter, which was to Mr. Syeed, was addressed "Dear Sir", and asked for the same information—"... if you could tell us whether you would consider him trustworthy". On the same day, Jan. 25, 1966, Kureshy presented himself at the Rusholme branch of the defendant bank with the cheque for £3,000 and sought to pay it in, together with a sum of £35 9s. 6d. in cash. The paying-in slip was to credit Eliaszade, and the name was put down twice and the credit as £3,035 9s. 6d. The cheque was in fact endorsed, although endorsement was no longer necessary. The



cheque was specially cleared by the bank, with the consequence that on Jan. 25, 1966, the defendant bank had collected the proceeds of the cheque from the Bank of India and had placed them to the credit of the account in the name of Eliaszade which had just been opened. At that time, however, no cheque book had been issued to Kureshy by the defendant bank. A

On the same day, Jan. 26, 1966, Mr. Ali, who was then about to leave for Pakistan, visited the Rusholme branch of the defendant bank in order to make some banking arrangements which would obtain during his absence abroad. The manager of the branch, Mr. Fisher, gave evidence at the trial that Mr. Ali came into his office saying that he was going to Pakistan, and referred to receiving an enquiry about Eliaszade. Mr. Ali said that Eliaszade had been known to him for a time; that he believed that he intended starting a restaurant, and that in Mr. Ali's opinion Eliaszade was all right for the conduct of a bank account. Mr. Fisher did not ask further, and passed on this message to Mr. Meakin, saying that he had satisfied himself that it would be in order to issue a cheque book and start the account in that way. Payments out of the account were made as follows —on Jan. 31, 1966, a payment of £500 to "self"; a payment of £1,080 to Famaz Agencies, and a payment on Feb. 5, 1966 of £1,450 to M. Sheikh. In effect all money which had been paid in was withdrawn or paid out. B C D

On Feb. 8, 1966, Mr. Marfani, then in Pakistan, had a signal to say that Kureshy had gone. In March, 1966, he learned that Eliaszade had not been paid the £3,000.

On July 26, 1967, as reported at [1967] 3 All E.R. 967, NIELD, J., at Manchester Assizes, gave judgment in the action in favour of the defendant bank, holding that the bank were protected by s. 4 of the Cheques Act, 1957, having acted in accordance with the ordinary practice of careful bankers and having discharged the onus of showing that they acted without negligence. The plaintiff company appealed to the Court of Appeal on the following grounds: (i) that the judge misdirected himself on a matter of law by determining the issue of whether the defendant bank had acted without negligence by considering matters and events which occurred after the act of conversion by the bank on Jan. 25, 1967. In particular, he should have determined the issue by disregarding any evidence which related to the taking up of a reference by the defendant bank on Jan. 26, 1967. (ii) that the judge misdirected himself on a matter of law by accepting uncritically the defendant bank's evidence about their own particular banking practice in the opening of new accounts as the sole criterion of whether the defendant bank had acted without negligence. In the absence of independent expert evidence, the judge should have himself determined the issue of negligence by a consideration of all the circumstances of the case. (iii) that the judge failed to attach proper significance to the fact that the defendant bank had ordered special collection of the cheque on Jan. 25, 1967, without having received a request from their customer so to do. The plaintiff company submitted that the proper and reasonable inference to be drawn from the fact of special collection was that the suspicions of the officials of the defendant bank were aroused about the integrity of their new customer but, in ordering special collection of the cheque, the defendant bank were ignoring the interests of the true owner of the cheque. (iv) that the judge ought to have found negligence on the part of the defendant bank. The plaintiff company contended that, in failing to do so, the judge failed to consider the significance and relevance of the following facts:—(a) that at the time of conversion the defendant bank had taken no or no adequate steps to satisfy themselves as to the identity of the new customer; (b) that at the time of conversion the defendant bank had failed to make elementary enquiries from their customer with regard to his background, domicile, income, existing and past occupation, and prior banking transactions; (c) that at the time of conversion the defendant bank had failed to obtain any references about their new customer; (d) the amount for which the cheque was drawn, its date, the similarity between the writing on the cheque and paying slip; (v) E F G H I

- A that the judge in determining whether or not the defendant bank had acted without negligence, failed to pay regard to the cumulative effect of the defendant bank's conduct in the matters listed, but considered each allegation of negligence in isolation. (vi) that if the judge was entitled to consider the manner in which the defendant bank took up a reference on Jan. 26, 1967, he should have held that the defendant bank failed to make proper and prudent enquiries from the referee who was interviewed by their manager and failed to ensure that a second reference was obtained and/or failed to attach significance to the fact that no reference was forthcoming from the second referee nominated by their new customer. (vii) that the judge misdirected himself in law by considering whether the taking of precautions by the defendant bank would have proved to be fruitless.
- C *A. J. L. Lloyd, Q.C.*, and *G. A. Carman* for the plaintiff company.  
*W. D. T. Hodgson, Q.C.*, and *J. W. da Cunha* for the defendant bank.

DIPLOCK, L.J., delivered the first judgment at the invitation of DANCKWERTS, L.J.: By an ingenious and elaborate fraud, one Kureshy, the plaintiff company's employee, obtained payment to himself of a cheque for £3,000 drawn by the plaintiff company on the Bank of India in favour of a firm called Eliaszade as payee. The cheque was crossed. To carry out his scheme, Kureshy needed a bank account. He opened one with the defendant bank in the name of Eliaszade, and handed the cheque to them for collection. They presented it for payment to the Bank of India and received payment of it which they credited to the account of Eliaszade, out of which Kureshy drew nearly all of the sum of £3,000 so credited.

The facts are set out with clarity and in detail in the judge's judgment, and are now reported in the All England Law Reports (1). This makes it unnecessary for me to repeat them. I would only add that Kureshy's scheme was very carefully prepared. Well in advance of the actual drawing of the cheque which he fraudulently converted, he had already taken steps to establish a false identity as Eliaszade with Mr. Ali, whom he planned to use as his introducer to the defendant bank, who were Ali's bankers. After the cheque had been drawn, but before visiting the bank, he took the precaution on the day of the departure of the managing director of his employer (the plaintiff company) of making a false entry in the postage book of the plaintiff company to make it appear that the cheque had been posted to the payee, the real Eliaszade, in London. He would have been the only person in the office of the plaintiff company in a position to answer any inquiries about the cheque, had any been made. This was a cunning calculating rogue.

It may seem odd that in the 1960s the liability of the defendant bank for the part which they were deceived into playing in this transaction should be affected by the series of legal fictions by use of which the lawyers of the sixteenth century evolved from the ancient real action of *detinue sur trover* a personal action on the case of *trover* which, with the abolition of forms of action, became the modern tort of conversion. It may also seem odd that the basis of their liability is that the piece of paper on which the cheque was written was "goods" belonging to the plaintiff company, and that the defendant bank's acts in accepting possession of that piece of paper from Kureshy, in presenting it to the Bank of India and accepting payment of it, constituted an unjustifiable denial by them of the plaintiff company's title to its goods, from which damage flowed. Such, however, is the common law of England, and one of the consequences of the historic origin of the tort of conversion and its application to negotiable instruments as "goods" is that the tort at common law is one of strict liability in which the moral concept of fault in the sense of either knowledge by the doer of an act that is likely to cause injury, loss or damage to another, or lack of reasonable care to avoid causing injury, loss or damage to another, plays no part.

(1) [1967] 3 All E.R. 967 at pp. 968-970.

At common law one's duty to one's neighbour who is the owner, or entitled to possession, of any goods is to refrain from doing any voluntary act in relation to his goods which is a usurpation of his proprietary or possessory rights in them. Subject to some exceptions which are irrelevant for the purposes of the present case, it matters not that the doer of the act of usurpation did not know, and could not by the exercise of any reasonable care have known, of his neighbour's interest in the goods. This duty is absolute; he acts at his peril.

A banker's business, of its very nature, exposes him daily to this peril. His contract with his customer requires him to accept possession of cheques delivered to him by his customer, to present them for payment to the banks on which the cheques are drawn, to receive payment of them and to credit the amount thereof to his own customer's account, either on receipt of the cheques themselves from the customer, or on receipt of actual payment of the cheques from the banks on which they are drawn. If the customer is not entitled to the cheque which he delivers to his banker for collection, the banker, however, innocent and careful he might have been, would at common law be liable to the true owner of the cheque for the amount of which he receives payment, either as damages for conversion or under the cognate cause of action, based historically on *assumpsit*, for money had and received.

So strict a liability, so absolute a duty, on bankers would have discouraged the development of banking business. It was accordingly progressively mitigated by statute, first by s. 82 of the Bills of Exchange Act, 1882, then by the Bills of Exchange (Crossed Cheques) Act, 1906, and finally by s. 4 of the Cheques Act, 1957, which is the current statute with which we are concerned, and sub-s. (1) of which reads as follows:

"(1) Where a banker, in good faith and without negligence—(a) receives payment for a customer of an instrument to which this section applies; or (b) having credited a customer's account with the amount of such an instrument, receives payment thereof for himself, and the customer has no title, or a defective title, to the instrument, the banker does not incur any liability to the true owner of the instrument by reason only of having received payment thereof."

Subsection (2) provides that the section applies *inter alia* to cheques.

A pettifogger might be tempted to thwart the obvious intention of Parliament by treating the immunity of the banker as limited to actions based on the receipt of payment as constituting the only act of conversion, or as the cause of action for money had and received; and, had the matter first come before the courts in the heyday of literal interpretation, it might well have been so construed. Fortunately, however, the interpretation of s. 82 of the Bills of Exchange Act, 1882, was exposed to the robust common sense of LORD MACNAGHTEN in *Capital & Counties Bank, Ltd. v. Gordon* (2), where he construed the section as extending the immunity "to cover every step taken in the ordinary course of business, and intended to lead up to that result", i.e., the receipt of payment of the cheque.

A purist might also comment (and some have) about the use of the expression "negligence", a term of art appropriate to a cause of action different in its legal characteristics from that of conversion or money had and received in respect of which the qualified immunity is conferred. It is, however, in my view, clear that the intention of the subsection and its statutory predecessors is to substitute for the absolute duty owed at common law by a banker to the true owner of a cheque not to take any steps in the ordinary course of business leading up to and including the receipt of payment of the cheque, and the crediting of the amount of the cheque to the account of his customer, in usurpation of the true owner's title thereto, a qualified duty to take reasonable care



A to refrain from taking any such step which he foresees, or ought reasonably to have foreseen, was likely to cause loss or damage to the true owner.

The only respect in which this substituted statutory duty differs from a common law cause of action in negligence is that, since it takes the form of a qualified immunity from a strict liability at common law, the onus of showing that he did take such reasonable care lies on the defendant banker. Granted good faith in B the banker (the other condition of the immunity) the usual matter with respect to which the banker must take reasonable care is to satisfy himself that his own customer's title to the cheque delivered to him for collection is not defective, i.e., that no other person is the true owner of it. Where the customer is in possession of the cheque at the time of delivery for collection, and appears on the face of it to be the "holder", i.e., the payee or indorsee or the bearer, the banker C is, in my view, entitled to assume that the customer is the owner of the cheque unless there are facts which are known, or ought to be known, to the banker which would cause a reasonable banker to suspect that the customer is not the true owner.

What facts ought to be known to the banker, i.e., what inquiries he should make, and what facts are sufficient to cause him reasonably to suspect that the D customer is not the true owner, must depend on current banking practice, and change as that practice changes. Cases decided thirty years ago, when the use by the general public of banking facilities was much less widespread, may not be a reliable guide to what the duty of a careful banker, in relation to inquiries and as to facts which should give rise to suspicion, is today.

The duty of care owed by the banker to the true owner of the cheque does E not arise until the cheque is delivered to him by his customer. It is then, and then only, that any duty to make inquiries can arise. Any antecedent inquiries that he has made are relevant only in so far as they have already brought to his knowledge facts which a careful banker ought to ascertain about his customers before accepting for collection the cheque which is the subject-matter of the action, and so have relieved him of any need to ascertain them again when the F cheque which is the subject-matter of the action is delivered to him. What the court has to do is to look at all the circumstances at the time of the acts complained of, and to ask itself were those circumstances such as would cause a reasonable banker possessed of such information about his customer as a reasonable banker would possess, to suspect that his customer was not the true owner of the cheque.

G Counsel for the plaintiff company has, not unnaturally, sought to divide the duty of care in the present case into two separate duties, viz., first a duty to make inquiries of and about Kureshy himself before accepting him as a customer; secondly, a duty to investigate more fully the reference given them by Mr. Ali when the account had been opened. He also contends that the defendant bank should have had their suspicions aroused by the cheque itself and the H circumstances in which it was delivered for collection by Kureshy. This occurred before the reference was given.

It is conceded that the information that the defendant bank had obtained from Kureshy himself when he opened the account on Jan. 24, was insufficient to justify their assuming, without further inquiry, that Kureshy was an honest and trustworthy man, though there was nothing in it to arouse suspicion that he I was not. They would not on that information have been prepared to let him draw on his account without further inquiry unless they had received a reference from a source which they regarded as so reliable that the quality of the reference might be taken as dispensing with the need for further inquiry. The reference given by Mr. Ali on Jan. 26 they regarded as fulfilling this requirement; but, as counsel for the plaintiff company points out (and this is why he seeks to separate the duties), even assuming that the obtaining of this reference would have been sufficient to comply with their duty of care, it was in fact given after the defendant bank had received payment of the cheque, and the conversion of it by the

bank was in law complete. Counsel concedes (as I think that he must) that had the reference been given immediately before the bank received payment of the cheque, instead of shortly after, this court would have been bound to take into consideration the reference as well as the information previously obtained from Kureshy in determining whether the defendant bank had fulfilled their duty of taking reasonable care to satisfy themselves that their customer's title to the cheque was not defective; but he contends that any precautions that they took after they themselves had received payment of the cheque from the drawee bank are irrelevant even though taken before they permitted their customer to draw on his account. I think that this is much too technical an effect to give to a statute which was intended to apply to business transactions as they are carried on in real life."

In all actions of the kind with which we are here concerned, the banker's customer has in fact turned out to be a fraudulent rogue, and attention is naturally concentrated on the duty of care which was owed by the banker to the person who has in fact turned out to be the true owner of the cheque. We are always able to be wise after the event, but the banker's duty fell to be performed before it, and the duty which he owed to the true owner ought not to be considered in isolation. At the relevant time the banker was entitled to take into consideration the interests of his customer who, be it remembered, would in all probability turn out to be honest, as most men are, and his own business interests, and to weigh these against the risk of loss or damage to the true owner of the cheque in the unlikely event that he should turn out not to be the customer himself.

What then is the risk of loss or damage to a possible true owner of the cheque if the banker receives payment of it, but does not part with the money to his customer pending completion of all reasonable steps to verify that his customer is entitled to it? One must assume, of course, that those inquiries may disclose that someone other than the customer is in fact the true owner. If they do, the amount received by the banker in payment of the cheque is held to the use of the true owner, and is recoverable from the banker by him under the equitable rules of following money. This right is independent of any liability by the banker for conversion or under the statute, and continues until the time that the banker allows his customer to use the money. What reasonably foreseeable loss will the true owner have sustained because the banker holds the money to his use instead of its being held on his account by another banker on whom the cheque was drawn? Usually the true owner is not the drawer, but is the payee or indorsee of the cheque or the bearer thereof. He, it is true, is kept out of his money, not because the banker has received payment, but because the owner is not in possession of the cheque. In the less usual case of which the present one is an example, where the true owner is the drawer, his credit with the payee bank is reduced by the amount of the payment, but it would in any event have been reduced by the payment of the cheque to the intended payee, and the drawer, too, in this case can follow the money into the new banker's hands. It is true that the drawer has not settled his indebtedness to the intended payee, but this is not because the banker has received payment but because the intended payee has not obtained possession of the cheque.

While it may be possible to imagine cases where receipt of payment by the banker, as distinct from payment out by him to his customer, might cause damage to the true owner, this possibility seems to me to be so minimal that the banker is entitled to ignore it, if it would be in the interest of his customer, if he prove to be in fact the true owner, that payment should be obtained. From the practical point of view of foreseeable loss to the true owner, it seems to me to make no difference whether the banker has received payment of the cheque or not, so long as he retains the payment in his own hands and it is capable of being followed and recovered from him by the true owner. The relevant time for determining whether the banker has complied with his duty of care towards



A the true owner of the cheque is, in my opinion, the time at which the banker pays out the proceeds of the cheque to his own customer, and so deprives the true owner of his right to follow the money into the banker's hands.

The question in this case, therefore, is whether the defendant bank have proved that by Feb. 2, when they started to pay out the proceeds of the cheque to Kureshy, they had taken all reasonable care to ascertain that he was the true owner of the cheque. This is to be judged by the practice of careful bankers. The only evidence of the practice of bankers was given by the manager and securities clerk of the branch of the defendant bank. No evidence that the general practice of other bankers differed from that adopted by the defendant bank was called by the plaintiff company, although they knew well in advance of the trial, as a result of searching interrogatories, exactly what steps the defendant bank had taken, and what inquiries they had made. It seems a reasonable inference that what the defendant bank did in the present case was in accordance with current banking practice. The judge accepted that it was, and counsel for the plaintiff company has not sought to argue the contrary. What he contends is that this court is entitled to examine that practice, and to form its own opinion whether it does comply with the standard of care which a prudent banker should adopt. This is quite right, but I venture to think that this court should be hesitant before condemning as negligent a practice generally adopted by those engaged in banking business.

Counsel for the plaintiff company has developed before this court the same criticisms of the defendants' conduct, both as to the inquiries made of Kureshy and the reference given by Mr. Ali, as were developed before the judge and dealt with in his judgment. This relieves me of the necessity to discuss them in detail. Suffice it to say, as respects the inquiries made of Kureshy, he submits that the defendant bank, before opening the account, ought to have required Kureshy to produce some document to identify himself, ought to have inquired the name of his previous employer (he had told them that he was not employed) and about previous banking accounts held by him.

F The defendant bank's answer was that they regarded a trustworthy reference as more reliable than inquiries made of the customer himself. It is to be borne in mind that, whatever inquiries it might be prudent for the bank to make for their own purposes, the only inquiries which they were under any duty to the plaintiff company to make were inquiries directed to discovering whether their new customer might use the account for the fraudulent purpose of cashing G cheques belonging to other people. The purpose of such inquiries would be to find out (a) whether the customer was a fraudulent rogue, and if so (b) whether he would be likely to have opportunities of dishonestly obtaining other people's cheques, and in particular those of the plaintiff company. As a matter of common sense, a person who is opening a bank account for a dishonest purpose is unlikely himself wittingly to give any information calculated to disclose his dishonest H purpose. He will be prepared with appropriate answers to lull suspicion. It may be that a searching interrogation would reveal inconsistencies or improbabilities in his story, but a bank cannot reasonably be expected to subject all prospective customers to a cross-examination, which cannot fail to give the impression that the bank doubts their honesty, and which would be understandably resented by the 999 honest potential customers, on the off chance of detecting I the thousandth dishonest one. If there is some other independent and apparently trustworthy source from which the honesty of the potential customer may be verified, to rely on this source of information is not only less likely to damage the bank's own business by driving away honest customers than interrogation of the customer himself, but is also more likely to result in the successful detection of the occasional dishonest one.

Counsel for the plaintiff company placed great reliance on the speech of Lord WRIGHT in *Lloyds Bank, Ltd. v. E. B. Savory & Co.* (3) as authority for the



proposition that it is the duty of a banker, when opening a new account, to ascertain the name of the customer's or customer's spouse's employers, in addition to obtaining suitable references. LORD WRIGHT went further than the other members of the three to two majority, LORD BUCKMASTER and LORD WARRINGTON, both of whom considered that such inquiries might be dispensed with if an apparently reliable and trustworthy reference were obtained. That case, as all other cases, depended on its own particular facts. The frauds had gone on for a very long time. There were many other matters calculated to arouse suspicion in the social conditions of the 1920s. It was decided on expert evidence, not of what is now current banking practice, but of what it was nearly forty years ago. I find in it no more than an illustration of the application of the general principle that a banker must exercise reasonable care in all the circumstances of the case.

Counsel for the defendant bank argued that, in any event, on the facts now known to us, none of the proposed inquiries would have resulted in any suspicion of Kureshy's honesty. He had prepared his scheme too well. Failure to make them was not causative of the loss. There are dicta, which can be found collected in *Baker v. Barclays Bank, Ltd.* (4), which suggest that, even if it could be proved that a failure to make a particular inquiry which a prudent banker would have made, had no causative effect on the loss sustained by the true owner, the banker would, nevertheless, be disentitled to the protection of s. 4 of the Cheques Act, 1957. For my part I think that these dicta are wrong; but it is obviously difficult to prove so speculative a proposition as what would have happened if inquiries had been made which were not made, and I do not think that the defendant bank has sustained the onus of proving it here. I prefer to put it in the alternative way which I have already indicated. It does not constitute any lack of reasonable care to refrain from making inquiries which it is improbable will lead to detection of the potential customer's dishonest purpose, if he is dishonest, and which are calculated to offend him and maybe drive away his custom if he is honest.

I turn next to the criticisms of the defendant bank's acceptance of Mr. Ali's reference. We must resist the temptation of hindsight. We know now (as the defendant bank did not) that Mr. Ali's knowledge of Kureshy was brief and scanty. He was in no position conscientiously to vouch for Kureshy's trustworthiness, or even his identity. Were the defendant bank acting prudently in relying on what Mr. Ali told them about their new customer who called himself Eliaszade? Their new customer was a Pakistani, a close community who in England keep themselves to themselves. The most reliable source of information about him would be likely to be a fellow Pakistani whom the defendant bank could reasonably regard as trustworthy. Mr. Ali was a Pakistani of substance, a restaurateur and thus likely to know about other Pakistanis in the same line of business. He had been a valued customer of the defendant bank for some six years. He had introduced a number of other Pakistanis as customers, and all of these had proved satisfactory. The bank had no reason to doubt Mr. Ali's honesty, conscientiousness or candour, or to suppose that he would vouch for the trustworthiness of a customer unless he had reasonable grounds for doing so. I do not think that there was any lack of reasonable care on the part of the defendant bank in accepting and acting on Mr. Ali's reference. It is to be noted that what he said about Eliaszade confirmed what Kureshy had said about himself two days before. There was no inconsistency between them.

The only criticism which has given me trouble is that, on being told by Mr. Ali that he had known Eliaszade "for some time", the bank manager did not ask Ali how long he had known him. We know now that had that inquiry been made and answered truthfully, it would have disclosed that Mr. Ali was in no position to vouch for Eliaszade's trustworthiness, and the bank would have been under a duty to make further inquiries before allowing this new customer to draw on

(4) [1955] 2 All E.R. 571 at pp. 582-584.

A his account; but this again is hindsight. The real question is: given their knowledge of Mr. Ali as a valued customer, and their experience of him as a reliable referee for Pakistani customers, ought his use of the imprecise expression "some time" to have aroused their suspicion that his knowledge of Eliaszade might be insufficient to enable him to express a reliable view of Eliaszade's trustworthiness? Should it have led them to inquire further as to the facts on which that knowledge was based? This, I think, was very much a matter for the judge, who saw and heard Mr. Ali as well as the bank witnesses. I agree with his conclusion (5) that the defendant bank, in acting without further probing on the information given to them by Mr. Ali as to their customer's trustworthiness, were not in breach of their duty to the plaintiff company to take reasonable care in relation to the plaintiff company's cheque which Kureshy had delivered to them for collection.

Counsel for the plaintiff company has made a number of other criticisms of the defendant bank's actions, in particular in relation to their obtaining special clearance of the cheque. They are all dealt with in the judgment appealed from. The significance of the special clearance depends on the judge's assessment of the credibility of the bank officials who gave evidence. I see no ground which would justify us in differing from his conclusions on these or any of the matters which I have dealt with at greater length. I would dismiss the appeal.

CAIRNS, J.: I have found this a difficult case. On Jan. 24, 1966, a man, who was in fact Kureshy, a fraudulent servant of the plaintiff company, presented himself at the Rusholme branch of the defendant bank and asked to open an account. He gave his name as Sheik Eliaszade, and said that he was thinking of going into business as a restaurateur. He gave an address in Manley Road, Whalley Range, Manchester 16, and gave the names of two referees, Mr. Ali, a restaurateur in Manchester, and Mr. Syeed, a restaurateur at Bolton. He was allowed to open an account and paid in £80. The next day he paid in a further £35 9s. 6d. in cash, and the plaintiff's cheque for £3,000 made out in favour of Eliaszade. On that day the defendant bank wrote to the two referees telling each of them that Sheik Eliaszade of 61, Manley Road, Whalley Range, Manchester, had given his name as a referee, and asking whether that gentleman might be considered trustworthy and likely to prove a satisfactory customer of the bank. Also on Jan. 25 the defendant bank had the £3,000 cheque specially cleared, and apparently received the proceeds on Jan. 26. On that day Mr. Ali came to the bank on business of his own, and after transacting it told the manager that he had received the inquiry about Eliaszade. He said that he had known Eliaszade "for some time"; he believed that he intended starting a restaurant business, and in his (Mr. Ali's) view he was considered all right for the conduct of a bank account. Mr. Syeed never replied to the defendant bank's letter. The bank manager was satisfied with the reference from Mr. Ali, and allowed the customer to draw on his account. Within a few days he drew out £1,580. He then drew a cheque for £1,975, which exceeded his credit balance, and was not met. The manager wrote to him on Feb. 3, addressing the letter to 59, Manley Road, asking him to remit funds to meet this cheque. He apparently received this letter because within two days he drew a cheque in favour of the same payee for £1,450. This was met, and the credit balance remaining in the account was thereby reduced to £85 4s. 6d.

The issue is whether the defendant bank received payment of the proceeds of the cheque for their customer without negligence. It is common ground that the onus of proving that they were not negligent in a material respect rests on the defendant bank, and that to establish this they have to show that they acted with reasonable care in all material respects in opening the account and clearing the cheque. There is an issue what would constitute negligence in a

material respect. I think that the rival contentions may be summarised by saying that the plaintiff company argues that the failure to take any precaution which a reasonable banker would have taken for the protection of their interests would make the defendant bank liable to it, whereas the defendant bank argue that they are liable only if there was a failure to take a precaution which, if taken, would probably in all the circumstances have been effective. A

There are dicta by GREER, L.J., in the Court of Appeal and LORD WRIGHT in the House of Lords in *Lloyds Bank, Ltd. v. E. B. Savory & Co.* (6), which bear on this question. GREER, L.J., said (7): B

"It is, I think, also true to say that a banker who has not exercised reasonable care cannot claim the benefit of the section, even though it may seem probable that the exercise of care would not have enabled him to discover the defective title of his customer. The protection is given to careful bankers, and any banker who does not exercise reasonable care is outside the section altogether, even though he may be able to say: 'If I had exercised care, the fraud would not have been discovered'." C

LORD WRIGHT in the House of Lords said (8):

"Nor is it any answer to a charge under s. 82 of neglecting a proper precaution, that if it had been taken, it might have been fruitless. Nor does a precaution cease to be proper for the purposes of s. 82 merely because though generally effective it may in special circumstances be ineffectual." D

It is evident that in *Baker v. Barclays Bank, Ltd.* (9) DEVLIN, J., considered that these expressions might go too far, because he said (10):

"I do not think that in this case I need go as far as to hold that every failure to make proper inquiries, whether or not they appear to be material, is fatal to a defence under s. 82. It is not necessary that I should hold that such carelessness is fatal even if the bank can show affirmatively that the failure was immaterial. In my judgment, however, if a bank manager fails to make inquiries which he should have made, there is, at the very least, a heavy burden on him to show that such inquiries could not have led to any action which could have protected the interests of the true owner." E

In those circumstances, and having heard the views expressed by DIPLOCK, L.J., I am emboldened to say that in my view both GREER, L.J., and LORD WRIGHT stated the view more unfavourably to the banker than can be justified in principle. If, for example, it were found that on opening an account the bank official had failed to ask the prospective customer for his address, this would plainly be the omission of a proper precaution. If, however, it were shown that on the following day the customer had voluntarily disclosed a perfectly genuine and respectable address to the bank, it seems to me that it would be impossible to hold that the bank had forfeited the protection of the section by the initial piece of carelessness. In my opinion, if the bank can show that in all probability a particular precaution would have been unavailing, the failure to take that precaution is not such negligence as deprives them of the protection. The burden of proof on the bank is no doubt heavy, but I do not think that it can be so heavy as to require them to prove with certainty that the precaution would have been useless. F

Approaching the matter in this way, it appears to me that there are four respects in which the defendant bank might be held to have been careless. They took no steps to establish the customer's identity; they made no inquiry as to his previous occupation; they were content with a single reference expressed in quite general terms, and they had the cheque cleared before they had any reference at all. I have felt great doubt whether the defendant bank have discharged G

(6) [1932] 2 K.B. 122; [1932] All E.R. Rep. 106; [1933] A.C. 201.

(7) [1932] 2 K.B. at p. 148.

(8) [1932] All E.R. Rep. at p. 118; [1933] A.C. at p. 233.

(9) [1955] 2 All E.R. 571.

(10) [1955] 2 All E.R. at p. 584. H



A the onus which lies on them in regard to these matters, but in the end I have reached the conclusion that they have discharged it.

My reasons are as follows. The evidence of the bank manager was to the effect that the steps taken were in accordance with the general practice of the defendant bank. In the absence of any evidence of different practices among bankers generally, I think that the judge was entitled to find (as he did) that B normal banking practice was followed. This is not conclusive in favour of the bank (see *Lloyds Bank, Ltd. v. E. B. Savory & Co.* (11)), but it is a matter to be taken into account in deciding whether they were negligent.

For the purpose of establishing identity, it might be thought desirable that some such document as a passport or a driving licence should be asked for; but there is no hint in any of the decided cases of any such means of identification C being considered necessary. If an apparently respectable referee, well known to the bank, identified the customer as a person known to him by the name which he claimed to be his, I cannot think that any further inquiry as to his identity would be necessary. If then the bank manager in this case had asked the customer to come to the bank with Mr. Ali in order to be identified by him as Eliaszade, this would in my view have amply fulfilled any duties that they D had in this respect. If they had done so, however, there can be no doubt that Ali would have said that the customer was indeed Eliaszade, and, therefore, the omission of this precaution had no effect.

As to the customer's previous occupation, the evidence was that he was asked if he was in employment, and that he said he was not employed. It is clear from *Lloyds Bank, Ltd. v. E. B. Savory & Co.* (11) that, if it had appeared E that he *was* employed, the bank official should have gone on to inquire by whom and in what capacity he was employed. Once, however, the man stated that he was not employed (there being nothing to suggest that this statement was untrue), I cannot think that it was incumbent on the bank officer to cross-examine him in order to determine whether he was lying, nor to inquire whether he had formerly been in employment or in business, or whence he had acquired F the money to enable him to set up as a restaurateur; that would be acting as an amateur detective, which it has been said more than once that a bank officer is not required to do.

Next as to references. In the absence of any evidence that it is usual for a bank to require more than one reference, I think that it would be impossible to lay down that two ought to be required. It is true that in this case two G references were called for, and only one was given; but it was adequately explained that the failure of a Pakistani to reply to a letter asking for a reference is not an unusual event, and one which would excite no suspicion. I was at one time disposed to think that the reference given by Ali was in such general terms, without any indication of how long Ali had known the man, or what dealings he had had with him, that it ought not to have been considered sufficient. Mr. Ali, H however, was regarded with justification by the bank as a reliable person whose word could be trusted. When he said that Eliaszade was "all right for the conduct of a bank account", I think that on the whole the bank manager was entitled to assume that this statement would not be made without the knowledge to justify it.

Finally, as to the clearing of the cheque before any reference was received, in I the events which happened the clearance of the cheque at this stage rather than twenty-four hours later, after the reference had been received, made no difference to anyone. For that reason, and the other reasons given by DIPLOCK, L.J., in relation to the early clearance of the cheque, I do not think that that is a factor which enables the plaintiff company to succeed against the defendant bank.

I wish to add this. It may be that competition between banks for customers tempts them to relax to some extent precautions taken on opening a new account. We have heard that former decisions of the courts adverse to banks have had the effect of causing them to tighten their rules about the inquiries to be made when an account is opened. I should be sorry if the effect of our decision in this case were to encourage any loosening of those rules. If the defendant bank here exercised sufficient care, it was in my view only just sufficient. I agree that the appeal should be dismissed. A B

**DANCKWERTS, L.J.:** I agree. In my opinion the arguments which have been put forward on behalf of the plaintiff company do not give proper weight to the facts of this case. Here was a cheque, true for a substantial sum of £3,000, but drawn in favour of "Eliaszade". Kureshy had established himself with Mr. Ali as Eliaszade, and none of the participants in the transaction knew him as anyone else. He was, therefore, accepted as the payee, and there was no suspicion that he was other than the payee. He was asked, when he sought to open the account, for references as to his character. Mr. Ali had been prepared by Kureshy as such a reference and, indeed, appears to have acted in good faith in the reference which he gave. Nobody had any reason to suspect that Kureshy was anyone but Eliaszade. Mr. Ali willingly gave him a reference, and he being well known to the defendant bank as a reputable customer who had introduced other Pakistani customers, the defendant bank accepted his statement that he had known the person in question for "some time", that he regarded him as all right for the conduct of a bank account, and that he believed that he intended starting a restaurant. All this fitted in with the possession by the person who was supposed to be Eliaszade of the cheque, and his desire to open an account at the defendant bank. I am unable to see anything to suggest that the man was not Eliaszade, and in that case why should the defendant bank make further inquiries? They were dealing with a well dressed man of acceptable appearance known to a customer of the bank, and I cannot see why suspicion should have been aroused in the officers of the bank. C D E

The circumstances of this case seem to me to be quite different from those of the reported cases to which we were referred. In my opinion the bank were not negligent, and are protected by s. 4 of the Cheques Act, 1957. I also would dismiss the appeal. F

*Appeal dismissed. Leave to appeal to the House of Lords refused.*

Solicitors: *Bower, Cotton & Bower*, agents for *Slater, Heelis & Co.*, Manchester (for the plaintiff company); *Addleshaw, Sons & Latham*, Manchester (for the defendant bank). G

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

A

## R. v. ELIA.

[COURT OF APPEAL, CRIMINAL DIVISION (Davies, L.J., Cantley and Cusack, J.J.),  
March 12, April 3, 1968.]

B

*Criminal Law—Trial—Jury—Discharge of jury, who were at deadlock, without returning a verdict—No bar to accused being tried by another jury—Discharge of jury before two hours' deliberation—No majority verdict—Re-trial and conviction by a majority verdict—Whether conviction at re-trial should stand—Criminal Justice Act 1967 (c. 80) s. 13.*

C

On Oct. 20, 1967, at the end of the first trial of the appellant on a charge of robbery, the jury returned to court after an hour and a quarter's deliberation, the foreman informing the trial judge that they were at a deadlock. The judge thereupon discharged them from returning a majority verdict. On Oct. 27, 1967, the appellant was convicted of the same offence by a majority verdict on a new trial before a different judge and jury. On appeal that, in view of s. 13\* of the Criminal Justice Act 1967 and the terms of a *Practice Direction*† given by the Court of Appeal on July 31, 1967, the judge at the first trial had no right to discharge the jury when he did, and that in consequence the appellant could not validly be tried again before another jury,

D

**Held:** the conviction at the second trial should stand, because—

E

(i) s. 13 of the Criminal Justice Act 1967 did not mandatorily require that the procedure which it contemplated should be followed in every case (see p. 590, letter B, post), and

(ii) even if there were error in the jury being discharged at the first trial, the discharge was no bar to a new trial (see p. 590, letter D, and p. 592, letter C, post).

F

*R. v. Lewis* ([1908-10] All E.R. Rep. 654) and dicta of ERLE, C.J., in *Winsor v. Reginam* ((1866), L.R. 1 Q.B. at p. 395) of SIR ALEXANDER COCKBURN, C.J., and of BLACKBURN, J. in *R. v. Charlesworth* ((1861), 1 B. & S. at pp. 506-508 and p. 527 respectively) applied.

Appeal dismissed.

G

[As to verdict of a jury being by agreement of all members of jury and the position where a jury do not agree, see 10 HALSBURY'S LAWS (3rd Edn.) 431, 432, para. 796; 23 HALSBURY'S LAWS (3rd Edn.) 35, 36, para. 69; and for cases on the subject, see 14 DIGEST (Repl.) 349, 350, 3390, 3391, 3397-3403; 368-370, 3568-3576, 3585-3590; 30 DIGEST (Repl.) 280, 481, 483, 485.

As to majority verdicts, see CURRENT SERVICE to 10 HALSBURY'S LAWS (3rd Edn.), para. 796A.]

H

Cases referred to:

*Conway and Lynch v. Reginam*, (1845), 5 L.T.O.S. 458; 7 I.R. 149; 14 Digest (Repl.) 370, \*2237.

*Practice Direction*, [1967] 3 All E.R. 137; [1967] 1 W.L.R. 1198; 51 Cr. App. Rep. 454; Digest (Repl.) Supp.

*R. v. Charlesworth*, (1861), 1 B. & S. 460; 31 L.J.M.C. 25; 5 L.T. 150; 25 J.P. 820; 121 E.R. 786; 14 Digest (Repl.) 346, 3353.

I

*R. v. Lewis*, [1908-10] All E.R. Rep. 654; (1909), 78 L.J.K.B. 722; 100 L.T. 976; 73 J.P. 346; 2 Cr. App. Rep. 180; 14 Digest (Repl.) 346, 3354.

*Winsor v. Reginam*, (1866), L.R. 1 Q.B. 289; *affid.* Ex.Ch.; L.R. 1 Q.B. 390; 7 B. & S. 490; 35 L.J.M.C. 161; 14 L.T. 567; 30 J.P. 374; 14 Digest (Repl.) 370, 3590.

### Appeal.

On Oct. 20, 1967, at the Central Criminal Court JUDGE ROGERS discharged a

\* Section 13 is set out at p. 589, letters D to F, post. It came into operation on Oct. 1, 1967; see S.I. 1967 No. 1234.

† [1967] 3 All E.R. 137.



jury trying the appellant (on a charge of robbery with another person of one Krishna Murty of £12, a wallet and a quantity of documents) without giving them an opportunity of returning a majority verdict. At the new trial on Oct. 27, 1967, at the same court before Mr. Commissioner HUMPHREYS, Q.C., and a jury the appellant, Peter Elia, was convicted of the robbery offence by a majority of eleven to one and sentenced to 2½ years' imprisonment. The case is reported on the question whether the discharge of a jury at the first trial rendered the re-trial a nullity, having regard to the provisions of s. 13 of the Criminal Justice Act 1967, and the *Practice Direction*\* on majority verdicts made by the Court of Appeal (criminal division) on July 31, 1967. The facts are set out in the judgment of the court.

The authority and cases noted below† were cited during the argument in addition to those referred to in the judgment of the court.

*N. B. Cockburn* for the appellant.

*J. G. Marriage* for the Crown.

*Cur. adv. vult.*

Apr. 3. DAVIES, L.J., read the following judgment of the court: This appeal is brought by leave of the single judge against a conviction at the Central Criminal Court on Oct. 27, 1967, for robbery with aggravation, for which offence the appellant was sentenced by Mr. Commissioner HUMPHREYS, Q.C., to 2½ years' imprisonment. The trial was a re-trial in circumstances which will appear later, and the verdict was by a majority of eleven to one. The appeal was heard in this court on Mar. 12, 1968, when it was dismissed, and the court reserved the giving of its reasons for the dismissal.

The facts of the case, according to the prosecution, were within a narrow compass. In the late evening of Sept. 18, 1967, an Indian, one Krishna Murty, fell into conversation in a public house in the West End of London with two men, one of whom he positively identified as the appellant. They chatted together in a well-lit bar for some fifteen minutes, during which time Mr. Murty produced his wallet in order to pay for a drink or drinks. At closing time he left to walk to Tottenham Court Road Station and the two men accompanied him. When they reached Soho Square, they inveigled him into a mews by some pretext and there attacked him, half strangled him and left him unconscious. When he recovered consciousness, his wallet, which had contained about £12, had, of course, gone. On the following evening he returned to the West End to search for his attackers. He went into Lyons Corner House and there saw and recognised the appellant. He telephoned the police who came and arrested the appellant. Mr. Murty was at all times quite positive in his identification of the appellant and in addition he said that he recognised the appellant's voice, presumably at the previous trial. The appellant, when questioned by the police, at all times asserted his innocence. He told them that he had spent the evening with a girl called June whom he had arranged to meet again but at no particular place. In evidence he said that he had also met a girl called Margaret and two men whom he named, and that June was going to write to him at the address of a mutual friend called Yianos which he (the appellant) did not know. The police evidence, however, was that he told them none of this.

In support of the appeal, four points are taken, three of which can be dealt with fairly shortly. [His LORDSHIP then discussed the three points, intimated that the submission on behalf of the appellant regarding these failed and continued:] There remains counsel for the appellant's point under s. 13 of the Criminal Justice Act 1967, and the *Practice Direction* (1) dated July 31, 1967.

\* [1967] 3 All E.R. 137.

† ARCHBOLD'S CRIMINAL PLEADING, EVIDENCE AND PRACTICE (36th Edn.) paras. 600, 601, 602, 603, 604, 605; *R. v. Wade*, (1825), 1 Mood. C.C. 86; *R. v. Connelly*, [1963] 3 All E.R. 510; [1964] A.C. 1254.

(1) [1967] 3 All E.R. 137.

A On Oct. 20, 1967, at the end of the first trial before JUDGE ROGERS, the jury returned into court at 4 p.m., when the following took place:

"JUDGE ROGERS: I understand, Mr. Foreman, that you are unable to reach agreement. The foreman of the jury: That is so, my lord. JUDGE ROGERS: Do you think any useful purpose would be served by further deliberation? You have been out now for one and a quarter hours. The foreman of the jury: We are of the opinion that no useful purpose would be served. We are at a deadlock. JUDGE ROGERS: In that case, it is a perfectly straightforward and simple case and not a case that would be helped by prolonged argument. Some of you obviously feel one way and some another and I don't think it right to press you any further. You have your conscientious views, and I don't think it right in a case of this sort to press you. So I will discharge you from giving a verdict in this matter and there will have to be a new trial."

The jury were discharged. It is submitted on behalf of the appellant that in view of the provisions of s. 13 of the Criminal Justice Act 1967 and the terms of the *Practice Direction* (2) the judge had no right to discharge the jury at that stage and that in consequence the appellant could not be tried again before another jury. Section 13 provides as follows:

"(1) Subject to the following provisions of this section, the verdict of a jury in criminal proceedings need not be unanimous if—

"(a) in a case where there are not less than eleven jurors, ten of them agree on the verdict; and

"(b) in a case where there are ten jurors, nine of them agree on the verdict;

and a verdict authorised by this subsection is hereafter in this section referred to as 'a majority verdict'.

"(2) A court shall not accept a majority verdict of guilty unless the foreman of the jury has stated in open court the number of jurors who respectively agreed to and dissented from the verdict.

"(3) A court shall not accept a majority verdict unless it appears to the court that the jury have had not less than two hours for deliberation or such longer period as the court thinks reasonable having regard to the nature and complexity of the case."

It is not necessary to set out the terms of the *Practice Direction* (2) which are well known and are to be found in the 5th Supplement to ARCHBOLD'S CRIMINAL PLEADING EVIDENCE AND PRACTICE (36th Edn.), para. 573A; but in view of the nature of the argument it is perhaps as well to observe that in that direction the first sentence of the model or specimen passage to be used at the end of the main summing-up is (3): "As you may know, the law permits me in certain circumstances to accept a verdict which is not the verdict of you all."

It is argued for the appellant that the terms of s. 13 are mandatory and that the procedure contemplated by sub-s. (2) and sub-s. (3) and laid down by the *Practice Direction* (2), though that admittedly has no statutory force, must be followed in every case. The statute, it is said, has in this respect trenched on the well-recognised power of a judge to discharge a jury for good cause. On the other hand it is argued for the Crown that the language of the section is most inapt for a mandatory or compulsory provision. Stress is laid on the words in sub-s. (1), "the verdict . . . need not be unanimous". It is said, moreover, that if the section is mandatory, one would expect in sub-s. (2) and sub-s. (3) instead of the words, "A court shall not accept . . . unless", the words, "A court shall accept . . . if . . ." For what it is worth, there is also the word "permits" in the specimen direction in the *Practice Direction* (3) referred to above. The

(2) [1967] 3 All E.R. 137.

(3) [1967] 3 All E.R. at p. 138.

Crown go so far as to submit that in a case of importance and difficulty where the issue is nicely balanced the judge could say that he would refuse to accept a majority verdict and could insist on unanimity or nothing. That point does not arise in this case, and we express no opinion on it. A

The correct interpretation of the section, coupled with the *Practice Direction* (4), is not easy. On the whole, we incline to the view that it is not mandatory in the sense that in every case and in all circumstances the contemplated procedure must be followed. The words of the section, do, in our view, fall short of enacting that in every case a majority verdict must in the last resort be invited. In the great majority of cases, no doubt, the contemplated procedure ought to be followed. If, for example, however, a jury were to return and inform the court that they were hopelessly and helplessly divided, it would seem quite idle to make them wait for the full two hours only to announce that they were unable to reach a verdict by the necessary majority. The argument that, as the result of the event that happened at the end of the first trial in the case, the appellant lost the chance of a majority acquittal is of little weight in view of the fact that he also lost the chance of a majority conviction. B

Even if the view indicated above be wrong and the judge was in error in discharging the jury, the decisive point in this case, in the view of the court, is that such an error on the part of the judge was no bar to the appellant being tried before another jury. Counsel for the appellant very properly put before the court authorities which, in our view, are conclusive on this point. *R. v. Lewis* (5), was a case where, after a trial had started, the jury were discharged owing to the absence of some of the witnesses for the prosecution. In the course of giving the judgment of the Court of Criminal Appeal, CHANNELL, J., said (6): C

"...the rule as to autrefois acquit and autrefois convict cannot be urged here because the appellant was never in peril on Apr. 20 (7). The established law to the effect that the discharging of the jury is in the discretion of the judge, and that his exercise of the discretion is not subject to review, is not affected by the Criminal Appeal Act, 1907, and therefore we have no jurisdiction to deal with it. However, although we cannot say it judicially, we would like to intimate that the judge's discretion in this case appears, if we rightly understand the facts, to have been exercised in a way different from that in which it has been our individual practice to exercise it. A jury should not be discharged in order to allow the prosecution to present a stronger case on another trial. That is the rule on which judges have acted and on which we ought to act, but we have no jurisdiction to deal with this matter." D

So there was a case where the court was of opinion that the judge was wrong to discharge the jury but nevertheless held that they could not interfere. It is suggested by counsel for the appellant that the present case is different, since he says that the discharge was in breach of the statute; but even so, the appellant was not in peril at the first trial. He could not, therefore, plead autrefois acquit or autrefois convict, and there was no ground on which he could move to quash. E

Two cases of respectable antiquity and high authority were cited in *R. v. Lewis* (8) which are most relevant to the present question. The first was *R. v. Charlesworth* (9), a decision of the Court of Queen's Bench. In that case SIR ALEXANDER COCKBURN, C.J., said (10): F

(4) [1967] 3 All E.R. 137.

(5) [1908-10] All E.R. Rep. 654; (1909), 2 Cr. App. Rep. 180.

(6) (1909), 2 Cr. App. Rep. at p. 181; [1908-10] All E.R. Rep. at p. 655.

(7) April 20 was the date of the first trial.

(8) [1908-10] All E.R. Rep. 654; [1909] 2 Cr. App. Rep. 180.

(9) (1861), 1 B. & S. 460.

(10) (1861), 1 B. & S. at pp. 506-508. G



- A "Assuming that the judge had not this power (11) or that he exercised it improperly, the question is, whether what he has done amounts to the acquittal of the defendant, and entitles him to have judgment entered up as if he had been acquitted. On this I can add nothing to the conclusive reasoning of CRAMPTON, J., in *Conway and Lynch v. Reginam* (12) on which so much observation has been made. There is no instance of such a plea as this, except in this case and that. It may be said with truth that may be because, since the practice established in the time of LORD HOLT, juries have not been discharged, and therefore the occasion for such a plea has not presented itself. On the other hand, the only pleas known to the law of England to stay a man from being tried on an indictment or information (and we must consider this as if it was a fresh information, and the defendant had pleaded to it the facts stated on the record) are the pleas of autrefois acquit and autrefois convict, and it is clear that this statement of facts amounts to neither. It is said that a man is not to be tried twice, and is not a second time to be put in jeopardy; and that that applies equally to this case as to a case where a man has been convicted or acquitted. In that I cannot concur; and the judgment of CRAMPTON, J., is conclusive on that subject. When we talk of a man being tried twice, we mean a trial which proceeds to its legitimate and lawful conclusion by verdict; and when we speak of a man being twice put in jeopardy, we mean put in jeopardy by the verdict of a jury; and he is not tried nor put in jeopardy until the verdict is given. If that is not so, then in every case of a defective verdict a man could not be tried a second time; and yet it is well known that, though a jury have pronounced upon a case, yet, if their verdict be defective, it will not avail the party accused in the event of his being put on his trial a second time. Therefore, in my humble judgment (though it is not necessary to decide the point), as at present advised, I cannot come to the conclusion that there has been, in this case, a trial, or that the accused has been put in jeopardy, or put in the position, either in fact or in law, of a man who has been once acquitted, and who, having been once acquitted, cannot be put on his trial a second time."
- B
- C
- D
- E
- F

To the same effect were the observations of WIGHTMAN, J. (13); and BLACKBURN, J., said (14):

- G "... the one point on which I rest my judgment is that, at all events in a case of misdemeanour, the discharge of a jury sworn to try an issue after the trial has begun, even if improper, is not in my opinion a legal bar to a trial of the issue by another jury. I have said 'at all events in a case of misdemeanour' because that is the only question before us, and because the law of England undoubtedly does, in favorem vitae, make distinction in many cases, and it may be in this, between the modes of procedure in felonies and in misdemeanours."
- H

The present case was one of felony, but in the opinion of the court there was in this regard no difference between felony and misdemeanour in the year 1967 (15). The other case, five years later, was *Winsor v. Reginam* (16), in the Court of Queen's Bench and on appeal in the Exchequer Chamber (17). In the course of delivering the judgment of the Exchequer Chamber, ERLE, C.J., said (18):

- I
- (11) Viz., power to discharge the jury.
- (12) (1845), 5 L.T.O.S. 458 at p. 460; 7 I.R. 149 at p. 165.
- (13) (1861), 1 B. & S. at pp. 511, 512.
- (14) (1861), 1 B. & S. at p. 527.
- (15) The statutory abolition of the differences between felony and misdemeanour effected by the Criminal Law Act 1967 s. 1, is not here referred to, as that did not become operative until Jan. 1, 1968 (see *ibid.*, s. 12 (1)).
- (16) (1866), L.R. 1 Q.B. 289.
- (17) (1866), L.R. 1 Q.B. 390.
- (18) (1866), L.R. 1 Q.B. at p. 395.

"Even if it was assumed, for the sake of argument, that the statement on the record led the judges of the court of error to the opinion that the order for the discharge in question was an improper exercise of discretion on the part of the judge who tried the case, still we should hold that such a discharge was no legal bar to a second trial on the same or on a fresh indictment. The only pleas known to the law founded upon a former trial are pleas of a former conviction or a former acquittal for the same offence, but if the former trial had been abortive without a verdict, there has been neither a conviction nor an acquittal, and the plea could not be proved."

In the view of this court, those authorities make it clear that whether JUDGE ROGERS was right or wrong at the end of the first trial in discharging the jury, as he did, whether he had the right in his discretion so to do or whether s. 13 of the Act of 1967 had taken away that right, there was no bar to the appellant being put in charge of a fresh jury for trial. For these reasons, the appeal was dismissed.

*Appeal dismissed.*

Solicitors: *Registrar of Criminal Appeals* (for the appellant); *Solicitor, Metropolitan Police* (for the Crown).

[Reported by N. P. METCALFE, Esq., Barrister-at-Law.]

### PRACTICE DIRECTION.

#### PROBATE, DIVORCE AND ADMIRALTY DIVISION (PROBATE).

*Probate—Practice—Omission of words from probate of will—Application—Copy of order to be annexed to will.*

Contested applications for omission of words from probate shall be made by summons to a registrar of the principal probate registry.

Uncontested applications for the omission of words shall be made to the registrar of the probate registry at which it is proposed to make application for the grant. Any such application shall be ex parte by lodging with the registrar affidavit evidence (exhibiting the will or codicil in question) together with any consents in writing of persons not under disability who might be prejudiced by the order. If the registrar is satisfied on the facts, and in the absence of consent, that there is no substantial interest unprotected, he will make the order.

A registrar may require an application for the omission of words from probate to be made by summons to a judge or to the court on motion.

A copy of any order to omit words from probate should be lodged with the application for the grant and will be annexed to the original will and filed therewith. A typewritten copy of the will, omitting such part, should be lodged at the seat or with the district registrar for the fiat of the principal clerk or the district registrar to be written in the margin before photography.

*Practice Note* of Mar. 25, 1964, (1) is cancelled.

By direction of the President.

May 15, 1968.

COMPTON MILLER,  
Senior Registrar.

A

## R. v. OTTEWELL.

[COURT OF APPEAL, CRIMINAL DIVISION (Lord Parker, C.J., Sachs, L.J., and Ashworth, J.), December 19, 1967, January 29, April 10, 1968.]

B

*Criminal Law—Sentence—Extended term of imprisonment—Meaning—Power to impose a term longer than the maximum for the particular offence, but not to extend an appropriate shorter term to a length less than the maximum—Sentencing powers, not power for rendering applicable statutory provisions regarding release on licence—Criminal Justice Act 1967 (c. 80) s. 37 (2), (3), (5), s. 60.*

C

The power conferred on the court by s. 37 (2)\* of the Criminal Justice Act 1967 to impose an “extended term of imprisonment” is a power to impose a term of imprisonment longer than the authorised maximum for the offence of which the accused is convicted, and s. 37 (3)† limits the extent of any extended term: accordingly, the power under s. 37 to impose an extended term of imprisonment does not authorise a court to impose a term longer than it otherwise would, but less than the maximum for the particular offence, and thereby to render applicable the provisions of s. 60‡ of the Act of 1967 regarding release on licence (see p. 596, letter I, p. 597, letters B and F, and p. 598, letter A, post).

D

The appellant was sentenced, on conviction on two counts of assault occasioning actual bodily harm, to two years’ imprisonment consecutive on each count, making four years in all. The maximum period of imprisonment for each such offence was greater than the imprisonment imposed§. The trial judge also directed under s. 37 (2) of the Criminal Justice Act 1967 that the sentence imposed was an extended one, and issued a certificate under s. 37 (5)|| of the Act of 1967 to that effect. On appeal,

E

**Held:** the sentence imposed was not an “extended term of imprisonment” within s. 37 (2), and accordingly there had been no jurisdiction to grant a certificate under s. 37 (5); the certificate would be set aside, but the sentence should stand (see p. 598, letter B, post).

F

**PER CURIAM:** the established principle that, in considering the length of a sentence which is to be imposed, a court should not take any question of remission of sentence into account, applies to release on licence as it does to remission (see p. 596, letter E, post).

G

*R. v. Maguire, R. v. Enos* ((1956), 40 Cr. App. Rep. 92) applied.  
Appeal against sentence dismissed.

[As to extended terms of imprisonment, see CURRENT SERVICE to 10 HALSBURY’S LAWS (3rd Edn.) para. 932A.]

Case referred to:

H

*R. v. Maguire, R. v. Enos*, (1956), 40 Cr. App. Rep. 92; Digest (Cont. Vol. A) 380, 5362a.

### Appeal.

I

This was an appeal by Peter Ottewell against sentences of two years’ imprisonment consecutive imposed on him at Leeds Assizes on Oct. 12, 1967, by HINCHCLIFFE, J., after he had pleaded guilty to two counts of assault occasioning actual bodily harm. The trial judge directed that the sentence imposed “be

\* Section 37 (2) is set out at p. 594, letter F, post. The Criminal Justice Act 1967 s. 37 came into operation on Oct. 1, 1967, by virtue of the Criminal Justice Act 1967 (Commencement No. 1) Order 1967, S.I. 1967 No. 1234.

† Section 37 (3) is set out at p. 594, letter G, post.

‡ Section 60, so far as material, is set out at p. 595, letters B to F, post.

§ The maximum sentence for assault occasioning actual bodily harm is five years’ imprisonment; see s. 47 of the Offences against the Person Act, 1861, as amended by Penal Servitude Act, 1891, s. 1 (1).

|| Section 37 (5) is set out at p. 594, letter I, post.



an extended term under s. 37 (2) of the Criminal Justice Act 1967". Leave to appeal against sentence was granted by JAMES, J., but solely in order that the Court of Appeal might consider whether the words "an extended term of imprisonment" in s. 37 (2) included a term of imprisonment less than the maximum permitted for the offence. The appeal came before the court (LORD PARKER, C.J., WINN, L.J., and WIDGERY, J.) on Dec. 19, 1967, when LORD PARKER, C.J., intimated that the court agreed with the single judge that there was nothing wrong with the sentences on the merits and could see no reason to interfere with sentence, but that, on the question arising on s. 37, the appeal would be adjourned to Jan. 29, 1968, for counsel to appear and assist the court as *amicus curiae*.

*A. Simpson* for the appellant.

*Nigel C. Bridge* as *amicus curiae*.

*Cur. adv. vult.*

Apr. 10. ASHWORTH, J., read the following judgment of the court: On Dec. 19, 1967, this court dismissed the appellant's appeal in so far as he sought a reduction in two consecutive sentences amounting together to four years' imprisonment for two offences of assault occasioning actual bodily harm. At the same time this court adjourned for further argument the question whether the learned judge had power to direct, as he did, that the imprisonment imposed by him "be an extended term under s. 37 (2) of the Criminal Justice Act 1967". The adjourned hearing took place on Jan. 29, 1968, and the court was greatly assisted by the arguments addressed to them by counsel as *amicus curiae* and by counsel for the appellant.

Section 37 of the Criminal Justice Act 1967 (hereinafter referred to as the Act) came into force on Oct. 1, 1967, and it is convenient to set out the first three subsections:

"(1) No person shall be sentenced by a court to preventive detention or corrective training. (2) Where an offender is convicted on indictment of an offence punishable with imprisonment for a term of two years or more and the conditions specified in sub-s. (4) of this section are satisfied, then, if the court is satisfied, by reason of his previous conduct and of the likelihood of his committing further offences, that it is expedient to protect the public from him for a substantial time, the court may impose an extended term of imprisonment under this section. (3) The extended term which may be imposed under this section for any offence may exceed the maximum term authorised for the offence apart from this section if the maximum so authorised is less than ten years, but shall not exceed ten years if the maximum so authorised is less than ten years or exceed five years if the maximum so authorised is less than five years."

It is not necessary to set out in full the terms of sub-s. (4) which specify the conditions which must be satisfied before an extended term of imprisonment can be imposed under the section. It may, however, be observed in passing that these conditions are not the same as those which had to be satisfied before a sentence of preventive detention could be passed under s. 21 of the Criminal Justice Act, 1948 (1). Section 37 (5) is in the following terms:

"Where an extended term of imprisonment is imposed on an offender under this section, the court shall issue a certificate (hereafter in this Act referred to as 'an extended sentence certificate') stating that the term was so imposed."

It is to be noted that s. 37 is the first section in Part 2 of the Act, which is headed by the words "Powers of courts to deal with offenders" followed by a sub-heading, relating to s. 37 and s. 38, "Powers to deal with persistent offenders". Moreover the side-note to s. 37 is "Punishment of persistent offenders".

(1) See 28 HALSBURY'S STATUTES (2nd Edn.) 371.

A The main arguments addressed to this court were based on the provisions of s. 60 of the Act and it is convenient to set out some of those provisions in full. Before that is done, it is to be noted that s. 60 is in Part 3 of the Act which is headed by the words "Treatment of offenders" followed by a sub-heading "Release of prisoners on licence and supervision of prisoners after release". Section 60 (1) is in the following terms:

B "The Secretary of State may, if recommended to do so by the Parole  
Board, release on licence a person serving a sentence of imprisonment, other  
than imprisonment for life, after he has served not less than one-third of his  
sentence or twelve months thereof, whichever expires the later . . . (3) With-  
out prejudice to his earlier release under sub-s. (1) of this section the Secretary  
of State may direct that—(a) a person serving a sentence of imprisonment  
C in respect of whom an extended sentence certificate was issued when the  
sentence was passed; or (b) a person serving a sentence of imprisonment for  
a term of eighteen months or more who was under the age of twenty-one  
when the sentence was passed, shall, instead of being granted remission of  
any part of his sentence under the prison rules, be released on licence at any  
time on or after the day on which he could have been discharged from prison  
D if the remission had been granted. (4) A person subject to a licence under  
this section shall comply with such conditions, if any, as may for the time  
being be specified in the licence . . . (6) A licence granted to any person under  
this section shall, unless previously revoked under s. 62 of this Act, remain in  
force until a date specified in the licence, being—(a) in the case of a licence  
E granted to a person in respect of whom an extended sentence certificate  
was issued when sentence was passed on him or to a person who was under  
the age of twenty-one when sentence was passed on him, the date of the  
expiration of the sentence; (b) in any other case, the date on which he  
could have been discharged from prison on remission of part of his sentence  
under the prison rules if, after the date of his release on licence, he had not  
F forfeited remission of any part of the sentence under the rules."

The effect of s. 60 in regard to a person in respect of whom an extended sentence  
certificate was issued in pursuance of s. 37 (5) is that he may be released on  
licence either under s. 60 (1) or s. 60 (3). In the former case, the licence may be  
issued if he has served one-third of his sentence or twelve months thereof which-  
ever expires the later, whereas in the latter case, the licence may be issued in lieu  
G of remission, at any time on or after the day on which he could have been dis-  
charged from prison if the remission had been granted. In either case the licence  
will remain in force until the date of the expiration of his sentence. There is  
of course no certainty that such a person will be released on licence either under  
sub-s. (1) or sub-s. (3), and in that event he will normally be discharged from  
prison on remission, having served two-thirds of his sentence.

H As a practical illustration, one may take the case of a man sentenced to six  
years' imprisonment in respect of whom an extended sentence certificate is  
issued:—(a) He may be released on licence under s. 60 (1) after serving two years,  
in which event the licence will remain in force until the end of the sixth year.  
(b) He may be released on licence under s. 60 (3) after serving four years, in which  
event the licence will remain in force until the end of the sixth year. (c) He  
I may not be released on licence, in which event he will be discharged from prison  
at the end of the fourth year. So far as the man is concerned, there are both  
advantages and drawbacks if he is released on licence under sub-s. (3). The  
licence will probably require him to maintain contact with a probation officer, as  
a result of which he will receive help and guidance in the process of rehabilitation.  
On the other hand the conditions in the licence will inevitably involve some  
restriction of his freedom of conduct or movement and he will not be as free a  
person as he would have been otherwise. It is on this aspect of the matter,  
namely, the control of a persistent offender on release, that counsel amicus

curiae chiefly relied in support of his interpretation of s. 37 (2) of the Act of 1967. A

It was said that the objects of s. 37 were two-fold: one object was to confer on a court power to impose a longer sentence than the authorised maximum, the other was to confer a power to ensure that a persistent offender should be kept under a measure of control after his release. It was further said that it is not incumbent on a court to make use of the first of these powers: the sentence could be within the statutory limit and all that is needed for the purpose of exercising the second power is a certificate that the sentence imposed (whatever its length) involves an extended term of imprisonment. In other words the phrase "extended term of imprisonment" is in effect a label to indicate that s. 60 has been made applicable. This seems to have been the course taken by the judge in the present case: the two sentences, each of two years, which he imposed were well within the authorised maximum and it is difficult to describe them, either singly or taken together, as being, in any real sense of the words, extended terms of imprisonment. B C

In the judgment of this court this approach to the problem of deciding the meaning of s. 37 is not correct. If the two objects just mentioned were indeed the objects of the legislature, one cannot help commenting that the language of s. 37 is a distinctly odd method of achieving them. We cannot accept the contention that one of the meanings of the words "extended term of imprisonment" is, to quote counsel as *amicus curiae*, "a term which by reason of s. 60 will be extended in its operation compared with its ordinary operation". Moreover, this approach to the problem runs counter to the well-established principle, that, in considering the length of the sentence which is to be imposed, a court should not take any question of remission of sentence into account (*R. v. Maguire*, *R. v. Enos* (2)). That case related to remission, but in our view the same principle applies to release on licence. A court's normal function is to "impose a term of imprisonment", and unless clearly and specifically empowered so to do, it neither should nor does exercise control over the way the sentence is carried into effect. The words "impose an extended term of imprisonment" are not apt to describe the action of a court in giving the Home Secretary powers to interfere with an entitlement to remission. D E F

In view of the extent to which counsel as *amicus curiae* stressed the necessity of taking s. 60 into account when construing s. 37, it is as well to mention a contention which he pressed very strongly. He urged that it would be absurd to be able to keep under licence control after their normal remission dates those who received a five year "extended term" in cases where before the Act of 1967 the maximum sentence was two years, but yet not be able to exercise such control in even more serious cases where perhaps a seven year sentence had been imposed where the maximum was fourteen years. The court has already indicated that if the legislature had wished to provide for control during the term of imprisonment of the latter class of offender it could easily have so stated: indeed it could have adopted some formula parallel to that used in s. 22 of the Criminal Justice Act, 1948, (3). His contention, however, brought into prominence a further point in view of his concession that, as at the time of the passing of the Act of 1967, the prisoner had an absolute right to uncontrolled remission if he earned it. G H

Under the Act of 1967 the only offenders who are deprived of that absolute right are those on whom an "extended term" is imposed: to the extent of that deprivation s. 37 (2), if read in conjunction with s. 60, is a penal section. Thus s. 37 (2) ought not to be construed so as to operate against the subject in the way counsel as *amicus curiae* contended unless its intention so to do is clear and there is not any other equally reasonable interpretation. As, however, the court has come to the conclusion that s. 37 (2) clearly has the different effect expressed I

(2) (1956), 40 Cr. App. Rep. 92.

(3) See 28 HALSBURY'S STATUTES (2nd Edn.) 373.



A later in this judgment, it is not necessary to rely on the need in doubtful cases to give a penal section in a statute the construction which is least unfavourable to the subject.

What then is the meaning of the word "extended term of imprisonment"? Although it may be stating the obvious, it is worth emphasising that the power conferred by s. 37 (2) is to pass a term of imprisonment, and an extended one at that. It is not a power to give directions as to treatment in prison or release on licence. It was submitted in argument that the term "extended" merely means a term that is longer than would otherwise be appropriate for the particular offence, and that the extended term need not be longer than the authorised maximum. One answer, in the view of this court, is that the power to impose a longer sentence than would otherwise be appropriate for the particular offence, in order to protect the public, already exists and is frequently exercised. For example, a persistent thief, who will not desist from small-scale thefts and is not deterred by sentences otherwise appropriate for the offence or offences, is frequently sentenced to a much longer term for the protection of the public: in such cases the court, in passing sentence, usually makes it plain that a severe sentence is required for the express purpose of protecting the public; but, apart from s. 37 (3), such longer term must not exceed the authorised maximum. Accordingly, when preventive detention came to be abolished by virtue of s. 37 (1) of the Criminal Justice Act 1967, it was replaced by a new power enlarging and extending the powers conferred by statute or by common law: hence the phrase "an extended term of imprisonment". It is true that in s. 37 (3) it is provided that the extended term may exceed the maximum authorised for the offence and at first sight this might indicate that equally the extended term might not exceed the maximum. In the view of this court the object of sub-s. (3) was not to confer an option on the sentencing court either to exceed the authorised maximum or not. The object was to set limits to the extent to which an extended term might exceed the authorised maximum: in its context that subsection supports rather than negatives the view that an extended term of imprisonment involves the exercise of a newly conferred power to exceed the authorised maximum sentence, subject to the limitations set out in sub-s. (3).

Another suggestion is that the clue to the meaning of s. 37 (2) is to be found in the phrase "it is expedient to protect the public from him for a substantial time". It is suggested that, to protect the public, a sentencing court might, for example, add twelve months to the sentence which it would otherwise have imposed, and in this way impose an extended term of imprisonment. On this footing, the question whether the authorised maximum was exceeded would be immaterial. In support of this suggestion it may be argued that as the law stood before the Act of 1967, while an offender's past record might properly be taken into account when a court was considering what sentence would be appropriate for the particular offence, care had to be taken to see that he was not being punished for that record, that is to say, for offences in respect of which he had already been punished. It may be argued further that, in order to deal with persistent offenders, Parliament has conferred in s. 37 (2) of the Act of 1967 a new power which is in effect a power to punish an offender for his record by adding to what would otherwise be an appropriate term of imprisonment and calling the resulting term an extended term of imprisonment, even if it keeps within the pre-existing statutory maximum. The difficulty in giving effect to this suggestion is that (as has already been stated) courts have for a long time felt themselves entitled to lengthen a sentence for the express purpose of protecting the public, and accordingly on this footing sub-s. (2) confers no new power. In addition it is difficult to separate when considering the length of sentence, the need to protect the public from the two other factors mentioned in sub-s. (2), namely the man's previous conduct and the likelihood of his committing further offences: all three factors should be considered together when the question of imposing an extended term of imprisonment arises.

Accordingly, in the view of this court, the meaning of extended term of imprisonment in s. 37 (2) is a term extended beyond the authorised maximum for the particular offence and s. 37 (3) defines and limits the extent of any extended term as opposed to being the sole source of the power to extend a term beyond the previous maximum. It follows that the judge could not grant a certificate under s. 37 (5). That certificate must be set aside but in regard to the actual sentence the appeal is dismissed.

*Appeal dismissed. Leave to appeal to the House of Lords granted, the court certifying under s. 1 of the Administration of Justice Act, 1969, that a point of law of general public importance was involved, viz., whether, on the construction of s. 37 of the Criminal Justice Act 1967, an extended term of imprisonment may be imposed although it does not exceed the maximum term authorised for the offence apart from s. 37.*

Solicitors: *Registrar of Criminal Appeals* (for the appellant); *Treasury Solicitor*.

[Reported by N. P. METCALFE, Esq., Barrister-at-Law.]

## PICKLES v. NATIONAL COAL BOARD (INTENDED ACTION).

[COURT OF APPEAL, CIVIL DIVISION (Lord Denning, M.R., Davies and Russell, L.JJ.), March 29, 1968.]

*Limitation of Action—Extension of time limit—Leave to contend in an action that time limit not a defence—Application by member of trade union to union for advice—All reasonable steps taken by member—Attributability of injury first known by member when union's advice communicated to him in July, 1967—Nature of applicant's illness (silicosis) known to him in September, 1966—Disease contracted in employment before 1960—Leave granted ex parte—Limitation Act 1963 (c. 47) s. 7 (5).*

The applicant was a miner employed by the National Coal Board. From 1947 to 1960 he worked underground. He then ceased working in a mine and became a lathe operator. In February, 1966, he became ill with chest trouble and in September, 1966, he was told by his doctor that he suffered from silicosis contracted whilst working at the colliery. At that time he did not know that he might have a cause of action against the National Coal Board. He approached the branch secretary of his union, who communicated with head office, and then asked the applicant to fill in a form, which he did in September, 1966. In June, 1967, after delay attributable to the union-representative, the form was sent to head office, who informed him in July, 1967, that there might be a claim for negligence or breach of statutory duty against the board. On appeal by the applicant from refusal of leave (pursuant to s. 1 of the Limitation Act 1963) to contend in an action that s. 2 (1) of the Limitation Act, 1939, should afford no defence,

**Held:** by applying to the trade union representative the applicant had taken all such action as it was reasonable for him to have taken before that time for the purpose of obtaining appropriate advice, and thus had satisfied s. 7 (5) (c) of the Limitation Act 1963; accordingly for the purpose of an ex parte application for leave pursuant to s. 1 the applicant had established that the attributability of his injury to a tort on the part of the board was outside his knowledge until July, 1967, with the consequence that leave should be granted to him (see p. 600, letters F, H and I, and p. 601, letters B, G and I, post).

Appeal allowed.

**A** [ **Editorial Note.** In applying this decision regard should also be had to the principle stated in *Goodchild v. Greatness Timber Co., Ltd.*, see ante, p. 255 at letter C.

As to extension of the limitation period in certain cases, see SUPPLEMENT to 24 HALSBURY'S LAWS (3rd Edn.) para. 381; and for cases on the subject, see DIGEST (Cont. Vol. B) 500-502, 1933a-2022a.

**B** For the Limitation Act 1963 s. 1, s. 2, s. 7, see 43 HALSBURY'S STATUTES (2nd Edn.) 614, 615, 618.]

### Interlocutory Appeal.

This was an appeal by Stanley Pickles from an order of THOMPSON, J., made on Nov. 20, 1967, dismissing his application (made on affidavit filed on Nov. 15, 1967) for leave pursuant to s. 1 of the Limitation Act 1963 in respect of an intended action against the National Coal Board for damages for personal injuries caused by alleged negligence or breach of statutory duty. The grounds of appeal were that the judge was wrong in law in holding that no material facts of a decisive character were at all times outside the knowledge (actual or constructive) of the appellant until a date which was not earlier than twelve months before Nov. 17, 1967. The facts are set out in the judgment of LORD DENNING, M.R.

*Hugh Griffiths, Q.C., and J. M. Williams for the applicant.*

**LORD DENNING, M.R.:** This is yet another case under the Limitation Act 1963. The applicant, Mr. Stanley Pickles, was at one time a mineworker. For two years before the war he worked on a screening plant in a mine in county Durham. He went to the war. After he came back he worked underground from 1947 until September, 1960. He was then a member of the Mineworkers' Union. In 1960 he ceased working in a mine and became a lathe operator. He moved down from Durham to Bedfordshire. He joined the Amalgamated Engineering Union. He worked there until he was taken ill in February, 1966, with trouble in his chest. It was thought at first to be tuberculosis, but afterwards it was found to be silicosis.

In July, 1966 (and this is the important date) he was told by his doctor that he had silicosis and he had contracted it while he was working at the colliery in county Durham. He did not realise then that he had any claim for negligence or breach of statutory duty, but he thought that he would have a claim on the national insurance fund. He went along to the Amalgamated Engineering Union in Bedfordshire. The union representative wrote up to head office, who suggested that he should fill in a schedule in the usual form. In September, 1966, he filled in the form. He said that he had got silicosis. One of the questions was whether the employers were to blame. He left the answer blank. He did not know that it was the fault of the employers. The union representative unfortunately did not at that time send the form up to the head office. It seems to have got lost somehow amongst his papers. He did not send the form up to head office until June, 1967. Meanwhile, the applicant had been along and asked about it on several occasions and he had been put off for one reason or another. When the form did get to head office, they thought it was a case for legal advice. The legal advisers looked into the matter. They thought that there might be a claim by the applicant for negligence or breach of statutory duty. In July, 1967, the applicant was told that that was their view. By that time the period of limitation had long expired. In order to overcome that bar, the solicitors on his behalf made application for leave under the Limitation Act 1963. They set out in an affidavit for the court the circumstances, most of which I have already described. It came before the judge *ex parte*, and the judge thought that it was not a case in which he should grant leave. Now counsel for the applicant asks us to review the judge's decision.

This is one more case on this very complicated and obscure Act. I need not recite all the provisions again; but it is quite plain that a plaintiff has to get



leave to bring an action, and actually to bring the action, within twelve months of the time when he gets to know (actually or constructively) the material facts (those facts being of a decisive character). The judge seems to have thought that in this case the applicant got to know the material facts in July, 1966, or at latest September, 1966, when he knew that he had got silicosis through working in the coal mine: and, seeing that more than twelve months had elapsed since he got that knowledge, the judge refused to grant him leave. Counsel for the applicant submits to us that the judge did not correctly interpret the statute. He says that it is not enough for a plaintiff to know that he has silicosis due to working in a mine. He must also know that it is attributable to negligence or breach of statutory duty: and in this case the applicant did not know it was so attributable until July, 1967.

The definition of "material facts" is contained in s. 7 (3). It provides:

"... any reference to the material facts relating to a cause of action is a reference to any one or more of the following, that is to say (a) the fact that personal injuries resulted from the negligence, nuisance or breach of duty constituting that cause of action... (c) the fact that the personal injuries so resulting were attributable to that negligence, nuisance or breach of duty..."

That definition makes it clear that the attributability of the injury to negligence or breach of duty, or, in other words, its causation, is a material fact within the the statute. I realise that, in the ordinary way, attributability or causation is regarded as a point of law, but, nevertheless, I think that for the purpose of this statute, it is to be regarded as a material fact.

Once attributability or causation is seen to be a material fact, the next question is when did the applicant get to know (actually or constructively) that his disease was attributable to the negligence or breach of duty of his employers. For that purpose we have to look at s. 7 (5). If one goes through that section, it is plain that sub-s. (5) (a) is satisfied. He did not actually know of the attributability of negligence or breach of statutory duty until July, 1967. Next, sub-s. (5) (b) is satisfied. He had taken all such action as was reasonable for him to have taken in order to ascertain it. He had put the matter before his trade union representative, which is surely all that is required of a man in his position. Subsection (5) (c) seems to add a little more to sub-s. (5) (b). By putting the matter before the trade union he had taken all action as it was reasonable for him to take to obtain advice. In the circumstances the attributability of silicosis to negligence or breach of statutory duty was not known to him—it was not within his knowledge, actual or constructive—until July, 1967. It was obviously a material fact of a decisive character within s. 7 (4) because until he knew of it he would not know he had a worthwhile action.

On the present evidence, I think that the applicant only got to know of the material facts of decisive character in July, 1967. He has, therefore, twelve months from July, 1967 in which to bring the action. That is, he has got to issue his writ by July, 1968, which he can do provided leave is given. I think that leave should be given. I do not say that he will win the action, but he has given evidence which, if accepted, might establish his cause of action. It is a proper case for leave. Of course, it does not finally decide the matter. The grant of leave ex parte is only provisional. The respondents will have the opportunity later to argue these points again if they so please, either on a preliminary issue or on a full trial of the case; but for present purposes I think that the applicant has sufficiently made out a case for leave, and I would grant leave accordingly.

DAVIES, L.J.: I agree. The applicant knew in July, 1966, because he had been told so by his doctors, that he had silicosis and that the silicosis was contracted while he was working in a mine. He says that at that time, although he thought that that might entitle him to some form of disablement benefit or pension, he had no idea that he had a cause of action against the National Coal

A Board. He did not, in other words, realise there had been any negligence or breach of duty on the part of his former employers. That evidence, naturally, it being an ex parte application, is uncontradicted, and it seems on the face of it to be true.

Nevertheless the question remains: did he take all such action as was reasonable for him to have found out his rights? In my view he plainly did. When he went back to work, or even perhaps when he was in hospital, he spoke to the branch secretary of the Amalgamated Engineering Union, of which he was a member, who wrote on Sept. 2, 1966, to the head office of his union:

C "The [applicant] who having been off work for some twenty-six weeks with tuberculosis has been told by a doctor in Bedford hospital that it was caused by silicosis from when he worked underground at a colliery. His doctor said that his union should be able to do something regarding a claim for him, but at the time he was in a colliery workers' union. I would appreciate your comments and advice that could be given our member."

On Sept. 21, the union wrote back saying:

D "We acknowledge receipt of your letter of Sept. 2 relative to the [applicant], who is unfortunately off work with tuberculosis which he has been informed has been caused by silicosis from working underground at a colliery. If [the applicant] contracted this disease prior to his admission into our union, he would not be entitled to legal aid. However, if the member so desires, we see no reason why he should not complete a schedule to be forwarded to this office for the attention of our legal department. We feel sure that department will tender some advice."

E On Sep. 29, that is to say just a week after that letter was written, the applicant did fill in the form of which we have a copy before us.

In my view in all the circumstances those were entirely proper and reasonable steps for the applicant to take. As was said by counsel for the applicant in another walk of life perhaps one would have gone to a solicitor, but it was quite reasonable for him to treat his union as his legal advisers in the circumstances. Unfortunately, as we know, Mr. George, the branch secretary, mislaid that form and did not come across it again until June, 1967, when he sent it to the union. The union acted then with the greatest promptness, which no doubt they would have done in 1966 if the schedule, as they call it, had been sent to them then.

G In my view prima facie the applicant here has fulfilled all the requirements of the Limitation Act 1963, and I agree accordingly that leave should be granted.

H **RUSSELL, L.J.:** The fact that the silicosis was attributable to negligence or breach of duty by the respondent National Coal Board is by definition a material fact under the Limitation Act 1963 s. 7 (3) and s. 1 (3), and clearly it is a material fact of a decisive character under s. 7 (4) and s. 1 (3). Was this fact outside the applicant's knowledge until July, 1967? Does he, in relation to this fact, pass, up to that date, the tests of relevant ignorance laid down by s. 7 (5) (a), (b) and (c)? I think so. Under para. (a) it is clear. Under para. (b) and para. (c)—which in this case seem to amount to the same thing—he took in my view all the steps and all the action as were reasonable by putting the matter in the hands of his trade union representative in a way which did lead to knowledge of the decisive fact, albeit late, due to the eccentricities of the filing system of the trade union representative. On the case as now presented, considerable additional material having been added since the hearing before the judge, I, too, agree that leave should be given.

*Leave granted pursuant to s. 1 of the Limitation Act 1963.*

Solicitors: *W. H. Thompson* (for the applicant).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

**WARDAR'S (IMPORT & EXPORT) CO., LTD.**  
**v. W. NORWOOD & SONS, LTD.**

A

[COURT OF APPEAL, CIVIL DIVISION (Harman and Salmon, L.J.J., and Phillimore, J.), March 15, 1968.]

*Sale of Goods—Transfer of property—Unascertained goods in possession of third party—Passing of risk—Buyers' carrier given delivery note addressed to warehouseman—Goods for carrier put out on pavement from bulk by warehouseman before carrier's arrival—Delivery note accepted by warehouseman—Goods thereafter loaded by carrier—Goods at buyers' risk from time of acceptance of delivery note by warehouseman and indication by him to carrier of goods for transport to buyers—Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 18, r. 5, s. 29 (3).*

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Sellers who had 1,500 cartons of kidneys in a cold store in London sold six hundred of these cartons to buyers, who inspected some of the cartons in the store, on Oct. 13, 1964. On the morning of Oct. 14 the sellers' agent gave the buyers' carrier a delivery note authorising him to pick up six hundred of the cartons: the carrier went to the cold store at about 8 a.m. and found the six hundred cartons had already been put out of the cold store on to the pavement. He produced his delivery note, and the cartons were loaded into his lorry. Loading was not complete until about noon. There was a tea break at about 10 a.m., after which the carrier noticed that the cartons were dripping. The carrier switched on the refrigeration in his lorry, and the refrigeration became effective at about 3 p.m. At about noon, when he signed for the cartons, the carrier added a note that they were in soft condition. When the cartons arrived in Glasgow the next day most of the kidneys were found to be unfit for human consumption. On a claim by the buyers for damages, and a counterclaim by the sellers for the price,

**Held:** (i) the contract when made was for the sale of unascertained goods, and the six hundred cartons were unconditionally appropriated to the contract at 8 a.m. when, by accepting the delivery note and indicating to the carrier that the cartons on the pavement were those that he was to take, the official at the cold store acknowledged that the goods were held on the buyers' behalf (cf. s. 29 (3) of the Sale of Goods Act, 1893); accordingly the property in the goods then passed to the buyers under r. 5 of s. 18 of the Act of 1893, and thereafter the goods were at the buyers' risk (see p. 604, letter H, p. 605, letters H and I, and p. 606, letter E, post).

(ii) as there was no evidence that the kidneys had deteriorated by 8 a.m., the buyers' claim for damages would be dismissed, and the sellers were entitled to judgment for the sale price (see p. 604, letter I, and p. 606, letters D and E, post).

Appeal allowed.

[As to unconditional appropriation of goods by delivery to a carrier, see 34 HALSBURY'S LAWS (3rd Edn.) 63, 64, para. 91; and for cases on the subject, see 39 DIGEST (Repl.) 608-610, 1214-1228.

As to delivery of the goods to a carrier being prima facie delivery to a buyer, see 34 HALSBURY'S LAWS (3rd Edn.) 107, para. 160; and for cases on the subject, see 39 DIGEST (Repl.) 701, 702, 1925-1937.

For the Sale of Goods Act, 1893, s. 16, s. 18 r. 5, s. 20, s. 29 (3), see 22 HALSBURY'S STATUTES (2nd Edn.) 995, 997, 999, 1004.]

Case referred to:

*Sterns, Ltd. v. Vickers, Ltd.*, [1922] All E.R. Rep. 126; [1923] 1 K.B. 78; 92 L.J.K.B. 331; 128 L.T. 402; 39 Digest (Repl.) 647, 1535.

**Appeal.**

This was an appeal by W. Norwood & Sons, Ltd., the defendants in an action brought by the plaintiffs, Wardar's (Import and Export) Co., Ltd., by writ



A issued on Oct. 12, 1965, claiming the balance (£2,026 ls. 3d.) on an account for the price of the goods sold and delivered less payments made and less an amount for goods sold by the defendants to the plaintiffs. The defendants by their amended defence admitted indebtedness in the sum of £2,026 ls. 3d., but claimed to set off, among other sums, a sum of £1,840 6s. 11d.; and they counterclaimed in the action alleging that on or about Oct. 13, 1964, the defendants had sold and

B delivered to the plaintiffs six hundred cartons of kidneys, and that there was due to the defendants, as balance of the price £1,840 6s. 11d. By their reply and defence to counterclaim the plaintiffs alleged that a large part of the kidneys were unfit and not of merchantable quality. The plaintiffs having, so they pleaded, paid for the kidneys, alleged that £1,840 6s. 11d., being the price of the unfit kidneys, together with the cost of carriage, became due to them from the

C defendants. On Oct. 24, 1967, DANCKWERTS, L.J., sitting as an additional judge of the Queen's Bench Division, awarded to the plaintiffs the sum that they claimed (£2,026 ls. 3d.) for the balance due as the price of goods sold by them to the defendants, and dismissed the defendants' counterclaim in regard to the sale of the kidneys. By notice dated Dec. 4, 1967, the defendants gave notice of appeal against the dismissal of their counterclaim and thus against the

D rejection of their contention that £1,840 6s. 11d. was due to them from the plaintiffs and should be set off against the £2,026 ls. 3d. The appeal being thus concerned with a sale of kidneys by the defendants to the plaintiffs, the defendants are herein referred to as "the sellers" and the plaintiffs as "the buyers".

*R. L. Johnson* for the sellers.

E *T. J. F. Hobley* for the buyers.

HARMAN, L.J.: This is an appeal from a judgment of DANCKWERTS, L.J., sitting in the Queen's Bench, on Oct. 24, 1967. I sympathise heartily with DANCKWERTS, L.J., when he starts by saying that he had a very difficult task in finding out what the facts were. So have we. In fact I am not sure that

F we know them very well now, and there is a good deal of speculation.

The story begins when the defendant sellers, who are meat importers, bought two consignments of kidneys from the Argentine in the autumn of 1964. The consignments were delivered in London and put into cold storage by the sellers, who presumably then advertised them for sale. On Oct. 13, 1964, there was a telephone conversation between them and the plaintiff buyers at which there

G was an agreement to sell six hundred out of the 1,500 cartons to the buyers, who already, I gather, had subsold to their own purchasers. On that same day the buyers made some inspection of the cartons, which were presumably at that time in good condition, and indeed there was some outside evidence that apart from the six hundred cartons with which we are here concerned these goods were of merchantable quality.

H Some carriers were thereupon instructed to pick up the goods and take them to Scotland, in pursuance of the subsale to a firm called Drummond in Glasgow. One McBeath, who had come down from Scotland with a lorry-load of fresh meat, apparently called on some agents called McKay's on the evening of Oct. 13 and was told that he would be taking back to Scotland the next day these six hundred cartons. He attended apparently early in the morning of Oct. 14

I at McKay's office, and was there given what was described as a delivery note, which was his authority to pick up these six hundred cartons and load them on his lorry and take them off. His lorry was a refrigerated lorry, but it was not cool because it had brought down fresh, unchilled meat from Scotland and did not need to be chilled for that purpose.

Mr. McBeath apparently arrived at 8 a.m. at the warehouse in Smithfield and there he found the goods already outside the cold store and waiting on the pavement to be picked up. He delivered his authority, that is to say his delivery note, and the cold storage firm directed Smithfield porters who were on the spot

to put the goods on the lorry. That process took from first to last from 8 a.m. till about noon, and Mr. McBeath got off at noon. There was in the course of it what was called a tea-break, of unknown length, said by some people to stretch for an hour but whether that is a libel or not it is not for me to say. Anyhow by the time these goods were loaded on to the lorry there was a good deal of evaporation of the freezing to which they had been subject when they were in the cold store, and Mr. McBeath had never turned on his refrigerating machinery; he did that during this tea-break, which was said to be at about 10 a.m. or a little after. He admitted that it would take three hours anyhow from then before the cooling process really spread to the insulation surrounding the lorry; so that the goods were in an unchilled lorry for several hours or at least the great part of that time. He signed for them and added the words at the bottom "In soft condition". He presumably signed towards 12 noon, just before he got off, so they were by then noticeably becoming unfrozen. He took them to Scotland. He had a night stop on the way, but he kept his refrigeration on all the time. He delivered them in Glasgow; and almost at once there were protests. The goods were condemned by the medical officer of health—or at least 470 out of the six hundred cartons were—and the whole consignment, I gather was treated as unfit for human consumption. The question is, on whom is the loss to fall; and that depends on when the property in the goods passed from seller to buyer.

Section 16 of the Sale of Goods Act, 1893, provides:

"Where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained."

That applies here because the 1,500 cartons did not have any note or indication on them which were selected by the buyer: he simply bought six hundred out of the 1,500 and, therefore, there was no ascertainment at that point. Therefore there must be, for a transfer of the property, an ascertainment of the goods. Section 18 deals with intention: it deals with the sale of specific goods. Section 20 provides:

"Risk prima facie passes with property. Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not..."

Section 29 (3) provides:

"Where the goods at the time of sale are in the possession of a third person, there is no delivery by seller to buyer unless and until such third person acknowledges to the buyer that he holds the goods on his behalf..."

Therefore as soon as the cold storage official (who was the third person in question) acknowledged to Mr. McBeath that the goods were his, the property seems to me to have passed, and I think that that moment must be the time when Mr. McBeath took delivery under his delivery note and that is acknowledged by the owner of the cold store as entitling Mr. McBeath to take the goods away.

Consequently, it seems to me that the property in the goods passed and the risk passed as soon as the goods already taken out of the cold store were acknowledged to be the goods of the buyer. If that is so, it seems to me that on the balance of probability it is fairly clear that the damage was done after and not before that moment and that therefore the risk was on the buyer. The counter-claim should succeed accordingly, and I would therefore allow the appeal.

**SALMON, L.J.:** I entirely agree, and I add a word only because we are differing from **DANCKWERTS, L.J.**; who decide this case at first instance.

The evidence, as he said, was rather meagre; but the correct inferences to be drawn from it are, I think, tolerably plain. The driver, Mr. McBeath, received the delivery order in the early hours of the morning of Oct. 14, 1964. He was

A instructed to go to St. John's Cold Store and collect six hundred cartons of frozen kidneys and take them to Scotland. His van was a refrigerated van, but the refrigeration had not been turned on when he received his orders for the day before, as HARMAN, L.J., has said, he had brought a cargo of fresh meat down from Scotland. Although he knew that he was about to pick up some frozen kidneys to take them to Scotland out of the cold store, he did not think of turning on the refrigeration in the van at once. He must have known that it would take some hours to become cold. Whether it is possible that the buyers have any claim against the carriers is not for me to say. Indeed there is hardly enough evidence before us on which one could even speculate on that topic.

C When the driver, Mr. McBeath, arrived at the cold store at 8 a.m. on Oct. 14, according to his evidence the load of frozen kidneys which he was to take to Scotland was there on the pavement waiting for him. There is no doubt that that load of six hundred cartons had been in the cold store, the day before and indeed had then been examined by the buyers soon after they made their oral contract of purchase. As far as the evidence goes, there was absolutely nothing the matter with the kidneys on Oct. 13. There is no evidence when these six D hundred cartons were taken out of the cold store. It seems unlikely that they would have been left on the pavement overnight. Had they been left on the pavement overnight, it is perhaps even more unlikely that they would all have been there in the morning. The natural inference, I think, is that they must have been taken out of the cold store at some time on the morning of Oct. 14 prior to 8 a.m.

E Now, as HARMAN, L.J., has said, these six hundred cartons were part of a consignment of 1,500 cartons of frozen kidneys that had been stored in the cold store. The evidence called at the trial showed that the rest of the cartons—that is, nine hundred of the cartons—had also been sold, and no complaint was made in respect of them. At the time of the sale it was a sale of unascertained goods: six hundred cartons were bought out of a total of 1,500 cartons. F This case really turns on when the property passed to the buyers. It is plain that as a rule the goods remain at the sellers' risk until the property does pass to the buyers. After the property passes, then the goods are at the buyers' risk (s. 20 of the Sale of Goods Act, 1893). There are special circumstances (of which *Sterns, Ltd. v. Vickers, Ltd.* (1) is an example) when the risk may pass to the buyers even before the property has passed to them; but there are no G such special circumstances here. The case, as I say, depends entirely on when it was that the property passed.

Under r. 5 of s. 18, the property passes to the buyers in the case of unascertained goods such as these when the goods are unconditionally appropriated to the contract. At 8 a.m. the carrier arrived; and the carrier was the buyers' agent. There were the goods, which had been left on the pavement by the sellers' H agent for the purpose of fulfilling the contract. The carrier handed over the delivery note with the clear intention that those goods should be accepted for loading; and the loading commenced.

I It is unnecessary to decide the point whether there was an unconditional appropriation to the contract at the moment when the goods were put on to the pavement, which is perhaps fortunate, because we do not know precisely when that was; but in my view there can be no doubt that there was a clear, unconditional appropriation when the delivery order was handed over in respect of the goods which had been deposited on the pavement for loading. There is certainly no evidence that they were not then of merchantable quality. It would seem from the evidence of Mr. McBeath, the driver of the lorry, that at some stage the porters wished to take a tea-break. The driver was apparently concerned at the goods being left standing on the pavement, but he was told,



according to his evidence, that the tea-break would take only five minutes. A  
 It appears that it took about an hour; and it was after the tea-break, according  
 to Mr. McBeath that he first noticed that some of the cartons were dripping,  
 which would be a strong indication that the goods had by then started to  
 deteriorate. Meantime, however, a good many of the cartons—we do not  
 know how many—had already been loaded into the lorry. Since, however  
 (as I think), the goods were appropriated to the contract when the delivery B  
 order was handed over and accepted in respect of the goods standing on the  
 pavement, any deterioration that occurred thereafter was at the risk of the  
 buyers. We know that when the goods arrived at their destination the vast  
 bulk of them were not of merchantable quality. We also know from the driver  
 of the lorry that he did not turn on the refrigeration, so he says, until the tea-  
 break was taken. At any rate, the refrigeration did not become effective until C  
 3 p.m. It may not be very material, but it does not seem to me to be at all  
 unlikely, if the goods were left in a stuffy lorry, as they were, for some hours,  
 that the deterioration may have occurred during that time. The driver said  
 that this was a hot day. Unless it was a very exceptional day for Oct. 14 in  
 this country, I cannot think that the sun had much strength in it by 8 a.m.  
 In any event, none of this, I think, matters, because at 8 a.m. these goods were D  
 appropriated to the contract and the risk of deterioration then fell on the buyers;  
 and there is no evidence that there was any deterioration before eight o'clock in  
 the morning.

Accordingly, I agree with HARMAN, L.J., that this appeal should be allowed.

PHILLIMORE, J.: I agree with the judgments which have been delivered E  
 by my lords, and I do not for myself desire to add anything.

*Appeal allowed. Judgment for defendants on claim and counterclaim.*

Solicitors: C. Butcher & Simon Burns (for the sellers); Burnett L. Elman  
 (for the buyers).

[Reported by HENRY SUMMERFIELD, Esq., Barrister-at-Law.] F

## PROCEDURE DIRECTION.

### HOUSE OF LORDS

*House of Lords—Costs—Order for costs other than by award to successful party  
 —Letter within fourteen days of conclusion of hearing.*

If either party wishes to submit that there should be an order as to costs or  
 expenses other than that they should be awarded to the successful party, the H  
 agents for that party should, within fourteen days of the conclusion of the  
 hearing of the appeal, indicate by letter to the Judicial Office how they would  
 wish costs or expenses to be dealt with. A copy of such letter should be sent  
 to the agents for the other party or parties to the appeal (1).

By the authority of the Appeal Committee.

May 21, 1968.

RICHARD CAVE, I  
 Principal Clerk.

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(1) This direction is a new Judicial Direction as to Procedure, No. 32 (ii).

A

NOTE.

## R. v. ANGEL.

B

[COURT OF APPEAL, CRIMINAL DIVISION (Lord Parker, C.J., Winn, L.J., and Ashworth, J.), March 15, 1968.]

*Criminal Law—Gross indecency—Consent of Director of Public Prosecutions required for institution of proceedings—One party to offence under twenty-one—Consent not obtained—Trial a nullity—Conviction quashed—Sexual Offences Act 1967 (c. 60) s. 8.*

C

[As to the consent of the Director of Public Prosecutions for the institution of certain proceedings, see 10 HALSBURY'S LAWS (3rd Edn.) 339, para. 628, note (i); and for cases on the consent necessary to institute proceedings, see 14 DIGEST (Repl.) 188, 189, 1535-1540.]

**Appeal.**

D

The appellant, Robert Charles Angel, pleaded guilty on Nov. 7, 1967, at the York assizes to one count of gross indecency and two counts of buggery. All the offences concerned the same boy, who was nine years of age. The appellant had asked for other offences to be taken into consideration when he was sentenced. He appealed to the Court of Appeal on a point of law, viz., that the consent of the Director of Public Prosecutions to the prosecution had not been obtained pursuant to s. 8\* of the Sexual Offences Act 1967. The case noted below† was cited in argument.

E

*G. J. K. Coles* for the appellant.

*J. B. Deby* for the Crown.

F

LORD PARKER, C.J., having stated the nature of the appeal and indicated the legal question, continued: It has been ascertained that the consent of the Director of Public Prosecutions was not obtained, and in the result the whole of the trial, including the committal proceedings, has been a complete nullity, as it has been instituted without that necessary consent. Accordingly, the court has no alternative but to quash the conviction on the ground that the trial was a complete nullity, and will allow the appeal for that purpose.

*Appeal allowed. Conviction quashed.*

G

Solicitors: *Hudsons, Hart & Borrows*, Richmond, Yorks. (for the appellant); *Kingsley, Napley & Co.*, agents for *Darling, Heslop & Forster*, Barnard Castle (for the Crown).

[Reported by N. P. METCALFE, Esq., Barrister-at-Law.]

H

I

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\* Section 8, so far as material, provides: "No proceedings shall be instituted except by or with the consent of the Director of Public Prosecutions against any man for the offence of . . . buggery with, or gross indecency with, another man . . . where either of those men was at the time of its commission under the age of twenty-one . . ."

† *R. v. Warn*, [1968] 1 All E.R. 339; and p. 300, ante.

## R. v. R.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Park, J.), May 8, 9, 1967.]

*Divorce—Infant—Child of the family—Acceptance of child as one of the family—Knowledge of material facts necessary for acceptance—Child disowned as soon as husband knew of facts showing that child was not his—Whether child had been accepted as one of the family—Matrimonial Causes Act 1965 (c. 72) s. 46 (2) (b).*

The respondent mother married the petitioner in 1943. In 1956 a child was born to her, whom the petitioner treated as their child. In 1961 the petitioner first discovered facts showing that the child was not his, but was the child of the respondent and co-respondent. He thereupon disowned the child and instituted divorce proceedings in which he was granted a decree nisi on the ground of the respondent's adultery. On an issue whether the child had been "accepted" by the petitioner as one of the family for the purposes of s. 34 and s. 46 (2) (b) of the Matrimonial Causes Act 1965,

**Held:** a child was not accepted by a party to a marriage as one of the family unless that party's consent thereto was shown to have been given with knowledge of the material facts; in the present case the petitioner had not had knowledge of the material facts for the five years during which the child had been treated as one of the family, and, as he had disowned the child on first learning the material facts, the child had not been accepted by him as one of the family (see p. 609, letter H, post).

[ **Editorial Note.** This decision was considered in *Re L.* ([1968] 1 All E.R. 20; see at p. 26, letter A, p. 33, letter D, and p. 35, letter E.

As to the acceptance of a child as one of the family for the purposes of custody and maintenance under s. 34 of the Matrimonial Causes Act 1965, see SUPPLEMENT to 12 HALSBURY'S LAWS (3rd Edn.) para. 755A; and for cases on the subject see DIGEST (Cont. Vol. B) 383, 6756a, 6757e.

For the Matrimonial Causes Act 1965 s. 34 and s. 46, see 45 HALSBURY'S STATUTES (2nd Edn.) 491, 504.]

### Issue.

In a divorce suit a decree nisi was granted to the petitioning husband on the ground of the wife's adultery; the court found that the child, who was born to the wife during marriage, was not the child of the petitioner but was the child of the wife and the co-respondent. By order dated Apr. 4, 1966, it was ordered that the child be at liberty to intervene in the suit and be separately represented, and the Official Solicitor was appointed guardian ad litem of the child. By order dated Oct. 14, 1966, an issue was ordered to be tried whether the child had been accepted as a child of the family. For the purpose of this issue the petitioner was to be the plaintiff, and the respondent and the Official Solicitor were to be defendants.

*Roger Gray* for the petitioner.

*J. D. K. Burton* for the respondent.

*A. B. Hollis* for the Official Solicitor.

**PARK, J.:** The issue which I have to try is whether a child born to the respondent in April, 1956, is a child of the family. The respondent bore no other children. The circumstances in which this issue arises are as follows. The parties were married in 1943 and thereafter lived together at various addresses abroad and in the United Kingdom. In July, 1961, when the respondent and the child were on holiday in Europe, the petitioner discovered certain letters and other documents which tended to show that from about the year 1955 and, possibly, earlier up to the discovery of the documents, the respondent had frequently committed adultery with the co-respondent and that the child was born as a result of this adultery. Immediately he made this discovery, the petitioner left the matrimonial home and disowned both the respondent and the



A child. He then presented a petition for divorce on the ground of the respondent's adultery with the co-respondent. In the petition he put in issue the paternity of this child. By her answer, the respondent denied adultery and denied that the child was not a child of the petitioner and herself. She prayed for an order for custody of the child and for maintenance. After a long trial in which I heard evidence of blood tests made from samples of blood taken from the parties and from the child, I held that the respondent had frequently committed adultery with the co-respondent in and between 1955 and 1961 and that the child was the child of the respondent and the co-respondent. I granted a decree nisi to the petitioner. In April, 1966, the Official Solicitor was appointed guardian of the child and this issue was directed to be tried.

C It is not disputed that from the date of the child's birth in 1956 up to the discovery of the letters and other documents in 1961, the petitioner believed the child to be his; that in that belief he maintained the child and in every respect treated her as his daughter, and that when the documents and letters indicated to him that he was not the child's father he immediately ceased to treat her as his daughter and in fact disowned her.

D Under s. 34 (1) of the Matrimonial Causes Act 1965, the court can make such order as it thinks just for the custody, maintenance and education of any relevant child. By s. 46 (2) (b) a relevant child means a child of one party to the marriage who has been accepted as one of the family by the other party. Thus, the question I have to decide is whether on these facts the petitioner can be held to have accepted the child as one of the family.

E There is no authority which assists on the meaning of the expression "accepted as one of the family" as it is used in the Act of 1965. Counsel for the petitioner, and counsel who, on the instructions of the Official Solicitor, appeared for the child both submitted that, in order to come within the Act of 1965, any acceptance must be an acceptance with full knowledge of the facts, and that there had been no such acceptance by the petitioner in this case. Counsel for the Official Solicitor also drew my attention to the definition of "accept" in the SHORTER F OXFORD ENGLISH DICTIONARY. The first part of that definition reads as follows: "To take or receive what is offered one; to take or receive with a consenting mind."

I think that the child of one party to the marriage cannot be held to have been accepted as one of the family by the other party unless it is shown by the evidence, first, that the other party consented either expressly or impliedly to receive the child as one of the family, and, secondly, that that consent was given with knowledge of the material facts. Whether there has been an acceptance of a child is in each case a question of fact.

G The fact that for five years the petitioner maintained the child and treated her as his daughter would ordinarily be regarded as overwhelming evidence both of his consent to receive her and of his acceptance of her as one of the family. In this case, however, the petitioner acted in this manner throughout that period solely because he believed, and had every reason for believing, that the child was in fact his. It was not until 1961 that it became reasonably clear to him that she was not. It was then that he first had the opportunity with knowledge of the material facts either to consent to receive her as one of the family or to refuse to receive her. Without any hesitation he refused to receive her.

I In my judgment, the petitioner for these reasons has never accepted the child as one of the family and she is not therefore a relevant child.

*Ruling accordingly.*

Solicitors: *Cowles & Co.* (for the petitioner); *F. W. Hughes & Son* (for the respondent); *Official Solicitor*.

[*Reported by ALICE BLOOMFIELD, Barrister-at-Law.*]

## KING v. REGINAM.

[PRIVY COUNCIL (Lord Hodson, Lord Upjohn and Lord Pearson), January 25, 29, 30, April 3, 1968.]

*Privy Council—Jamaica—Drugs—Dangerous drugs—Evidence—Admissibility—Search of premises authorised by warrant—Warrant did not authorise search—Accused found on premises and searched—Warrant for search of person should expressly authorise such search—Dangerous drug found on accused—Discretion of court to admit evidence obtained as result of search.*

A statutory power to search the premises does not of itself imply power to search persons found on those premises; moreover, if a warrant is issued under a statutory power which authorises the search, pursuant to warrant, of premises and of persons found there, the warrant should expressly authorise searching persons if it is to be valid authority for such search (see p. 612, letter H, and p. 612, letter I, to p. 613, letter A, post).

*Seccombe v. A.-G.* ([1919] S.A.L.R. 270) applied.

Police officers went with a search warrant to search a house for ganja, a dangerous drug. The warrant was read to a woman on the premises but not apparently directly to the appellant who was also there, but he was told that the police were there to carry out a search for ganja. The appellant was searched, ganja was found in one of his trousers' pockets, and he was arrested. The ganja was subsequently analysed by the government analyst and a certificate obtained on analysis put in evidence. The search of the appellant was not authorised by the Jamaican Dangerous Drugs Law or the Jamaican Constabulary Force Law, but there was no evidence that the appellant was wilfully misled by the police officers or any of them into thinking that there was such authorisation. One of the officers admitted at the trial that he knew that the warrant was to search the premises of a named woman and that it referred to the search of no-one else; he suspected that the appellant might have had ganja on him and did not offer him the opportunity of being searched in front of a justice of the peace under the Jamaican Constabulary Force Law although he knew of that right of a citizen. On appeal against conviction of being unlawfully in possession of dangerous drugs, to wit, ganja, the appellant contended that, as no legal justification for his being searched had been established, even if the evidence of the police were admissible the court should in its discretion have excluded it as being unfair to him.

**Held:** there was no ground for interfering with the way in which the court's discretion had been exercised, because this was not a case in which evidence had been obtained by conduct of which the Crown ought not to take advantage (see p. 617, letter H, post).

Dictum of LORD MACDERMOTT, C.J., in *R. v. Murphy* ([1965] N.I. at p. 149) approved.

[**Editorial Note.** On the question of propriety of methods of obtaining evidence and consequences regarding admissibility, reference may also be made to *Sneddon v. Stevenson* ([1967] 2 All E.R. 1277) and *Commissioners of Customs and Excise v. Harz* ([1967] 1 All E.R. 177).

As to admissibility of evidence obtained wrongfully, see 15 HALSBURY'S LAWS (3rd Edn.) 266, 267, para. 487; and for a case on the subject, see 14 DIGEST (Repl.) 403, 3944.

As to search warrants, see 10 HALSBURY'S LAWS (3rd Edn.) 356-358, para. 653.]

Cases referred to:

*Advocate (H.M.) v. Turnbull*, 1951 S.C. (J.) 96; [1951] S.L.T. 409.

*Browne's Policy, Re, Browne v. Browne*, [1903] 1 Ch. 188; 72 L.J.Ch. 85; 87 L.T. 588; 27 Digest (Repl.) 137, 993.

- A *Callis v. Gunn*, [1963] 3 All E.R. 677; [1964] 1 Q.B. 495; [1963] 3 W.L.R. 931; 128 J.P. 41; 48 Cr. App. Rep. 36; Digest (Cont. Vol. A) 368, 4448c.
- Fairley v. Fishmongers of London*, 1951 S.C. (J.) 14; 25 Digest (Repl.) 48, \*170.
- Harris v. Director of Public Prosecutions*, [1952] 1 All E.R. 1044; [1952] A.C. 694; 176 J.P. 248; 36 Cr. App. Rep. 39; 14 Digest (Repl.) 423, 4118.
- B *Jones v. Owens*, (1870), 34 J.P. 759; 25 Digest (Repl.) 48, 448.
- Kuruma, Son of Kaniu v. Reginam*, [1955] 1 All E.R. 236; [1955] A.C. 197; [1955] 2 W.L.R. 223; 119 J.P. 157; 14 Digest (Repl.) 403, 3944.
- Lawrie v. Muir*, 1950 S.C. (J.) 19; 25 Digest (Repl.) 144, \*18b.
- Noor Mohamed v. Regem*, [1949] 1 All E.R. 365; [1949] A.C. 182; 14 Digest (Repl.) 421, 4097.
- C *People, The, (A.-G.) v. O'Brien*, [1965] I.R. 142.
- R. v. Murphy*, [1965] N.I. 138; Digest (Cont. Vol. B) 629, \*126a.
- R. v. Payne*, [1963] 1 All E.R. 848; [1963] 1 W.L.R. 637; 127 J.P. 230; 47 Cr. App. Rep. 122; 45 Digest (Repl.) 115, 391.
- Seale-Hayne v. Jodrell*, [1891-94] All E.R. Rep. 477; [1891] A.C. 304; 61 L.J.Ch. 70; 65 L.T. 57; 48 Digest (Repl.) 446, 3978.
- D *Secombe v. A.-G.*, [1919] S.A.L.R. 270.

### Appeal.

This was an appeal by Herman King by special leave from the judgment of the Court of Appeal of Jamaica (HENRIQUES, MOODY and ECCLESTON, JJ.), dated July 29, 1966, dismissing the appellant's appeal against his conviction and sentence of eighteen months' imprisonment with hard labour by His Honour L. L. ROBOTHAM, resident magistrate, Kingston, dated Feb. 2, 1966, for unlawful possession of a dangerous drug, viz., ganja. The facts are set out in the judgment of the Board.

*M. P. Solomon and B. Sinclair* for the appellant.

*J. G. Le Quesne, Q.C.*, and *S. G. Davies* for the Crown.

- F **LORD HODSON:** The appellant was charged as follows:

"Herman King of 4, Anglesea Avenue of the parish of St. Andrew with force at 20, Ladd Lane and within the jurisdiction of this court unlawfully was found in possession of certain dangerous drugs to wit ganja. Contrary to s. 7 (c) of ch. 90."

- G This Act is called The Dangerous Drugs Law. The appellant was convicted by the resident magistrate, Kingston, Jamaica, on Feb. 2, 1966, and his appeal to the Court of Appeal of Jamaica was dismissed on July 29, 1966.

The case against the appellant was that, on Jan. 11, 1966, at 20, Ladd Lane, Kingston, he was searched by a police officer in pursuance of a search warrant, under the Dangerous Drugs Law, and ganja was found on him. The appellant's case was that ganja was planted on him by the police officer who conducted the search. He said that he was first searched and that nothing was found on him, whereupon the only other man present, apart from police officers, was sent out of the room. He said that he was then searched again and ganja was produced which the police falsely claimed had been found on him. There was a conflict of evidence between the witnesses called on either side and, on the appellant being

- I disbelieved, the conviction followed.

The Dangerous Drugs Law, s. 7, provides as follows:

"Every person who . . . (c) has in his possession any prepared opium or ganja . . . shall be guilty of an offence against this law."

Section 21 (2) of the Law provides as follows:

"If a justice is satisfied by information on oath that there is reasonable ground for suspecting—(a) that any drugs to which this Law applies are, in contravention of the provisions of this Law or of any regulations made



thereunder, in the possession or under the control of any persons in any premises; or (b) that any document directly or indirectly relating to or connected with any transaction or dealing which was, or any intended transaction or dealing which would if carried out be, an offence against this Law or, in the case of a transaction or dealing carried out or intended to be carried out in any place outside the Island, an offence against the provisions of any corresponding law in force in that place, is in the possession or under the control of any person in any premises; he may grant a search warrant authorising any constable named in the warrant, at any time or times within one month from the date of the warrant, to enter, if need be by force, the premises named in the warrant, and to search the premises and any persons found therein, and if there is reasonable ground for suspecting that an offence against this Law has been committed in relation to any such drugs which may be found in the premises or in the possession of any such persons, or that any document which may be so found is such a document as aforesaid, to seize and detain those drugs or that document, as the case may be."

The section thus authorised any constable named in a warrant to enter if need be by force the premises named in the warrant and to search the premises and any persons found therein.

The police search party went to 20, Ladd Lane on Jan. 11, 1966, armed with a warrant which was in the following terms:

"To any lawful constable of the parish of Kingston WHEREAS it appears to me W. Chambers, Esq., one of Her Majesty's justices of the peace in and for the parish of Kingston by the INFORMATION and complaint an oath of Henry R. Isaacs, Sgt. of Police, that there is good reason to believe that dangerous drugs to wit: ganja is kept and concealed on the premises of Joyce Cohen of 20, Ladd Lane in the parish of Kingston THESE ARE THEREFORE in Her Majesty's name, to authorise and command you with proper assistance, to enter the said premises of the said Joyce Cohen in the day or night time and there diligently search for the said dangerous drugs and if any articles of dangerous drugs be found after such search, that you will bring the dangerous drugs so found and the body of the said Joyce Cohen before me, or some other of Her Majesty's justices of the peace for the said parish of Kingston to be disposed of and dealt with according to law.

"Given under my hand and seal at 32, Lenearl Street in the parish aforesaid, Jan. 11, 1966.

(S) W. Chambers

Justice of the peace for the parish of Kingston."

Although a warrant to search persons as well as premises was contemplated by this section, this warrant did not in terms authorise search of any person although it did contemplate the arrest of one person named in the warrant.

In these circumstances, the search was not on the face of it justified by the warrant nor, in their lordships' opinion, can authority for the search of any person be implied from the language of the section without express authorisation.

In a South African case on consideration of a statutory provision as to the issue of warrants to search premises, persons not being mentioned, it was held at first instance that a search warrant covered persons as well as premises where premises only were mentioned, since to hold the opposite would lead to the defeat of the objects of search warrants because persons on the premises would only have to take material documents and conceal them on their persons and defeat the objects of the search. This decision was reversed on appeal by the Transvaal Provincial Division in *Seccombe v. A.-G.* (1). Their lordships see no reason to take a different view of the Act in question here which, by referring to persons as well as premises, strengthens the argument that, if a warrant is to cover persons, it must say so in

A terms. The warrant is defective not only for the reason stated but also because the terms of the section were not complied with since no constable was "named" in the warrant. This, in their lordships' opinion, is sufficient to invalidate the warrant since the legislature has been at pains to authorise entry and search only by a constable named. The word "named" is to be taken literally and not to be given a wider meaning, such as "designated", "specified" or "identified", which it may often bear in an appropriate context. For example, the court has inclined in favour of the wider meaning where the context so requires so as to give effect to the intention of a testator: see *Seale-Hayne v. Jodrell* (2), where the words "such of my relatives hereinbefore named" were held not to be confined to relatives of whom Christian names and surnames had been mentioned in a will. In another case, *Re Browne's Policy, Browne v. Browne* (3), a man with a wife and children effected a policy of assurance on his life under the Married Women's Property Act, 1882, s. 11, expressed to be "for the benefit of his wife and children". The wife died, the man remarried and had a child by his second marriage. It was held that these were entitled to participate jointly with the children of the first marriage. There are no considerations here which lead to any expanded meaning of the word "named".

D A further point taken in the Court of Appeal of Jamaica that the constable who performed the search was not a lawful constable of the parish of Kingston but of the parish of St. Andrew was not pursued in view of the terms of s. 13 (2) of the Constabulary Force Law which makes all constables constables in every parish.

E In the Jamaica courts, the argument was conducted on the footing that the warrant for the search of the appellant was not justified by s. 21 of the Dangerous Drugs Law although justification under this Law has been urged by the Crown before their lordships who are of opinion that search of the appellant was not justified by that law. Turning to the Constabulary Force Law (c. 72) to which the attention of the Jamaica courts was directed, s. 18 and s. 22 read as follows:

F "18. It shall be lawful for any constable, without warrant, to apprehend any person found committing any offence punishable upon indictment or summary conviction and to take him forthwith before a justice who shall enquire into the circumstances of the alleged offence, and either commit the offender to the nearest jail, prison or lock-up to be thereafter dealt with according to law, or to take bail by recognizance, with or without security in such amount as such justice shall direct, for his appearance on such day as he shall appoint, before a court of competent jurisdiction, to be dealt with according to law.

G "22. It shall be lawful for any constable to apprehend without warrant any person known or suspected to be in unlawful possession of opium, ganja (*Cannabis Sativa*), morphine, cocaine or any other dangerous or prohibited drugs, or any person known or suspected to be in possession of any paper, ticket or token relating to any game, pretended game or lottery called or known as Peaka Peow or Drop Pan, or any game of a similar nature and to take him forthwith before a justice who shall thereupon cause such person to be searched in his presence."

H There is nothing in the language of s. 18 to justify the search here made. The word "found" does not authorise a search although arrest is authorised in the circumstances specified by the section. Section 22 makes provision for a search in a particular manner where a person is known or suspected of being in possession of, inter alia, ganja. The person to be searched must be taken before a justice who shall thereupon cause such person to be searched in his presence. This was not done. Accordingly, no legal justification for the search having been established, objection was taken to the evidence of the police on the footing that, even if it

(2) [1891-94] All E.R. Rep. 477; [1891] A.C. 304.

(3) [1903] 1 Ch. 188.

were admissible, the court should in its discretion exclude it. The magistrate held that, even if s. 22 of the Constabulary Force Law had not been complied with, the evidence was admissible on the authority of *Kuruma, Son of Kanju v. Reginam* (4). The Court of Appeal took the same view in dismissing the appeal.

The evidence adduced by the prosecution, if accepted as credible as it was, was relevant and amply sufficient to prove the charge. The following is a summary of the evidence: On Jan. 11, 1966, Sgt. Isaacs, A/Cpl. Gayle, A/Cpl. Linton and other police went to 20, Ladd Lane to search for ganja under the Dangerous Drugs Law. The warrant was read by Sgt. Isaacs on the premises. It was read to a woman on the premises and not apparently directly to the appellant, but the appellant and another man, who was also searched, were told that the police were there to carry out a search for ganja. Corporal Gayle searched the appellant and found the ganja in one of his trousers' pockets and arrested him. The ganja was subsequently analysed by the government analyst and a certificate obtained on analysis put in evidence. Although the search was not authorised by the Dangerous Drugs Law or the Constabulary Force Law, there was no evidence that the appellant was wilfully misled by the police officers or any of them into thinking that there was such authorisation. Corporal Gayle admitted at the trial that he knew that the warrant was to search the premises of Joyce Cohen and that it referred to the search of no-one else. He suspected that the appellant might have had ganja on him and did not offer him the opportunity of being searched in front of a justice of the peace although he knew of that right of a citizen. It can, therefore, be said that he should have had the advantage of a search before a magistrate and the choice of this was never offered to him.

The substantial argument on behalf of the appellant was that, in the discretion of the court, the evidence produced as a result of the search, which was the whole of the evidence against him, ought, though admissible, to have been excluded as unfair to him.

Before referring to the *Kuruma* case (4), it is convenient to refer to some earlier decisions. *Jones v. Owens* (5) was a decision of the Divisional Court of the King's Bench Division. There, a constable who had no right to search the person of the appellant did so and, finding twenty-five young salmon in his pocket, summoned him under the Salmon Fishery Acts for illegally having these in his possession. The appellant was convicted by the justices, and on appeal it was said by MELLOR, J. (LUSH, J., concurring) (6):

"I think it would be a dangerous obstacle to the administration of justice if we were to hold, because evidence was obtained by illegal means it could not be used against a party charged with an offence. The justices rightly convicted the appellant."

This matter has been discussed in a number of Scottish cases which were reviewed in the *Kuruma* case (4). It should be prefaced that, in the Scottish cases to which reference will be made, the court is directing its mind to the admissibility of evidence, and in this connexion to a discretion to be exercised whether or not to admit evidence in cases where it could be said to be unfair to the accused to do so.

In the English cases, the evidence under consideration is admissible in law (whether illegally obtained or not) and the exercise of discretion is called for in order to decide whether, even though admissible, it should be excluded in fairness to the accused. The same end is reached in both jurisdictions though by a slightly different route. There is a passage in the opinion of the Lord Justice General (LORD COOPER) in *Lawrie v. Muir* (7) which points to some of the difficulties of the question which is involved. He said (8):

(4) [1955] 1 All E.R. 236; [1955] A.C. 197.

(5) (1870), 34 J.P. 759.

(6) (1870), 34 J.P. at p. 760.

(7) 1950 S.C. (J.) 19.

(8) 1950 S.C. (J.) at pp. 26, 27.



A "From the standpoint of principle it seems to me that the law must strive to reconcile two highly important interests which are liable to come in conflict—(a) the interest of the citizen to be protected from illegal or irregular invasions of his liberties by the authorities, and (b) the interest of the State to secure that evidence bearing upon the commission of crime, and necessary to enable justice to be done shall not be withheld from courts of law on any merely formal or technical ground. Neither of these objects can be insisted upon to the uttermost. The protection of the citizen is primarily protection for the innocent citizen against unwarranted, wrongful and perhaps high handed interference, and the common sanction is an action of damages. The protection is not intended as a protection for the guilty citizen against the efforts of the public prosecutor to vindicate the law. On the other hand, the interest of the State cannot be magnified to the point of causing all the safeguards for the protection of the citizen to vanish, and of offering a positive inducement to the authorities to proceed by irregular methods."

He proceeded (9):

D "Irregularities require to be excused, and infringements of the formalities of the law in relation to these matters are not lightly to be condoned. Whether any given irregularity ought to be excused depends upon the nature of the irregularity and the circumstances under which it was committed. In particular the case may bring into place the discretionary principle of fairness to the accused which has been so fully developed in our law in relation to the admission in evidence of confessions or admissions by a person suspected or charged with crime. That principle would obviously require consideration in any case in which the departure from the strict procedure had been adopted deliberately with a view to securing the admission of evidence obtained by an unfair trick . . . On the other hand, to take an extreme instance figured in argument, it would usually be wrong to exclude some highly incriminating production in a murder trial merely because it was found by a police officer in the course of a search authorised for a different purpose or before a proper warrant had been obtained."

In a later case, *Fairley v. Fishmongers of London* (10), another salmon case where a prosecution for stealing unclean or unseasonable salmon was brought without a search warrant or other authority, the Lord Justice General (LORD COOPER), applying *Lawrie v. Muir* (11), said that he could find nothing to suggest that any departure from the strict procedure was deliberately adopted with a view to obtaining the admission of evidence obtained by an unfair trick. On the other hand, in *H.M. Advocate v. Turnbull* (12), a case in which the accused was charged with making false income tax returns on behalf of a client, LORD GUTHRIE, after referring to the two preceding decisions of the Lord Justice General, excluded documents which had been illegally obtained on the ground of unfairness to the accused, since the legal action of the police was not justified by any circumstances of urgency, but was deliberately undertaken in order to obtain from the accused's private papers evidence on which further charges against him might be founded.

H The discretion in criminal cases to disallow evidence if the strict rules of admissibility would operate unfairly against an accused has been emphasised before this Board in *Noor Mohamed v. Regem* (13), and in the House of Lords in *Harris v. Director of Public Prosecutions* (14) as was pointed out by LORD GODDARD, C.J., in *Kuruma's case* (15). In that case, he said (16):

(9) 1950 S.C. (J.) at p. 27.

(11) 1950 S.C. (J.) 19.

(13) [1949] 1 All E.R. 365; [1949] A.C. 182.

(14) [1952] 1 All E.R. 1044; [1952] A.C. 694.

(15) [1955] 1 All E.R. 236; [1955] A.C. 197.

(16) [1955] 1 All E.R. at p. 239; [1955] A.C. at p. 203.

(10) 1951 S.C. (J.) 14.

(12) 1951 S.C. (J.) 96.

"In their lordships' opinion, the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained."

He said later in commenting on the Scottish cases to some of which reference has been made (17):

"If, for instance, some admission of some piece of evidence, e.g., a document, had been obtained from a defendant by a trick, no doubt the judge might properly rule it out."

An instance of the exclusion of evidence on appeal on the ground that it has been obtained unfairly, although clearly admissible, is to be found in *R. v. Payne* (18). The defendant was taken to a police station following a car collision. He was there asked if he was willing to be examined by a doctor, and it was made clear to him that the purpose of the examination was to see if he was suffering from any illness or disability and that it was no part of the doctor's duty to examine him in order to give an opinion as to his fitness to drive. The defendant then agreed to the doctor's examination. At his trial on charges of driving while unfit through drink and being in charge of a car while likewise unfit, the doctor gave evidence for the prosecution to the effect that the defendant was under the influence of drink to such an extent as to be unfit to drive. On appeal against conviction, although the doctor's evidence was clearly admissible it was held that, in the exercise of his discretion, the chairman of London Sessions should have refused to allow it to be given since, had the defendant realised the doctor would give evidence as to his fitness or unfitness to drive, he might have refused to allow himself to be examined. The appeal was allowed and the conviction quashed. *Callis v. Gunn* (19) is another case where the *Kuruma* case (20) was considered. It was held that evidence of finger prints was relevant and admissible. It had been excluded by magistrates and on appeal by the prosecutor, which was allowed, it was held by the Divisional Court that, while the court had an overriding discretion to disallow evidence if its admission would operate unfairly against a defendant, there were no representations by the police officer who took the finger prints and nothing to justify the justices in excluding the evidence. LORD PARKER, C.J., in referring to the discretion, said that, as he understood it (21),

"... it would certainly be exercised in excluding the evidence if there was any suggestion of it having been obtained oppressively, by false representations, by a trick, by threats, by bribes, anything of that sort."

In *R. v. Murphy* (22), LORD MACDERMOTT, C.J., giving the judgment of the Courts-Martial Appeal Court, made valuable observations on circumstances which will or will not render it unfair to allow admissible evidence to be given against an accused person. There the appellant, a soldier serving in the army, was charged before a district court-martial with the offence of disclosing information useful to an enemy, contrary to s. 60 (1) of the Army Act, 1955. The substance of that case against him was contained in the evidence of police officers who had posed as members of a subversive organisation with which the authorities suspected the appellant to have sympathies, and had elicited the information the subject of the charge, by asking the appellant questions about the security of his barracks. The appellant was convicted and appealed on the ground that the court-martial ought, in its discretion, to have rejected the evidence. The appellant relied in his argument on the use of the word "trick", which appears in *Kuruma's* case (20) and *Callis v. Gunn* (19) and in other cases as well. The court reviewed these and other authorities and, commenting on the passage in LORD PARKER, C.J.'s judgment to which their lordships have already referred, used this language (23):

(17) [1955] 1 All E.R. at p. 239; [1955] A.C. at p. 204.

(18) [1963] 1 All E.R. 848.

(19) [1963] 3 All E.R. 677; [1964] 1 Q.B. 495.

(20) [1955] 1 All E.R. 236; [1955] A.C. 197.

(21) [1963] 3 All E.R. at p. 681; [1964] 1 Q.B. at p. 502.

(22) [1965] N.I. 138.

(23) [1965] N.I. at pp. 147, 148.

- A "We do not read this passage as doing more than listing a variety of classes of *oppressive* conduct which would justify exclusion. It certainly gives no ground for saying that any evidence obtained by any false representation or trick is to be regarded as oppressive and left out of consideration. Detection by deception is a form of police procedure to be directed and used sparingly and with circumspection; but as a method it is as old as the constable in plain clothes and, regrettable though the fact may be, the day has not yet come when it would be safe to say that law and order could always be enforced and the public safety protected without occasional resort to it. We find that conclusion hard to avoid on any survey of the preventive and enforcement functions of the police, but it is enough to point to the salient facts of the present appeal. The appellant was beyond all doubt a serious security risk; this was revealed by the trick of misrepresentation practised by the police as already described; and no other way of obtaining this revelation has been demonstrated or suggested. We cannot hold that this was necessarily oppressive or that LORD PARKER OF WADDINGTON intended to lay down any rule of law which meant that it was the duty of the court-martial, once the trick used by the police had been established, to reject the evidence that followed from it."
- B
- C
- D

Their lordships agree with the judgment of the Courts-Martial Appeal Court in holding that unfairness to the accused is not susceptible of close definition. It was said (24):

- E "... it must be judged of in the light of all the material facts and findings and all the surrounding circumstances. The position of the accused, the nature of the investigation, and the gravity or otherwise of the suspected offence may all be relevant. That is not to say that the standard of fairness must bear some sort of inverse proportion to the extent to which the public interest may be involved, but different offences may pose different problems for the police and justify different methods."

- F The appellant relied in support of his submission that the evidence illegally obtained against him should be excluded on the argument that it was obtained in violation of his constitutional rights, and reference was made to an Irish case of *The People (A.-G.) v. O'Brien* (25), where the point was discussed by the Supreme Court of Eire. The provision of the Jamaican Constitution scheduled to the Jamaica (Constitution) Order in Council, 1962 (26) (para. 19) gives protection to persons against search of persons on property without consent. This constitutional right may or may not be enshrined in a written constitution, but it seems to their lordships that it matters not whether it depends on such enshrinement or simply on the common law as it would do in this country. In either event, the discretion of the court must be exercised and has not been taken away by the declaration of the right in written form.
- G

- H Having considered the evidence and the submissions advanced, their lordships hold that there is no ground for interfering with the way in which the discretion has been exercised in this case. This is not, in their opinion, a case in which evidence has been obtained by conduct of which the Crown ought not to take advantage. If they had thought otherwise, they would have excluded the evidence even though tendered for the suppression of crime.

- I Their lordships will humbly advise Her Majesty that the appeal be dismissed.

*Appeal dismissed.*

Solicitors: *T. L. Wilson & Co.* (for the appellant); *Charles Russell & Co.* (for the Crown).

[*Reported by S. A. HATTEEA, Esq., Barrister-at-Law.*]

(24) [1965] N.I. at p. 149.

(25) [1965] I.R. 142.

(26) S.I. 1962 No. 1550.



## Re WOOTTON'S WILL TRUSTS.

## TROTTER AND ANOTHER v. DUFFIN AND ANOTHER.

[CHANCERY DIVISION (Pennycuik, J.), January 30, 1968.]

*Charity—Power—Collateral power—Objects of power not exclusively charitable—Gift by will to trustees of residuary estate on trusts for accumulation or for payment of income, and power after certain period to pay, or apply capital—Class of beneficiaries defined to include some clearly charitable objects and also some which might not be charitable objects in law—Whether provisions valid.*

*Charity—Uncertainty—Opinion of trustees—Trust for such other organisation or body not being registered as a charity but in the opinion of the testatrix' trustees having charitable objects—Whether a valid charitable trust.*

A testatrix made her will on July 7, 1961. By cl. 13 she bequeathed her residuary estate to her trustees and directed as follows: “(ii) to accumulate the income . . . for a period of twenty-one years from the date of my death and invest such accumulations . . ., or at the absolute discretion of my trustees to pay the whole or any part of such income . . . to such one or more exclusively of the other or others of the beneficiaries mentioned in cl. 14 hereof in such shares and manner and at such times as my trustees shall in their absolute discretion think fit (iii) After the expiration of twenty-one years to pay the whole of the said income to such one or more exclusively of the other or others of the beneficiaries mentioned in cl. 14 hereof in such shares and manner and with such direction as aforesaid until the vesting date mentioned in cl. 15 hereof (iv) Notwithstanding cl. (ii) and (iii) hereof . . . my trustees may at any time until the said vesting date pay, or during such period apply, the whole or any part of the capital then representing my residuary estate to such one or more exclusively of the other or others of the beneficiaries mentioned in cl. 14 hereof in such shares and manner and at such times as my trustees in their own absolute discretion think fit (v) Subject as aforesaid, my trustees shall on the vesting date stand possessed of that part of the capital and income of my residuary estate as shall then remain in the hands of my trustees and subject to the trusts of this my will for such of the beneficiaries mentioned in cl. 14 hereof who shall have received income or capital from my trustees as aforesaid during the period immediately prior to five years of the said vesting date and if more than one in equal shares”. By cl. 14 of the will the beneficiaries were defined to mean “(a) any charitable institution or other charitable body in England or (b) such other organisation or body not being registered as a charity but in the opinion of my trustees as having charitable objects or such other person or persons who owing to age or ill health shall be in need of financial help for their respective care or maintenance as my trustees shall in their absolute discretion from time to time select or determine”. By cl. 15 the testatrix defined the vesting date as sixty years from the date of her death or on twenty years after the death of the last lineal descendant of His Majesty King George V. She died on Oct. 25, 1962. On application for determination of questions arising on cl. 14 and cl. 13 of her will,

**Held:** (i) the objects defined in the first limb of cl. 14 (b), viz., an organisation or body not registered as a charity but in the opinion of the trustees having charitable objects, were not limited to objects that in law were charitable because the qualification was not the intrinsic character of the organisation or body but the opinion of the trustees, and not only might their opinion be mistaken but also the qualification, literally construed, need apply only to some of the objects of the organisation or body; accordingly the trust of income contained in cl. 13 (iii) was void (see p. 621, letter G, and p. 622, letter D, post).

A

*Chichester Diocesan Fund and Board of Finance (Incorporated) v. Simpson* ([1944] 2 All E.R. 60), applied.

B

(ii) as it would be possible to determine under cl. 14 (a) whether any organisation or body was charitable, under the first limb of cl. 14 (b) what was the opinion of the trustees as regards any organisation or body, and under the second limb whether any person complied with the requirements of that clause, the test for the validity of a power was complied with, viz., that it must be possible to ascertain with certainty whether any particular person or organisation complied with the requirements of cl. 14; accordingly the powers contained in cl. 13 (ii) and (iv) were valid (see p. 623, letters D and G, and p. 624, letter D, post).

C

*Re Gestetner (decd.)*, [1953] 1 All E.R. 1150; *Re Coates (decd.)* ([1955] 1 All E.R. 26); *Re Sayer Trust* ([1956] 3 All E.R. 600) and *Re Gulbenkian's Settlement Trusts* ([1967] 3 All E.R. 15) applied.

D

(iii) the ultimate trust of capital in cl. 13 (v) was for such of the beneficiaries as had received income or capital "during the period immediately prior to five years of the said vesting date" and accordingly it would be valid if the specified period were certain; cl. 13 (v) contained a plain misdescription of the period which the testatrix clearly intended, and accordingly the words last quoted would be construed as "during the period of five years immediately preceding the vesting date" with the consequence that the trust so construed was valid (see p. 624, letter G, post).

E

[As to ascertainment of objects of charitable trust, see 4 HALSBURY'S LAWS (3rd Edn.) 275, 277, paras. 573, 574; and for cases on the failure or uncertainty of objects at the commencement of the trust, see 9 DIGEST (Repl.) 408-423, 998-1134.]

Cases referred to:

F

*Chichester Diocesan Fund and Board of Finance (Incorporated) v. Simpson*, [1944] 2 All E.R. 60; [1944] A.C. 341; 113 L.J.Ch. 225; 171 L.T. 141; 8 Digest (Repl.) 395, 875.

*Coates (decd.)*, *Re, Ramsden v. Coates*, [1955] 1 All E.R. 26; [1955] Ch. 495; [1954] 3 W.L.R. 959; 37 Digest (Repl.) 403, 1330.

*Gestetner (decd.)*, *Re, Barnett v. Blumka*, [1953] 1 All E.R. 1150; [1953] Ch. 672; [1953] 2 W.L.R. 1033; 37 Digest (Repl.) 411, 1400.

G

*Gulbenkian's Settlement Trusts, Re, Hacobian v. Mann*, [1967] 3 All E.R. 15; [1968] Ch. 126; [1967] 3 W.L.R. 1112; Digest (Repl.) Supp.

*Inland Revenue Comrs. v. Broadway Cottages Trusts*, *Inland Revenue Comrs. v. Sunnyslands Trust*, [1954] 3 All E.R. 120; [1955] Ch. 20; [1954] 3 W.L.R. 438; 47 Digest (Repl.) 48, 315.

H

*Oxford Group v. Inland Revenue Comrs.*, [1949] 2 All E.R. 537; 28 Digest (Repl.) 316, 1386.

*Sayer Trust, Re, MacGregor v. Sayer*, [1956] 3 All E.R. 600; [1957] Ch. 423; [1957] 2 W.L.R. 261; 37 Digest (Repl.) 404, 1332.

*Shaw (decd.)*, *Re, Public Trustee v. Day*, [1957] 1 All E.R. 745; [1957] 1 W.L.R. 729, on appeal, C.A.; [1958] 1 All E.R. 245, n.; Digest (Cont. Vol. A) 94, 126c

I

### Adjourned Summons.

This was an application by originating summons dated Oct. 24, 1966, by the plaintiffs, Hugh Stuart Stucley Trotter and Laurence Parsons, who were the executors and trustees of the will and codicil of Clara Henrietta Wootton ("the testatrix"), for the determination of the following questions:—(i) whether on the true construction of the will, cl. 14 thereof effectively defined the persons or objects entitled or eligible to receive any part of the income or capital of the residuary estate of the testatrix or whether such clause was void on the ground of uncertainty or otherwise; (ii) if it were determined that cl. 14 effectively

defined the persons entitled or eligible as aforesaid, whether on the true construction of the will the plaintiffs as trustees might lawfully apply the residuary estate in accordance with the direction of the testatrix contained in all or any one or more and, if so, which of the following sub-clauses of her will, viz., cl. 13 (ii), (iii), (iv), (v). The relevant provisions of the testatrix' will are set out at letters F to I, below, and p. 621, letter A, post. The defendants were Angela Phyllis Duffin, who claimed as a next-of-kin of the testatrix to be entitled to participate in any property as to which she had died intestate and Her Majesty's Attorney-General.

*Edward Bagshawe* for the plaintiffs, the executors and trustees.

*M. W. Cockle* for the first defendant, the next-of-kin.

*N. C. H. Browne-Wilkinson* and *Jonathan Parker* for the Attorney-General.

**PENNYCUICK, J.:** This originating summons raises certain questions on the construction and effect of the will of Clara Henrietta Wootton to whom I will refer as "the testatrix". The principal question is concerned with the validity and effect of the trusts and powers created in relation to her residuary estate. The testatrix made her will on July 7, 1961. She appointed the plaintiffs on the summons, Mr. Trotter and Mr. Parsons, to be her executors and trustees. She made a number of specific and pecuniary legacies. By cl. 13 of her will she bequeathed her residuary estate to the trustees and directed them to invest it. I will read the succeeding sub-clauses of cl. 13 and cl. 14:

"13 . . . (ii) To accumulate the income arising therefrom for a period of twenty-one years from the date of my death and invest such accumulations in any of the investments hereby authorised or at the absolute discretion of my trustees to pay the whole or any part of such income as aforesaid to such one or more exclusively of the other or others of the beneficiaries mentioned in cl. 14 hereof in such shares and manner and at such times as my trustees shall in their absolute discretion think fit.

"(iii) After the expiration of twenty-one years to pay the whole of the said income to such one or more exclusively of the other or others of the beneficiaries mentioned in cl. 14 hereof in such shares and manner and with such direction as aforesaid until the vesting date mentioned in cl. 15 hereof

"(iv) Notwithstanding cl. (ii) and (iii) hereof I declare that my trustees may at any time until the said vesting date pay or during such period apply the whole or any part of the capital then representing my residuary estate to such one or more exclusively of the other or others of the beneficiaries mentioned in cl. 14 hereof in such shares and manner and at such times as my trustees shall in their own absolute discretion think fit.

"(v) Subject as aforesaid my trustees shall on the vesting date stand possessed of that part of the capital and income of my residuary estate as shall then remain in the hands of my trustees and subject to the trusts of this my will for such of the beneficiaries mentioned in cl. 14 hereof who shall have received income or capital from my trustees as aforesaid during the period immediately prior to five years of the said vesting date and if more than one in equal shares

"14. The beneficiaries for the purpose of cl. 13 of this my will shall mean: (a) any charitable institution or other charitable body in England or (b) such other organisation or body not being registered as a charity but in the opinion of my trustees as having charitable objects or such other person or persons who owing to age or ill health shall be in need of financial help for their respective care or maintenance as my trustees shall in their absolute discretion from time to time select or determine."

By cl. 15 the testatrix defines the vesting date as meaning sixty years from the date of her death



A "or the date of expiration of the period of twenty years after the death of the last to die of the lineal descendants living at the date of the death of his late Majesty King George V (whichever shall first occur) . . ."

The testatrix made a codicil to her will which is not material. She died on Oct. 25, 1962. Her will was duly proved. Her net residuary estate is of the order of £68,000.

B The originating summons raises a number of questions on the will. The plaintiffs are the executors and trustees; the first defendant is Mrs. Duffin who is joined to represent the next-of-kin of the testatrix, and the Attorney-General is the second defendant. The first question raised by the summons is in these terms:

C "1. Whether upon the true construction of the said will cl. 14 thereof effectually defines the persons or objects entitled or eligible to receive any part of the income or capital of the residuary estate of the testatrix or whether such clause is void upon the ground of uncertainty or otherwise."

That question is closely bound up with question 2 which is in these terms:

D "2. If it shall be determined that the said clause effectually defines the persons entitled or eligible as aforesaid whether upon the true construction of the said will the plaintiffs as trustees thereof may lawfully apply the said residuary estate in accordance with the direction of the testatrix contained in all or any one or more and if so which of the following sub-clauses of her will that is to say: 13 (ii) 13 (iii) 13 (iv) and 13 (v)."

E It is, I think, now common ground that the two questions are linked together but do not fall to be answered in quite those terms. The first question to be considered is whether the class of beneficiaries as defined in cl. 14 of the will includes non-charitable as well as charitable objects. It is clear that the class of beneficiaries under cl. 14 (a) are charitable, namely "any charitable institution or other charitable body in England". It is also clear that the class named in

F the second limb of cl. 14 (b), namely "persons who owing to age or ill health shall be in need of financial help for their respective care or maintenance", represents the proper object of a charitable gift, that is, a gift for the relief of poverty. The difficulty has been occasioned by the first limb of that cl. 14 (b), namely "such other organisation or body not being registered as a charity but in the opinion of my trustees as having charitable objects . . ." It is, I think,

G really clear that the object comprised in that limb of cl. 14 (b) cannot be regarded as a charitable object. There are two objections to its being so regarded. First, the qualification is not the intrinsic character of the organisation or body, but the opinion of the trustees, and the trustees might be mistaken in their opinion that the objects of any given organisation or body were in law charitable. In the second place it would, on the literal meaning of the words used, be sufficient  
H that the trustees should be of the opinion that certain of the objects of the organisation or body were charitable, notwithstanding that even in the opinion of the trustees the organisation or body had other objects which were not charitable. There is there no such word as "exclusively" or "only".

I Counsel for the Attorney-General contended, without any show of optimism, that the trustees can only properly form the opinion that the objects of a given body are charitable if those objects are in truth charitable. That, I think, is simply to strike out the opinion of the trustees as part of the qualification, and such a construction is, I think, not legitimate. If this point were otherwise doubtful it would be concluded by the decision of the Court of Appeal in the *Oxford Group v. Inland Revenue Comrs.* (1), where one of the objects of the company concerned was to do all such other things as are incidental or conducive or the association may think conducive to the attainment of the above objects

or any of them. It was held that the object was not charitable (see per COHEN, A.L.J. (2):

"Then, again, under para. (10) of sub-cl. (C), the association is empowered to do, not merely things which are incidental or conducive to the attainment of the main object, but also such things as the association may think conducive to it. In other words, the question which the court would have to decide, if any activity of the association was being challenged as being ultra vires, would be not whether, in the opinion of the court, the activity was conducive to the main object, but whether the association, in undertaking it, had thought it conducive."

It would follow that if there were a trust of the residuary estate for the beneficiaries as defined in cl. 14, that trust would be void. (See, for example, *Chichester Diocesan Fund and Board of Finance (Incorporated) v. Simpson* (3). However, that is by no means the end of the matter because the testatrix has not purported to create a trust for the beneficiaries as defined in cl. 14. What she has done in cl. 13 is to create a number of powers and trusts in favour of the beneficiaries or some of them. To get it out of the way, the trust in sub-cl. (iii) is clearly void after the expiration of twenty-one years to pay the whole of the income between the beneficiaries.

It remains to consider the powers in cl. 13 (ii) and cl. 13 (iv) and the ultimate trust in cl. 13 (v). I will consider first the powers. The general principle as to the validity of a power, where it is impossible to make a complete list of the possible objects of the power, has been considered in a number of cases, in particular *Re Gestetner (decd.)*, *Barnett v. Blumka* (4), *Re Coates (decd.)*, *Ramsden v. Coates* (5) and *Re Sayer Trust*, *MacGregor v. Sayer* (6). I will cite the last-mentioned case because it raises in a clear form the distinction between the validity of a trust in such circumstances and the validity of a power in such circumstances. In that case it was held (i) that as, on the evidence, it was impossible to make a complete list of persons who had been employed by the company since its incorporation, the trust to distribute the surplus was necessarily void, and the ultimate surplus was held on a resulting trust for the settlor. *Inland Revenue Comrs. v. Broadway Cottages Trust*, *Inland Revenue Comrs. v. Sunninglands Trust* (7) applied. (ii) That since, to exercise the powers collateral, it was not necessary to ascertain a whole class of beneficiaries, but only whether a particular praepositus was an object of the power (see *Re Gestetner (decd.)* (4) and *Re Coates (decd.)* (5)), and since there was sufficient certainty in cl. 4 of the deed to make that possible, the question whether any particular praepositus was a "dependant" or a "dependent relative" could be answered by the committee or by the court. (iii) That the absence of a gift over on failure to exercise any of the powers did not make the power invalid and inoperative so that the fund was held on trust for the settlor from the execution of the deed, as, in default of the execution of the trust to distribute the surplus, there arose by operation of law a trust in favour of the settlor which the court would execute.

UPJOHN, J., said this (8):

"A different and difficult problem arises, however, with regard to the exercise of the powers during the life of the fund under cl. 4 and on the winding-up of the fund under cl. 6, those both being, as I have said, not trust powers but powers collateral. In such a case the authorities establish that it is not necessary that the whole class of possible beneficiaries should be ascertained or ascertainable. That is in complete contrast, of course,

(2) [1949] 2 All E.R. at pp. 544, 545.

(3) [1944] 2 All E.R. 60; [1944] A.C. 341.

(4) [1953] 1 All E.R. 1150; [1953] Ch. 672.

(5) [1955] 1 All E.R. 26; [1955] Ch. 495.

(6) [1956] 3 All E.R. 600; [1957] Ch. 423.

(7) [1954] 3 All E.R. 120; [1955] Ch. 20.

(8) [1956] 3 All E.R. at pp. 603, 604; [1957] Ch. at p. 431.

A with the case of a trust power. It is enough, if it is possible to treat it with sufficient certainty, whether any particular praepositus is an object of the power or not."

He then refers to the cases which I have mentioned.

B I should, I think, at this stage refer to the recent case of *Re Gulbenkian's Settlement Trusts, Hacobian v. Maun* (9) in which the Court of Appeal followed the principle laid down in such cases as *Re Gestetner (decd.)* (10) and *Re Sayer Trust* (11). LORD DENNING, M.R., however, used slightly different language. He said this (12):

C "4: *Powers collateral.* These are cases where a trustee has a power, but not a duty, to apply the capital or income of a fund amongst a group of persons. In such cases, even though the group may be uncertain and imprecise, nevertheless the gift is not bad so long as there are some persons who come fairly and squarely within it."

D That is not quite the same test as laid down in *Re Gestetner (decd.)* (10) and *Re Sayer Trust* (11), as I read them. In those cases the test laid down was that it would be possible to say of any given individual whether or not he was an object of the power. In the passage in LORD DENNING's judgment it is sufficient to show that there are some persons who come fairly and squarely within the power. I am not concerned in the present case with any distinction there may be in the test as laid down in those authorities. I am content to take the more stringent test as laid down in *Re Sayer Trust* (11).

E In the present case the qualification of a beneficiary is such that it would be possible to determine with certainty whether any given organisation or body fell within it. The first group is charitable institutions or other charitable bodies: it would always be possible to tell of any institution or body whether or not it was charitable. The second group is organisations or bodies which in the opinion of the trustees have charitable objects. Again it would always be possible to determine with certainty what is the opinion of the trustees as regards any given organisation or body. The third group is persons who owing to old age or ill health are in need of financial help for their respective care or maintenance. Again, one can always determine with certainty, given all the facts, whether any particular person complies with that requirement.

F Unless there is any more to it, it follows that the power contained in cl. 13 (ii) is valid, that is to say the trustees during the twenty-one year period have power to apply any part of the income for any one or more bodies or persons who possess the qualification as beneficiaries laid down in cl. 14. Equally, the power to apply capital contained in cl. 13 (iv) is valid. It is always possible for the trustees to determine with certainty whether any given body or person complies with the requirements of cl. 14.

G Counsel for the next-of-kin contended that a different rule applied according to whether the objects of the power were individuals or objects other than individuals such as here, institutions, bodies and organisations. He was not able to suggest any ground in principle for that distinction, and he cited no authority which bore it out. He did, however, refer to the speech of VISCOUNT SIMONDS in the *Chichester Diocesan Fund* case (13) where he said this:

H "It is a cardinal rule, common to English and to Scots law, that a man may not delegate his testamentary power: to him the law gives the right to dispose of his estate in favour of ascertained or ascertainable persons. He does not exercise that right if in effect he empowers his executors to say what persons or objects are to be his beneficiaries. To this salutary

(9) [1967] 3 All E.R. 15; [1968] Ch. 126.

(10) [1953] 1 All E.R. 1150; [1953] Ch. 672.

(11) [1956] 3 All E.R. 600; [1957] Ch. 423.

(12) [1967] 3 All E.R. at p. 18; [1968] Ch. at p. 133.

(13) [1944] 2 All E.R. at p. 74; [1944] A.C. at p. 371.



rule there is a single exception: a testator may validly leave it to his A  
 executors to determine what charitable objects shall benefit, so long as  
 charitable and no other objects may benefit."

It seems to me that that passage is addressed entirely to the case of a trust and  
 that LORD SIMONDS is not addressing himself to the case of a collateral power  
 which was not before the court. I would add that if that passage were addressed B  
 to the case of collateral powers, such powers would not only be invalid where  
 they are in favour of objects, they would equally be invalid where they are in  
 favour of individuals, so that such cases as *Re Gestetner (decd.)* (14), *Re Sager*  
*Trust* (15) and *Re Galbenkian's Settlement Trusts* (16) would have been wrongly  
 decided.

I was referred on this point to *Re Shaw (decd.)*, *Public Trustee v. Day* (17).  
 That was a case of a trust, and HARMAN, J., held that he was bound by authority C  
 to treat the trust as invalid and he held, again on authority, that it was not  
 open to the court to validate the trusts by treating them as powers. He said  
 this (18):

"In my judgment, I am not at liberty to validate this trust by treating  
 it as a power."

I think that it is implicit in his judgment, that if he could have treated the trust D  
 as a power and not as a trust, then he would have held it to be valid.

I conclude, therefore, that the powers in sub-cl. (ii) and (iv) of cl. 13 are  
 valid. It remains to consider sub-cl. (v). This point is not, perhaps, of very great  
 practical importance since, if sub-cl. (v) were invalid, the trustees could effec- E  
 tively devote the whole estate to charity by exercising the power under sub-cl.  
 (iv). However, I must decide the point. Sub-clause (v) represents an ultimate  
 trust of capital, not for the beneficiaries as a whole which would admittedly be  
 void, but for such of the beneficiaries mentioned in cl. 13 "... who shall have  
 received income or capital from my trustees as aforesaid during the period  
 immediately prior to five years of the said vesting date and if more than one  
 in equal shares." The effect of that provision is that capital is divisible in equal F  
 shares amongst those of the beneficiaries to whom there has been a distribution  
 of either income or capital during a specified period. If the period is certain  
 there appears to be no reason why that trust should not be valid. The difficulty  
 lies in the extremely odd words which the testatrix has used to describe the  
 period. I will repeat those words: "... during the period immediately prior  
 to five years of the ... vesting date ..." Those words are on the face of G  
 them neither sense nor grammar. There are, I think, two possible alternatives:  
 either to treat the period as so uncertain that the court cannot give effect to the  
 clause or to treat the words as a plain misdescription of a certain period, namely  
 the period of five years immediately preceding the vesting date. I feel no doubt  
 reading the clause that that was the intention of the testatrix and it is the  
 obvious period to choose. A period calculated back from any other date would H  
 be extraordinarily capricious and I think with some hesitation that I am at  
 liberty to treat the words that she has used as a mere garbled misdescription  
 of that period.

*Declaration accordingly.*

Solicitors: *Trotter, Leaf & Pitcairn* (for the plaintiffs and the first defendant);  
*Treasury Solicitor.* I

[Reported by JENIFER SANDELL, Barrister-at-Law.]

(14) [1953] 1 All E.R. 1150; [1953] Ch. 672.

(15) [1956] 3 All E.R. 600; [1957] Ch. 423.

(16) [1967] 3 All E.R. 15; [1968] Ch. 126.

(17) [1957] 1 All E.R. 745.

(18) [1957] 1 All E.R. at p. 759, letter D.

A

## Re PARADISE MOTOR CO., LTD.

[COURT OF APPEAL, CIVIL DIVISION (Willmer, Danckwerts and Russell, L.J.J.),  
January 15, 16, 17, 18, 19, February 15, March 7, 1968.]

B

*Company—Shares—Transfer—Proper instrument—Instrument that would attract stamp duty, not necessarily complying with all formalities of articles of association—Companies Act, 1948 (11 & 12 Geo. 6 c. 38), s. 75.*

*Gift—Disclaimer—Knowledge of nature of donee's possible claim—Finality of oral disclaimer of attempted gift inter vivos—Disclaimer operating by way of avoidance not by way of disposition of equitable interest—Writing not required under Law of Property Act, 1925 (15 & 16 Geo. 5 c. 20), s. 53.*

C

In the compulsory liquidation of a company questions arose whether there had been an effective gift by W. of 350 shares in the company to J. and whether, if W. had intended such a gift, J. had disclaimed it. At the age of sixteen J., who was W.'s stepson and had previously been in the custody of J.'s father, came to live with W. and his wife and was treated by W. as a member of the family. W. had built up the company's prosperous business; he was a working mechanical engineer, and a dominant, secretive and difficult man. During service in the army J. married; he returned to live with W. and his wife for three weeks only in 1948 and then moved into his own home. In 1948 W. bought the 350 shares and directed that they be put in the name of J. The transfer did not name the transferee, but it bore a signature purporting to be that of J. J. denied that he had signed it.

E

By art. 8 of the company's articles of association a transfer of shares had to be signed by both transferor and transferee and had to be attested; and by s. 75 of the Companies Act, 1948, it was not lawful to register a transfer unless a proper instrument of transfer were delivered to the company. The register of members showed 350 shares transferred to J. in 1948 and a transfer of three hundred of them by J. to W. in 1954. Certificates for the 350 and the fifty shares were issued in J.'s name and signed by W. On subsequent

F

changes of the company's name fresh certificates were issued and signed by W. W. alleged that in 1956 J. executed a transfer of fifty shares to him. In September, 1965, the liquidator wrote to J. telling him of these matters and asking whether he claimed to be a shareholder. J. returned the letter with the answer "no" against each question. In March, 1966, according to the evidence, a message was communicated to W. from J. in answer to a question put to him at W.'s request by a third person, that J. said that he had no shares, wanted no shares, and, if any money were to come to him from W., he, J., would not take it. J. did not substantially dispute this in his evidence, and he testified that he first learnt of the matters stated in the liquidator's letter when he received it in September, 1965.

G

H

**Held:** (i) (a) the relationship between W. and J. was such as to give rise in 1948 to a presumption of advancement, and, on this ground, as well as on the evidence, an intention on the part of W. to make a gift of the 350 shares was established (see p. 629, letter I, post).

I

(b) the phrase "proper instrument" in s. 75 of the Companies Act meant an instrument such as would attract stamp duty, not an instrument complying with every formality required by the articles of association (see p. 630, letter H, post); and, in the circumstances, having regard to the lapse of time and the issue and revisions of share certificates, the failure to procure the execution of the transfer of the 350 shares by J. amounted only to an irregularity, and W. had made an effective gift, so far as it lay in his power to do so, of the 350 shares (see p. 630, letter E, post).

(i) J. had effectively and bindingly disclaimed the gift of the 350 shares because—

(a) having sufficient knowledge of the nature of his possible claim to the

shares, the message that he had sent to W. in March, 1966, constituted a disclaimer, and writing was not made necessary for a disclaimer by s. 53 of the Law of Property Act, 1925, since a disclaimer operated by way of avoidance not by way of disposition (see p. 632, letters B and C, post).

(b) the company's register was rectifiable without any execution of a transfer by J. for the purposes of s. 75 of the Act of 1948, as disclaimer related only to the beneficial interest and avoided the gift (see p. 632, letter E, post).

(c) a disclaimer of an attempt inter vivos to make a gift could not be withdrawn (see p. 632, letter F, post).

*Re Cranstoun's Will Trusts, Gibbs v. Home of Rest for Horses* ([1949] 1 All E.R. 871) distinguished.

Appeals dismissed.

[As to the gift of shares in a company, see 18 HALSBURY'S LAWS (3rd Edn.) 380, para. 723; and as to the need for execution and registration of transfers of shares, see 6 *ibid.*, 256, 258, paras. 534, 537.

As to the disclaimer of a gift, see 18 HALSBURY'S LAWS (3rd Edn.) 389, para. 741; and for cases on the subject, see 25 DIGEST (Repl.) 571, 152-154.

As to the need for writing for the transfer of beneficial interests, see 11 HALSBURY'S LAWS (3rd Edn.) 336, 337, para. 542.

For the Law of Property Act, 1925, s. 53, see 20 HALSBURY'S STATUTES (2nd Edn.) 551; and for the Companies Act, 1948, s. 75, see 3 *ibid.*, p. 522.]

Cases referred to:

*Bennet v. Bennet*, (1879), 10 Ch.D. 474; 40 L.T. 378; 25 Digest (Repl.) 561, 99.

*Cranstoun's Will Trusts, Re, Gibbs v. Home of Rest for Horses*, [1949] 1 All E.R. 871; [1949] Ch. 523; [1949] L.J.R. 1066; 48 Digest (Repl.) 255, 2298.

*Naas v. Westminster Bank, Ltd.*, [1940] 1 All E.R. 485; [1940] A.C. 366; 109 L.J.Ch. 138; 162 L.T. 277; 17 Digest (Repl.) 234, 373.

*Rose, Re, Rose v. Inland Revenue Comrs.*, [1952] 1 All E.R. 1217; [1952] Ch. 499; 21 Digest (Repl.) 25, 99.

*Stratton's Deed of Disclaimer, Re, Stratton v. Inland Revenue Comrs.*, [1957] 2 All E.R. 594; [1958] Ch. 42; [1957] 3 W.L.R. 199; 21 Digest (Repl.) 15, 49.

*Young, Re, Fraser v. Young*, [1913] 1 Ch. 272; 82 L.J.Ch. 171; 108 L.T. 202; 48 Digest (Repl.) 255, 2297.

### Appeals.

These were appeals from two orders of PENNYCICK, J., both dated May 4, 1967, and made respectively on applications by two summonses, one dated Apr. 14, 1966, by Mr. Albert Edward Watson, seeking an order that the list of contributories be varied by substituting his name for that of Mr. Eric Johns. Mr. Eric Johns was the registered holder of fifty shares in Paradise Motor Co., Ltd. ("the company"). On this summons the trial judge made an order declaring that Mr. Johns's name was never validly entered on the register. The second summons, dated Apr. 22, 1966, was issued by Mr. Johns, who thereby sought an order that his name should be included in the list of contributories as the holder of 350 shares in the company; three hundred of these shares were shares registered in Mr. Watson's name and fifty were the shares to which the first summons related. On May 4, 1967, the trial judge dismissed Mr. Johns' summons. Mr. Johns appealed by two notices of appeal, each dated Aug. 11, 1967, against the declaration made on Mr. Watson's summons and the dismissal of Mr. Johns' summons. By a respondent's notice dated Oct. 6, 1967, Mr. Watson gave notice that he would contend on the appeal that the order of May 4, 1967, should be varied by ordering Mr. Johns's name to be removed from the list of contributories and, if necessary, that the liquidator should re-settle the list of contributories. The facts are set out in the judgment of the court.



- A *Jeremiah Harman* for the appellant, Mr. Eric Johns.  
A. L. Figgis for the respondent, Mr. Albert John Watson.  
E. W. Hamilton for the Official Receiver in Companies Liquidation.

*Cur. adv. vult.*

Mar. 7. DANCKWERTS, L.J., read the following judgment of the court:

- B This is an appeal in the winding-up of the company from a judgment of PENNYCUICK, J. The appeal is in respect of 350 shares, or alternatively fifty shares out of the company's one thousand issued shares of £1 each.

- The compulsory winding-up order on the petition of a creditor was made on Nov. 23, 1965. Usually in such a situation there is no competition to be included in the list of contributories, but on this occasion, as the result of the sale of the company's business, there is a surplus of £12,000 to be divided between the shareholders of the company. By one summons in the liquidation dated Apr. 14, 1966, Mr. Albert John Watson claims an order that the list of contributories be varied by substituting his name for that of Mr. Eric Johns in respect of fifty shares. By the other summons dated Apr. 22, 1966, Mr. Eric Johns seeks an order that the list of contributories be varied by including his own name as holder of 350 shares. The fifty shares claimed by Mr. Watson are part of the 350 shares claimed by Mr. Eric Johns.

- The company carried on the business of motor repairers. It was incorporated on June 27, 1946, as a private company under the name of Kirkstall Motors (Leeds), Ltd. by Mr. Watson and one John Dean, to each of whom 350 fully paid shares were allotted for cash. The name was changed in 1949 to Spread Eagle Motor Co., Ltd., and in 1956 the company's name was changed to its present name.

- E In 1948 Mr. John Dean sold his 350 shares to Mr. Watson for £300 and some vehicles. Mr. John Dean executed a transfer of his 350 shares, and the validity and effect of that transfer is one of the issues in this case.

- The evidence at the hearing was by affidavit, but the deponents were all cross-examined and an additional witness (Mr. Dennis Watson) was called. The main issue in the case was whether a gift of the 350 shares had been made and completed by Mr. Watson to Mr. Eric Johns. The transfer of the 350 shares bore the name of Mr. Eric Johns (who is a son of Mrs. Watson by her former marriage), but he in his evidence denied that he had ever executed it, and this is one of the mysterious features of the case. The transfer did not name the transferee in the space provided but this is not material. The presence of the Johns signature can be taken only as indicating that Mr. Eric Johns was intended as transferee. Article 8 of the company's articles of association provides:

- H “(a) The transfer of a share shall be in writing signed by both the transferor and the transferee and attested and the transferor shall be deemed to remain the holder of the shares until the name of the transferee is entered in the register of members in respect thereof. (b) The instrument of transfer of any share shall be in writing in the usual common form.”

Mr. Watson seems to have handed the transfer to Mr. Kirkman, the secretary of the company, and he entered the transfer in the register of transfers and the name of Mr. Eric Johns in the register of members.

- I The judge's estimate of the characters of the witnesses is very material. He said in his judgment:

“Mr. Watson is a working mechanical engineer, now in his sixties. He built up a prosperous business by his own exertions. He possesses great industry and resolution. He does not pretend to education, but has a full share of cunning. His own assessment of himself was that he was as honest as he could afford to be. In 1942 he was sentenced to twelve months' imprisonment for conspiracy to defraud an insurance company. Mr. Johns describes him as a 'domineering, secretive and difficult man with whom to

deal'. After hearing his evidence, I find this description justified. I would not be disposed to accept his evidence except where it is corroborated. Mrs. Watson gave evidence on one particular incident. I do not regard her evidence as adding anything to that of her husband. The other witness called on behalf of Mr. Watson was Mr. Kirkman, a certified accountant practising at 57, Headrow, Leeds, who was the secretary of the company. Mr. Kirkman is a very elderly man; he was not meticulous in carrying out his duties as secretary, at any rate in regard to transfers. His recollection of events which took place more than ten years ago was not very clear, but I thought he did his best to be truthful. Mr. Johns is a man of about forty. He was during certain periods employed by the company. On two occasions by his own admission he misappropriated moneys of the company, although on the second occasion he was compelled to restore them. He now runs a business of his own with his half-brothers. He was himself not above reproach as a witness in every particular, but his evidence was forthright, and on the whole seemed to me to be truthful. The only other witnesses were Mr. Johns's two half-brothers. Their evidence was rather on the edge of the cardinal issue in the case. I saw no reason to disbelieve them."

The facts as found by the judge were as follows:

"Mr. Watson has at all material times lived with Mrs. Watson in the Leeds district. From 1948 onwards he had the entire control of the company's business. Mr. Johns came to live with Mr. and Mrs. Watson at the age of fourteen. He was in the army from 1946 to 1948, during which period he married. On his discharge from the army he came to stay with Mr. and Mrs. Watson for some three weeks before moving to a house of his own. He has not since lived with them. He was employed by the company before he went into the army, and thereafter again until 1954. In 1953 Mr. Watson dismissed him on the first occasion when he misappropriated the company's moneys, but took him back the next day. His name appears as a director of the company from 1949 to 1953, but he never received notice of or attended board meetings. Indeed, according to Mr. Kirkman, there never were any board meetings. He never took part in the management of the company, and Mr. Watson regarded him simply as a workman."

The judge accepted the evidence of Mr. Eric Johns that he did not execute the transfer in 1948. If he did not sign the transfer, what purports to be his signature must be a forgery, and must have been put on either by Mr. Watson or by Mr. Kirkman, whose signature "J. Kirkman, 57 Headrow, Leeds, accountant" appears as attesting witness, and there is no suggestion that his signature is not genuine as well as Mr. Kirkman's signature attesting that of Mr. John Dean. The judge understood indeed that Mr. Kirkman in his evidence said that he remembered Mr. Eric Johns executing the transfer in his office, but Mr. Kirkman's evidence is so confusing, and at times impossible to interpret, that not much reliance can be placed on this.

A curious feature of the case is that the signature "Eric Johns" on the 1948 transfer, and the signature "Eric Johns" on an alleged transfer by which it is alleged that three hundred of the shares were re-transferred by Mr. Eric Johns to Mr. Watson in 1954, are very like and have a resemblance to the signature "E. Johns" on Mr. Eric John's affidavit.

Mr. Watson in his evidence, of course, said that he never made any gift of the shares to Mr. Eric Johns. His expression as: "I did not give no shares to no-one." But as the judge rejected his evidence, this denial cannot carry any weight.

The two main questions, therefore, seem to us to be—(i) Did Mr. Watson intend to make a gift of the 350 shares to Mr. Eric Johns in 1948? (ii) If he did,

A did he complete the gift in such a way that his intention to make such a gift took effect?

Mr. Kirkman's evidence was that Mr. Watson's instructions were to put the 350 shares in Mr. Eric John's name, and that he (presumably Mr. Watson) said that he would like to do something with them. Mr. Kirkman said: "I do not know of anything, but the 350 shares were put in his name at the beginning"; that must refer to Mr. Eric Johns. In the same passage, however, Mr. Kirkman says: "From the beginning we seemed to hold the 350 in abeyance somewhat." In re-examination it seems Mr. Kirkman was asked: "Was the word 'gift' ever used?" and his answer was: "I would not say that, I do not know, not with me it was not." Mr. Kirkman's evidence is not made any easier to understand by the fact that sometimes he is talking of the 1954 transfer by which it is alleged that three hundred of the shares were transferred back to Mr. Watson by Mr. Johns, leaving fifty shares only in Mr. Johns's name.

Finally the judge said that he felt little doubt, and he so found, that Mr. Watson's intention was to make a beneficial disposition in favour of Mr. Johns which would be effective unless and until he chose to recall it. We are a little puzzled by the reference to recall of the gift, because the rule is that a gift cannot be recalled once it has been made unless an arrangement has been made with the donee to that effect. There could not be any such arrangement in the present case. Perhaps the judge meant that the intention to recall, if in Mr. Watson's mind, could not be effective.

The judge, however, had rejected the argument that Mr. Eric Johns was in the position of a "quasi-child" (as it has been called) of Mr. Watson. On this point (which the judge described as a border-line case) we think that he came down on the wrong side. We have been taken through the numerous cases on the subject of a person assuming the position of a parent to a person under the age of twenty-one, and there are certainly some cases which seem to limit the relationships in which such a situation can arise rather strictly. SIR GEORGE JESSEL, M.R., in *Bennet v. Bennet* (1), however, re-stated the law on the subject in such a way that the matter is dependent on the circumstances of the individual case. The position is in our view stated correctly in SNELL'S PRINCIPLES OF EQUITY (1966 Edn.) at pp. 192, 194, supported by UNDERHILL ON LAW OF TRUSTS AND TRUSTEES (11th Edn.) at pp. 193, 194. The matter is of importance on the question of onus of proof, for if there is a presumption of advancement, the onus is on those who dispute the gift, while if there is no presumption of advancement, there is primarily a resulting trust in favour of the person who paid the money, which has to be rebutted by effective evidence. The judge was, we think, mistaken in thinking that Mr. Eric Johns came to live with Mr. Watson and his mother at the age of fourteen; we think that it must have been at the age of sixteen. On the dissolution of his mother's first marriage, his father was given the custody of Eric, and we think that it was not until that order expired when he was sixteen that Eric went to live with Mr. Watson. Mr. Watson was, however, obviously very fond of him and treated him as a member of the family and as one of his sons, and on the same footing as his three sons by Eric's mother both before and after he actually married Eric's mother.

Eric went into the army in 1946, but when he was demobilised in 1948, though he married before he left the army, he rejoined the Watson family with his wife until he obtained a home of his own. Mr. Watson treated him with the indulgence which a father would show to a son until the final break when the step-brothers left with Eric to set up their own business. We think that there was the necessary relationship to create a presumption of advancement. We see no reason, therefore, to differ from the judge's finding of an intention to make a gift of the 350 shares, though we differ from him in his rejection of the presumption of advancement.



The next question then is whether the gift was effective. As has been mentioned, the transfer does not comply with the articles of the company (art. 8) because it has not been signed by the transferee. A further difficulty is caused by the provisions of s. 75 of the Companies Act, 1948, which provides as follows:

“Notwithstanding anything in the articles of a company, it shall not be lawful for the company to register a transfer of shares in or debentures of the company unless a proper instrument of transfer has been delivered to the company: . . .”

The transfer to the present case is certainly an instrument, and it appears that the section was passed to make sure that there was an instrument which could be stamped with stamp duty. The question is whether in the present case it is a proper instrument of transfer so as to satisfy the section, and whether the absence of the transferee's signature makes the transfer a nullity. Mr. Dean, the transferor, duly signed the transfer, and Mr. Watson (who had paid the price for the 350 shares) directed Mr. Kirkman, the company's secretary, to register the transfer and to register Mr. Eric Johns as the owner of the shares, which Mr. Kirkman accordingly did. Further, share certificates were issued showing Mr. Eric Johns as the owner of the 350 shares, and these were signed by Mr. Watson as director of the company, and fresh certificates were issued and signed by Mr. Watson each time that the name of the company was changed.

There is plenty of authority for the proposition that neglect of unessential matters on a transfer may not be fatal to the transfer's validity, and may amount to mere irregularities; see BUCKLEY ON THE COMPANIES ACTS (13th Edn.) at pp. 810-811 in the notes to art. 22 of Table A. It is stated on p. 811: “. . . lapse of time, coupled with recognition of the transferee as a shareholder, may render the transfer incapable of being impeached.” In view of the lapse of time and Mr. Watson's actions in regard to the shares, Mr. Watson surely cannot now be allowed to take advantage of his own failure to procure execution of the transfer by Mr. Eric Johns. This can be treated as a mere irregularity. The transfer was not invalid and Mr. Watson may be treated as having done everything which was needed on his part to complete the gift of the shares; compare *Re Rose, Rose v. Inland Revenue Comrs.* (2).

The judge considered that the transfer was a nullity for lack of the transferee's signature, but as indicated, these being fully paid shares, we consider that it may be regarded as an irregularity. He also considered that it was not a “proper instrument” for the purposes of s. 75, and that therefore the registration was illegal, and consequently void; but we do not consider that a “proper instrument” necessarily means an instrument complying with the formalities prescribed by the articles; indeed, the section includes a case in which the articles may not provide for any transfer by instrument. Having regard to the purpose of the section, we would construe the phrase as meaning an instrument such as will attract stamp duty under the relevant fiscal legislation.

We come finally to the question whether the gift was disclaimed by Mr. Johns. The material relevant to this point consists partly in correspondence, and partly in evidence of statements by Mr. Johns. In July, 1965, the liquidator wrote to Mr. Johns asking whether he was a shareholder, and if so would he send his share certificate, and whether he had transferred fifty shares to Mr. Watson in 1956. There being no answer, the liquidator repeated his requests and said: “It is in your own interests to let me have this information as, if you are a shareholder, it may be that you will be entitled to share in any return of capital that is made in this liquidation.” Mr. Johns replied that he could not help in any way about the share certificate or about the fifty shares transferred to Mr. Watson in 1956. On Sept. 8, 1965, the liquidator wrote telling Mr. Johns that according to the register of members, 350 shares were transferred to Mr. Johns by Mr. Dean in February, 1948; that Mr. Johns transferred three hundred

A of those to Mr. Watson in August, 1954; that it would appear that a certificate for fifty shares was issued in Mr. Johns's name in 1954, and that Mr. Watson said that the fifty shares were transferred by Mr. Johns to Mr. Watson in about 1956, a proper form of transfer having been executed by Mr. Johns in the presence of Mr. Watson and Mrs. Watson in the front room of Mr. Watson's home at Birstall. He then asked four questions. First, did Mr. Johns receive the share certificate for fifty shares mentioned? Secondly, did Mr. Johns transfer those fifty shares to Mr. Watson in 1956 or to anyone else? Thirdly, does Mr. Johns claim to be a shareholder of the company (if so, for how many shares)? Fourthly, has he any share certificates of the company? In his evidence, Mr. Johns said that he did not know that he had any claim at all until Sept. 8, which is, of course, a reference to that letter. On Oct. 1, he returned the letter with the word "No" against all four questions. These matters, put together, seem to amount to a disclaimer ("I do not claim") of any right to shares in the company at a time when he understood that it was being suggested that he might have such a right, and had been told that if he had such a right, it might result in him getting money from the company in liquidation.

Then there is the evidence of the message sent by Mr. Johns to Mr. Watson via Ronald. Mr. Watson in an affidavit said that in March, 1966, Ronald said to him: "All he [Mr. Johns] has to say is: 'I have no . . . shares. I want no . . . shares, and if I had any money to come of the bastard I wouldn't even take it' ". Ronald, in cross-examination said that Mr. Johns gave him a message to give to Mr. Watson that he did not want now to do with it, and he were not going to sign it. This referred immediately to an attempt by Mr. Watson to get a transfer for fifty shares signed. Asked if he gave that message to Mr. Watson, Ronald said that he told Mr. Watson. Asked whether the message was in the terms as stated in Mr. Watson's affidavit, he agreed except for a different expletive. Mr. Johns in evidence agreed that he had given Ronald a message to give to Mr. Watson from him, said that he had heard Ronald's evidence and when asked whether that was the message he had given Ronald to give Mr. Watson answered: "Well, it was near enough true except for the swear words", which shows that he was referring to the passage with expletives in it.

The judge was unable to find either in the answer to the letter or in the message to Mr. Watson via Ronald a disclaimer. In the case of the message he doubted whether Ronald could properly be treated as giving the message to Mr. Watson on behalf of Mr. Johns, but the evidence appears to us to be quite clear on that point. In the case of both, he considered that for a disclaimer of a gift to be effective as such, the donee must possess reasonably full information as to the nature and amount of the gift. We do not think with respect that that generalisation is of universal application, and we do not think that it applies here. The message to Mr. Watson was quite plainly couched in language that showed that he was in no circumstances accepting entitlement to any shares.

That that was then his attitude is made the more likely by the fact that in his evidence (when he knew for certain the value of the subject-matter) he asserted that he did not want any of the money for himself if he won, but would give it to charity, to someone who needs it.

Whether or not the answer to the letter of Sept. 8 was a disclaimer in our judgment the message in March, 1966, to Mr. Watson can have no other colour.

I In this connexion our attention was drawn to *Naas v. Westminster Bank, Ltd.* (3) and in particular to two passages. LORD RUSSELL OF KILLOWEN said (4): "Disclaimer can only be made with knowledge of the interest alleged to be disclaimed, and with an intention to disclaim it." LORD WRIGHT said (5):

"Disclaimer of a deed has been rightly described as a solemn irrevocable

(3) [1940] 1 All E.R. 485; [1940] A.C. 366.

(4) [1940] 1 All E.R. at p. 504; [1940] A.C. at p. 396.

(5) [1940] 1 All E.R. at p. 506; [1940] A.C. at p. 400.

act. If it is alleged, the court must be satisfied that it is fully proved by the party alleging it, who must also establish that it was made with full knowledge and with full intention. In this case, I can find no evidence that the first appellant ever desired to disclaim."

That was a case in which the person allegedly disclaiming had been led to believe that she had no interest to disclaim, that the deed was no deed. Here, as we have said, there was a sufficient knowledge of the nature of the possible claim; and we may add that before the oral disclaimer the evidence shows that Mr. Johns's solicitor had had a long telephone conversation with the official receiver.

After reserving judgment we heard further argument on two points. The first argument was that there could be here no disclaimer of the beneficial interest in the shares because a disclaimer would be, by re-transfer, a disposition of an equitable interest in property, and neither of the suggested disclaimers was in writing, signed by Mr. Johns; see Law of Property Act, 1925, s. 53. We think that the short answer to this is that a disclaimer operates by way of avoidance, and not by way of disposition. For the general characteristics of disclaimer we refer briefly to the discussion in *Re Stratton's Disclaimer, Stratton v. Inland Revenue Comrs.* (6). Further it was argued that, in the case of the fifty shares still registered in the name of Mr. Eric Johns, disclaimer cannot be effective without alteration of the share register, and this was not possible in law under the section already mentioned of the Companies Act, 1948. The question of the gift, and of the disclaimer of the gift, however, is concerned only with the beneficial interest. The answer to this point is that if the gift is avoided by disclaimer, the company's register is rectifiable as of right without the execution of any transfer.

The second argument was based on decisions that in a case of disclaimer of a benefit under a will, a disclaimer may be withdrawn if no-one has changed his position on the faith of it. We do not decide whether these decisions (or dicta) are correct: they are *Re Young, Fraser v. Young* (7) and *Re Cranstoun's Will Trusts, Gibbs v. Home of Rest for Horses* (8). It seems to us, however, that disclaimer of an attempt inter vivos to make a gift cannot be withdrawn. Maybe a will remains an outstanding offer of a gift; but surely this is not so when the proposing donor, rebuffed, is still alive.

Counsel proposed that if A tenders to B by post a deed poll conveyance of property by way of gift, and B returns it by post with refusal and contumely, but telephones later to withdrawn his refusal, the gift is effective. We can but say that this would be a remarkable situation that we cannot accept. We see no reason why a rebuffed would-be donor, no longer willing because of the rebuff, should be held to his offer of benevolence. A dead testator is no longer conscious, in worldly terms of rebuff. Assuming, therefore, the cited cases to be correct, they are quite different, and bear no relation to disclaimer of an attempted gift inter vivos, and we note the word "irrevocable" in the passage cited from LORD WRIGHT.

Accordingly, in our judgment, the claim of Mr. Eric Johns to the shares must fail; but the form of the orders to be made may need some discussion.

*Appeals dismissed. Order dated May 4, 1967, made on the summons dated Apr. 14, 1966, varied and, in lieu of the declaration therein, declaration that the appellant had disclaimed the gift of such shares as had been given to him and that the list of contributories of the company be varied by substituting in respect of fifty shares for the name of Mr. Johns the name of Mr. Watson; order varied, affirmed (9). Order dated May 4, 1967, made on the summons dated Apr. 22, 1966, affirmed (9).*

(6) [1957] 2 All E.R. 594; [1958] Ch. 42.

(7) [1913] 1 Ch. 272.

(8) [1949] 1 All E.R. 871; [1949] Ch. 523.

(9) The summary of the order made is taken from the minutes of order as agreed.



A Solicitors: *Sharpe, Pritchard & Co.*, agents for *Spencer & Fisch*, Leeds (for the appellant, Mr. Eric Johns); *Ward Bourie & Co.*, agents for *Bernard B. Fielding*, Leeds (for the respondent, Mr. Albert John Watson); *Durrant, Cooper & Hambling* (for the Official Receiver).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

B  
T. A. MILLER, LTD. v. MINISTER OF HOUSING  
AND LOCAL GOVERNMENT AND ANOTHER.

C [COURT OF APPEAL, CIVIL DIVISION (Lord Denning, M.R., Danckwerts and Edmund Davies, L.J.J.), February 5, 1968.]

Evidence—Tribunal—Rules of evidence governing admissibility in court of law not applicable—Logically probative evidence admissible before tribunal—Town planning inquiry—Letter written admitted in evidence—Other evidence given by witnesses on oath—Letter relied on—Finding based on letter upheld.

D A tribunal, acting under statutory authority, is entitled, unless the statute provides to the contrary, to act on any material which is logically probative: accordingly, where an inspector conducting a town planning inquiry, received evidence of witnesses testifying on oath and also a letter, written by a person who did not attend the inquiry and not verified on oath, the statements in which were relevant and were put to the witnesses who contradicted them, the inspector, and the Minister on appeal, were entitled to rely on the letter if they thought fit (see p. 634, letters H and I, and p. 635, letters B and C, post).

E *R. v. Deputy Industrial Injuries Comr., Ex p. Moore* ([1965] 1 All E.R. 81) considered.

F [Editorial Note. In regard to the technical rules of evidence not applying in proceedings before local inquiries, see also *Wednesbury Corpn. v. Ministry of Housing and Local Government* ([1965] 3 All E.R. 571 at p. 579, letter H) per DIPLOCK, L.J.

As to the question whether the law governing the admissibility of evidence applies to tribunals of a quasi-judicial, administrative or domestic nature, see

G 15 HALSBURY'S LAWS (3rd Edn.) 261, 262, para. 475.

As to the general rule against the admission of hearsay and exceptions to it, see 15 HALSBURY'S LAWS (3rd Edn.) 294, 295, paras. 533-535; and for cases on this subject, see 22 DIGEST (Repl.) 71-91, 463-689.]

Cases referred to:

H *Board of Education v. Rice*, [1911-13] All E.R. Rep. 36; [1911] A.C. 179; 80 L.J.K.B. 796; 104 L.T. 689; 19 Digest (Repl.) 630, 206.

*R. v. Deputy Industrial Injuries Comr., Ex parte Moore*, [1965] 1 All E.R. 81; [1965] 1 Q.B. 456; [1965] 2 W.L.R. 89; Digest (Cont. Vol. B) 543, 4589a.

**Application for leave to appeal.**

I In 1961 the appellants, T. A. Miller, Ltd., had bought the business of Fogwills, Ltd., who occupied the Burnt Common Nurseries at Send near Woking, which Fogwills, Ltd. had used as a nursery for producing seeds and plants and also for selling seeds and plants bought from other suppliers. The appellants, having opened a garden centre at these nurseries, where they sold garden ornaments, furniture, garden accessories, tools and fertilisers, etc., were served with an enforcement notice issued in July, 1966, by the second respondents, Guildford Rural District Council, on the ground that there had been a material change in the use of the land for which planning permission had not been obtained. The

appellants appealed to the Minister against the notice. An inquiry was held by an inspector who heard evidence on oath from witnesses, who were cross-examined and re-examined. He admitted also in evidence a letter, dated Nov. 19, 1964, from a Mr. Fogwill, who had been managing director of Fogwills, Ltd., in which Mr. Fogwill stated:

"When we occupied the premises referred to, it was broadly true that only produce produced at those premises was sold there, except that stock of packeted seeds produced elsewhere was normally kept there... we can assure you that no gardening equipment or furniture of any bulk was ever stocked at the premises or even trans-shipped there, unless there were some very isolated occurrences which may have escaped our attention."

The inspector relied on the contents of this letter, and in his report found that—

"Between 1946 and the winter of 1960/61 retail sales of imported goods, except packeted seeds, diminished to an almost non-existent level, as stated by Mr. G. M. Fogwill, managing director of the firm who only some 3½ years previously had vacated the nursery."

The inspector came to the conclusion that on the evidence before him development had taken place within a period of four years before July 28, 1966, which was the date of the enforcement notice. The appellants appealed to the Minister, who dismissed their appeal. By notice dated June 27, 1967, the appellants applied to the Divisional Court for an order remitting the matter to the Minister for re-hearing and determination. By order dated Dec. 5, 1967, the Divisional Court dismissed the appeal. By notice of motion dated Jan. 17, 1968, the appellants sought leave to appeal to the Court of Appeal from this order.

*George Dobry* for the appellants.

*Nigel Bridge* for the Minister.

The second respondents, the council, did not appear.

**LORD DENNING, M.R.**, stated the facts and continued: The inspector relied on Mr. Fogwill's letter. So did the Minister in his decision. Counsel for the appellants said that they ought not to have relied on it at all. It ought not even to have been admitted because it was hearsay. It was not on oath, no opportunity was given to test it by cross-examination, and it was objected to. Counsel said that in these circumstances it was contrary to natural justice for it to be admitted.

In my opinion this point is not well founded. A tribunal of this kind is master of its own procedure, provided that the rules of natural justice are applied. Most of the evidence here was on oath, but that is no reason why hearsay should not be admitted where it can fairly be regarded as reliable. Tribunals are entitled to act on any material which is logically probative, even though it is not evidence in a court of law (see *R. v. Deputy Industrial Injuries Comr., Ex parte Moore* (1)). During this very week in Parliament we have had the second reading of the Civil Evidence Bill. The Bill will abolish the rule against hearsay, even in the ordinary courts of the land. It allows first-hand hearsay to be admitted in civil proceedings, subject to safeguards. Hearsay is clearly admissible before a tribunal. No doubt in admitting it, the tribunal must observe the rules of natural justice, but this does not mean that it must be tested by cross-examination. It only means that the tribunal must give the other side a fair opportunity of commenting on it and of contradicting it (see *Board of Education v. Rice* (2) and *R. v. Deputy Industrial Injuries Comr., Ex parte Moore* (1)). The inspector here did that. Mr. Fogwill's letter of Nov. 19, 1964, was put to the witnesses and they contradicted it. No application was made for an adjournment to deal further with it. In these circumstances I do not see that there was anything contrary to natural justice in admitting it.

(1) [1965] 1 All E.R. 81; [1965] 1 Q.B. 456.

(2) [1911-13] All E.R. Rep. 36; [1911] A.C. 179.

A [HIS LORDSHIP said that the inspector's conclusion (see p. 634, letters C and D, ante) determined the case, as it meant that the garden centre was new development and that, therefore, as the appellants did not have planning permission, the enforcement notice was good.]

DANCKWERTS, L.J.: I agree and have nothing to add.

B EDMUND DAVIES, L.J.: For my own part, I should have entertained greater confidence in the correctness of the decision arrived at by the Minister in the light of his inspector's report had Mr. Fogwill, to whose letter the inspector clearly attached considerable importance, been called as a witness and been cross-examined on the assertions in his letter. But that is not the point at issue here. Having regard to such authorities as *R. v. Deputy Industrial Injuries Comr., Ex parte Moore* (3), it cannot, in my judgment, be said that it was not open to the inspector, and the Minister in turn, to attach such weight to the letter as they thought fit, nor that the rules of natural justice were breached by their so doing.

For that reason I agree with my lords that this application must be refused.

*Application dismissed.*

D Solicitors: *Bell & Sherrard*, Kingston-upon-Thames (for the appellants);  
*Solicitor, Ministry of Housing and Local Government.*

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

E

## PRACTICE DIRECTION.

### CHANCERY DIVISION.

F *Costs—Taxation—Review of taxation—Procedure in Chancery Division—R.S.C., Ord. 62, r. 35\*.*

CROSS, J., has directed that the following amendment be made to the *Practice Direction* (1) dated Apr. 4, 1962:

Delete para. 7 and insert new para. 7 as under.

G 7. If the judge decides to appoint assessors he will also fix a day for the hearing and the master will inform the parties of that decision and of the day fixed. Unless the master hears from the parties or one of them within seven days that the date fixed is not convenient, and for what reason, the nomination of the assessors will be proceeded with and the fixed date will *not* thereafter be altered. As soon as the date has been finally fixed the master will inform the party applying who shall within seven days of receiving that information lodge with the master two or more copies, as the case may be, of the summons, objections and answers mentioned in para. 4 for the use of the assessors, and the master shall forthwith advise the assessor or assessors who have been nominated to serve.

H

W. F. S. HAWKINS,  
Chief Master,  
Chancery Division.

I May 22, 1968.

(3) [1965] 1 All E.R. 81; [1965] 1 Q.B. 456.

\* Review of a taxing officer's certificate by a judge is governed by R.S.C., Ord. 62, r. 35, set out in *THE SUPREME COURT PRACTICE* 1967, p. 875.

(1) [1962] 2 All E.R. 128.



ROE AND ANOTHER *v.* ROBERT MCGREGOR AND SONS, LTD. A  
BILLS *v.* ROE AND ANOTHER.

[COURT OF APPEAL, CIVIL DIVISION (Harman, Salmon and Widgery, L.JJ.),  
March 11, 12, 13, 1968.]

*Court of Appeal—Evidence—Further evidence—Principle on which received—*  
*Judgment recovered against road contractors for negligence in leaving barrier*  
*on road unlighted—Subsequently evidence proffered by passenger in plaintiff*  
*driver's car that plaintiff was drunk at time of accident which gave rise to*  
*action—Passenger not approached by road contractors' solicitor until after*  
*judgment for plaintiff—Passenger then told people that plaintiff was drunk*  
*—Passenger disgruntled at not having received any part of money recovered*  
*for accident—Whether passenger's evidence obtainable with reasonable*  
*diligence before trial.* B C

*Solicitor—Litigation—Action arising out of car accident—No duty on defendants'*  
*solicitor to interview passenger in plaintiff's car, presumably friend of*  
*plaintiff and possibly potential claimant against defendants.*

At about 1 a.m. on a Sunday morning in December, 1963, a van crashed D  
through a fence which contractors had put across a road. As a result the  
van driver, his wife, who was with him, and another passenger suffered  
injuries. The driver and his wife brought an action for damages for negli-  
gence against the contractors. The passenger brought a similar action  
against the driver and the contractors. The action by the driver and his  
wife was heard first. In it the driver was asked in cross-examination whether  
his capacity to drive was impaired by drink; he replied that he had drunk E  
only three half-pints of beer during the evening, a social evening at an R.A.F.  
mess, and that he had gone straight to the mess from his house, making a  
detour en route only to pick up some petrol. The contractors had not  
pleaded, and the trial judge did not find, that the driver's capacity was  
impaired by drink. The trial judge found that the contractors were negligent  
in not lighting the fence, and gave judgment for the driver and his wife F  
against the contractors. It was then agreed that the passenger's action  
must also succeed, and the trial judge gave judgment (on July 10, 1967)  
for him against the contractors and the driver. At the time of the accident  
there was, as the defendant contractors had discovered long before the trial,  
also another passenger, H., in the van. After the trial H. apparently  
became disgruntled because he received no money from the driver, and G  
told people that the accident occurred because the driver was hopelessly  
drunk at the time, having drunk with his passengers for several hours at a  
public house before going to the mess and having drunk many pints of beer  
that evening. The contractors heard rumours of H.'s allegations, their  
solicitor then saw H., who confirmed these. The solicitor then saw the  
publican and obtained affidavits from H. and from the publican stating that H  
the driver had been drinking on that evening as previously described. The  
contractors then appealed and applied for leave to adduce this evidence of  
H. and of the publican on the hearing of the appeal.

**Held:** new trials of both actions would be ordered because—

(i) the contractors' solicitor was not in default in not approaching H. I  
before the trial, because it was reasonable to suppose that H. would be  
extremely unlikely to give evidence against his friend, the driver, and  
that H. himself might at any time bring an action for damages against the  
contractors; accordingly the evidence of H. was evidence which could  
not have been discovered by the contractors with reasonable diligence  
before the trial (see p. 639, letters E and G, p. 640, letter I, p. 642, letters C  
and F, and p. 643, letter E, post).

(ii) if believed, the evidence must have a most important effect on the

A court's findings as to responsibility for the accident (see p. 639, letter H, p. 641, letter I, p. 642, letter G, and p. 643, letter F, post).

(iii) there was nothing to show that the evidence which it was desired to adduce was unworthy of credence or unlikely to be true (see p. 640, letter B, and p. 642, letter I, post).

*Ladd v. Marshall* ([1954] 3 All E.R. 745) applied.

B Per SALMON, L.J.: if it is part of a party's case that the other party was guilty of negligence because he was driving when under the influence of drink, that ought to be expressly pleaded (see p. 641, letter D, post).

[As to grant of a new trial because fresh evidence is discovered, see 30 HALSBURY'S LAWS (3rd Edn.) 475, 476, para. 891 text and note (g); as to when the Court of Appeal will receive fresh evidence, see *ibid.* 478, 469, para. 884 text and note (p); and for cases on the subject, see 51 DIGEST (Repl.) 823-828, 3789-3829, 852, 853, 4032-4042.

As to solicitors' duty in relation to the preparation of cases for trial, see 36 HALSBURY'S LAWS (3rd Edn.) 101, para. 137, text and note (t).]

Case referred to:

D *Ladd v. Marshall*, [1954] 3 All E.R. 745; [1954] 1 W.L.R. 1489; 51 Digest (Repl.) 827, 3826.

### Appeals and Applications.

In the first of two actions arising out of the same motor accident the plaintiffs, the driver Frederick Raymond Roe and his wife Dorcen Jean Roe were awarded damages by KARMINSKI, J., at Nottingham Assizes on July 10, 1967, against the defendants, Robert McGregor and Sons, Ltd., contractors responsible for certain road works, who were held wholly responsible for the accident. In the second action heard immediately afterwards, KARMINSKI, J., awarded damages to the plaintiff Charles Bills, a passenger in the driver's car, against the contractors and the driver. The contractors appealed against both judgments, and by their notices of appeal asked that the judgments be set aside and that judgment should be given for the contractors, or that new trials be ordered.

F The contractors applied, before the appeals were heard, for leave to adduce further evidence in both appeals. The Court of Appeal adjourned the applications to adduce further evidence to be heard together with the appeals, which were heard together. The facts are set out in the judgment of HARMAN, L.J.

A. de Piro, Q.C., and M. Pearson for the road contractors, the defendants.  
G Bernard Caulfield, Q.C., and B. J. Appleby for the driver and his wife, the plaintiffs in the first action.

John Wilmers, Q.C., and F. B. Smedley for the passenger Mr. Bills, the plaintiff in the second action.

H HARMAN, L.J.: These are two motions, heard together, for new trials in two cases arising out of the same accident. The accident occurred as long ago as December, 1963, I am sorry to say. The writs were not issued until June of 1966—inside the three years, it is true, but very stale claims. The claim in one of them was by a man named Roe and his wife, he being the driver of, and she a passenger in, a van (not theirs, I think) going home on a Saturday night at one a.m. in the (Sunday) morning, taking the wrong road, driving through a fence, going over an embankment, and falling thirty feet. By extraordinary luck no very serious damage was done. That was the case of the driver and his wife. The second action was a case by a passenger in the car, Mr. Bills, who sued the driver for negligence and sued over against Robert McGregor and Sons, Ltd., the second defendants in that case, who were road contractors and were responsible for the fence. As the matter turned out, the plaintiff driver and his wife succeeded against the road contractors on the ground of their negligence and it was agreed that if he succeeded so indeed must his passenger, Mr. Bills. So that there were two judgments, one for the driver and his wife

against the road contractors, and one for Mr. Bills against the road contractors and against the driver, if Mr. Bills chose to enforce it, for a sum of damages. A

In the course of the driver's action some question was raised, as this was a return from a social evening on a Saturday night at one in the Sunday morning, whether the driver had not had his capacity to drive impaired by the taking of drink. As to that he said that his total intake for the evening was three half-pints of beer, and the judge rightly said that he could not think that that had impaired his capacity at all. The judge therefore held that this was a completely sober driver driving home. The judge found that the obstruction across the road was not lighted, that the two beacons were not lighted which were supposed to warn people that the road was blocked in this way, and that a notice which was there saying "Road Closed" or words to that effect was not something which an ordinary driver would see unless he was looking for it; and he gave judgment for the plaintiffs. B C

There was another man in the car, a man named Harrison. Part of the immunity which they all preserved was perhaps due to the fact that the car was tightly wedged with people: this does happen. When, however, the news of the driver and Mr. Bills's victory went round the public-houses of Newark, as apparently it soon did, Mr. Harrison at once began to protest against it, saying that to his knowledge the whole accident was caused by the fact that the driver was absolutely drunk at the time, quite unfit to drive, and that there had been a miscarriage of justice. Mr. Harrison had kept quiet up till that time. He says that he supposed that the driver had no right of action against the road contractors, but he thought that the driver might recover on his own insurance and that he had promised Mr. Harrison to do something for him out of it. Mr. Harrison therefore kept quiet, thinking that the best chance of getting any redress at all was the hope that the driver would do something for him out of what he got from the insurance company. D E

It was apparently evident by the time of the trial (which was not until comparatively recently July 10, 1967) that Mr. Harrison realised that there was nothing for him. The solicitor for the road contractors was notified by the road contractors of the rumours which they had heard about Mr. Harrison's complainings, and she made some enquiries. As a result, she got into touch with Mr. Harrison, who said that to his knowledge he and every other male occupant of the car were hopelessly drunk and that was why the accident happened. Mr. Harrison said, moreover, that she would find that not only did they go to the social occasion, about which we have heard, but also that they had spent several hours previously in a public-house of which he could not tell her the name. Further enquiries were made and the publican of that house has now come forward. He says that these people, the driver and his wife and Mr. Bills and his wife, were in his public-house that evening and that the men at any rate had been drinking heavily, the driver a good deal more heavily than Mr. Bills. F G H

The gravamen of the charges made against the driver does not end there. It is not merely that he said that he had had only a pint and a half of beer when he had twenty—so the road contractors say—but he also told the judge that he had gone straight to this social occasion from his home, making no detour except one to pick up some petrol. He said further that he did not know about the new by-pass, which was the cause of the closing of this road, which was quite within his area, because during that year he had been in hospital for ten or twelve weeks. It is said now that that was quite untrue, that if he had been in hospital part of that time he had been out of it at the week-ends and that he had been seen in the public-house on a number of occasions in the weeks before the accident. So there is involved not only evidence of new facts but evidence which, if it be believed, will show that the driver was guilty of deliberate deceit of the court, that he was perjuring himself on three subjects, first the amount of drink which he had taken, second the place from which he came, and third his ignorance of I



A the roadway—all of them deliberate untruths if the evidence to the contrary be believed.

It is by no means, of course, to be taken on these motions that this evidence is likely in the end to be believed. These motions are brought for leave to adduce this extra evidence; but in my judgment that would be, in a case of this sort, a hopelessly inconvenient course to take, because quite clearly, if Mr. Harrison and the publican are to have their evidence admitted, evidence to rebut what they say must also be admitted and there must be evidence on one side and the other which will very greatly alter the whole shape of the testimony. The only course for this court, if it thinks that it should do anything, is to order a new trial, and I think that really counsel in the end conceded that that was the proper course to take if the court were moved to take any course.

- C The court has always held its face against new evidence and will only admit it in very exceptional circumstances. The leading case on the subject, which is *Ladd v. Marshall* (1), says that first of all it must be evidence which could not with reasonable diligence have been obtained earlier, secondly it must be evidence which, if believed, would or might have a very important effect on the mind of the tribunal, thirdly, that it is evidence which is of a sort which inherently is not improbable. It was argued before us that those conditions, and in particular the first of them, were not satisfied here. It was said that the road contractors' solicitor knew that Mr. Harrison had been in the car: she had only, as it is said, to go to him and ask him for a statement and the whole matter would have come out at a much earlier stage and there could have been no need to come at this date and ask for the admission of fresh evidence. It is said that the solicitor made an error of judgment which, although perhaps understandable, be it said, was not excusable in the sense that she could have been said to have acted with reasonable diligence. In my opinion that charge entirely fails. I cannot see that there was any default at all on the part of the very experienced solicitor acting for the road contractors in not approaching Mr. Harrison. He was a man directly in the other camp. He might be expected at any moment to start proceedings himself for damages, although he had not done so nor sent any letter making any claim hitherto. He was a person who was unlikely in the extreme, it might reasonably be supposed, to be willing to give evidence against his friends in the car that they were all drunk at the time; and I cannot think that it was any part of the duty of this lady acting as solicitor to the defendants, the road contractors, to go and try to worm something out of Mr. Harrison. Indeed she expressed the view on oath that her opinion was that it would not have been a proper course to take, and I am far from saying that was not a view which she might reasonably hold. That being so, I think that this is evidence which has come to light since the trial and could not with reasonable diligence have been discovered before it. As to the publican, of course, it is not pretended that he was known or available or could have been with reasonable diligence discovered.
- H I think, therefore, that the first of the conditions in *Ladd v. Marshall* (1) is satisfied.

If that be so, it goes without saying almost, in my opinion, that this evidence, if believed, must have a most important effect on the judge's view of the contributory negligence or even indeed of the total responsibility of the driver for the accident. The learned judge accepted the driver's view that he had had no drink to speak of at all and came to his conclusion expressly on that view, having put to counsel for the road contractors the alternative either to abandon any reliance on alcohol or to amend his pleadings. Counsel in his discretion did not amend at that time, and I think that he was justified in not doing so, because as far as I can see he did not know, nor did his solicitors know, enough to justify them in making a charge of that sort at that time. Therefore it seems to me that the second condition in *Ladd v. Marshall* (1) is amply satisfied.

Then it is said, that Mr. Harrison is a man who is disgruntled: that he is not to be credited; that he is a man who has not got out of his friend, the driver, what he hoped that he would get, and his evidence is that of a person who is not to be trusted. As to the publican, it is asked who can say that he remembers which night it was out of the number that have passed since December, 1963. It is said that, therefore, the evidence is not credible. As to that, I think that when the word "credible" is used in this connexion it means that on the face of it the evidence is not worthy of any credence, and I do not think that in this case one can possibly go as far as that. It seems to me that this is evidence as to which, when one reads it without hearing cross-examination and without hearing what rebuttal there may be, one feels that this is not an unlikely story; and that, I think, is enough for the purpose of satisfying the third head in *Ladd v. Marshall* (2).

The road contractors did not, as I should have expected them to have done, combine this application with an application for leave to amend their pleadings. Without such an amendment I certainly should not think that they ought to be allowed to embark on a new trial, because their opponents are entitled to know at the earliest possible moment what the case is. At a very late stage during the adjournment today, they did produce what seems to us, I think, satisfactory information showing in written form the exact amendment that they propose to make. So I would move the court to make this order: that there be leave to amend in each case and that there be an order for a new trial of each of these two actions.

I ought, I think, perhaps to say something about Mr. Bills's case as opposed to the driver's case. It was said, as far as Mr. Bills is concerned, that he was only a passenger and that therefore whatever happened, unless the blame was held to be solely that of the driver, he must succeed against both defendants (the driver and the road contractors) and was therefore at liberty to execute his judgment against either of them, and that, therefore, in his case the matter was not of any great importance. That would be so, I think, unless the road contractors had applied to amend, as has now been done, by saying that Mr. Bills was guilty of negligence because he knew or ought to have known that the driver was entirely unfit to drive through drink and yet committed himself as a passenger to the car in which the accident occurred. That plea too is made against the driver's wife. It seems to me that there may or may not be something in it, but that it is a matter which should be ventilated in a new trial.

**SALMON, L.J.:** I entirely agree, and add only a word because we are ordering a new trial.

During the course of the argument certain criticisms were levelled against the ruling of the judge when the driver was being cross-examined in the action which he and his wife brought against the road contractors, Robert McGregor and Sons, Ltd. Certain criticisms were also made of the judgment in that case. In my view there is no foundation for those criticisms. The ruling of the judge and his judgment were both impeccable. On the pleadings as they stood at the date of the trial, substantially the only allegation of contributory negligence made against the driver was that he was driving too fast and was not keeping a proper look-out. The road contractors knew that this accident had occurred at one o'clock on a Sunday morning, when the driver and his wife and the other passengers in the vehicle were returning from a convivial Saturday night spent at a local Royal Air Force mess. It may well be that the road contractors were suspicious as to the sobriety, or lack of sobriety, of the driver of the van. This is not unusual when accidents occur in such circumstances as these. Nor is it unusual that there should be nothing more than suspicion. When the defence was drawn, there was no evidence, and I am quite satisfied that reasonable diligence could not then have discovered any evidence, to the effect that the driver was other than strictly sober. Since there was no material for suggesting that he was drunk, it would obviously have been improper to have made an allegation of drunkenness

A against him, in the hope that one might be able to substantiate it in cross-examination. When the driver went into the box, he deposed to the fact that he had called on his way from home at a petrol station and had then gone straight to the R.A.F. mess, where he had consumed no more than three half-pints of beer. He was being cross-examined by counsel and it looked to the judge, from the questions that were being asked, as if counsel for the road contractors might

B be going to suggest to this witness that he had taken a good deal more than the three half-pints to which he admitted. The judge ruled that on the pleading as it stood counsel would not be justified in challenging the witness's statement that he had only had three half-pints of beer. Counsel, very rightly, accepted that ruling by the learned judge. He said that he would not take the case any further than the suggestion that the driver was very tired and that possibly, being very

C tired, three half-pints of beer which he had drunk in the course of the evening might have affected his driving.

I think that the judge was plainly right. If it is going to be part of a defendant's case—or of a plaintiff's case for that matter—that the other party is guilty of negligence because he has driven when he was under the influence of drink, that ought to be expressly alleged in the pleading. It would be grossly

D unfair to confront a man at the trial for the first time with an allegation that he was driving under the influence of drink and thereby committing a criminal offence. If, however, such an allegation is pleaded, the man against whom it is made will have the opportunity of meeting it. He will go to trial prepared perhaps to prove that he was completely sober. If, however, the issue does not appear on the pleadings he will obviously not bring any witnesses as to the state of his sobriety because he will think, rightly, that that is not in issue. Therefore

E I do not think that any possible criticism can be made of the ruling of the judge.

He found, having very carefully considered the evidence, that he could not place reliance on the evidence called on behalf of the road contractors that they had lighted the fence with which they had closed the road. The road contractors conceded, as I read the evidence, that they recognised that it was necessary, in the interests of safety, to light this obstacle. Their case was that they had lit it.

F There was a great deal of evidence, including police evidence, the other way: that is to say that, although at one time this obstacle had been lit, for several weeks before the accident, the road contractors had forgotten or at any rate had neglected to light the obstacle. Undoubtedly some distance back from the obstacle there was a "Road Closed" sign. The driver was driving with his headlights on, though dipped. The learned judge came to the conclusion on those

G facts that there was negligence on the part of the road contractors in failing to light the obstacle; and I am not at all surprised that he came to that conclusion. He also came to the conclusion, which at first sight may seem perhaps a little more difficult to understand, namely, that the driver was not negligent although he failed to observe the "Road Closed" sign which he had passed well back from the obstacle, or to see the fence that stretched across the whole road, but crashed

H through it on to the embankment below; the judge, however, having accepted, as he was bound to accept, the driver's testimony that he had only had three half-pints of beer during the whole evening, approached the question on the basis that here was a man who was sober and apparently a careful, decent driver. No doubt the learned judge also appreciated that sometimes signs are so placed

I that they are very difficult to see, and that, even although one is keeping a proper look-out it may be possible to miss seeing a paling fence such as this stretching across the road.

The judge's finding certainly was one which, on the evidence before him, I do not think could successfully be challenged; but the position, if the evidence which the road contractors now seek to adduce is adduced at the new trial and is believed, would be very different. HARMAN, L.J., has stated it. I will not recapitulate it. There is the evidence of Mr. Harrison and of the bar steward Gregory, which, if true, shows that the driver and the whole party were drunk



when they left the public-house at 10.30 p.m., having spent some three hours or thereabouts in the public-house, drinking at what to some people may seem the astonishing rate of a pint every ten minutes, though I have no doubt that in some parts of the world it is not such a rare feat as perhaps it sounds. Then again, Mr. Harrison deposes to the fact that once they had got to the R.A.F. mess he, the driver and the passenger, Mr. Bills, continued to drink and that they were all, to put it euphemistically, extremely merry when they set off from the R.A.F. club. Now this evidence, as HARMAN, L.J., has said, was revealed in this way. The fact that the accident had occurred must have gone round Newark like wildfire. Mr. Harrison knew very well what had occurred that evening, and Mr. Gregory, if he is speaking the truth, must have remembered what happened during that evening after he heard of the accident; but they kept quiet.

It is said that the first rule or principle laid down in *Ladd v. Marshall* (3) has not been observed because the very experienced solicitor acting for the road contractors could, by the exercise of ordinary diligence, have discovered this evidence before the trial, or, as I think it was put, half-way through the trial. To my mind there is not substance in that contention. Mr. Harrison was a friend of the driver and his wife and of Mr. Bills, the plaintiff passenger. Putting oneself in the place of the road contractors' solicitor, it would be, I think, only natural to assume that if Mr. Harrison was able to give evidence at all he would be called by his friends to give it for them. Moreover, Mr. Harrison had a clear case for damages for negligence—either against the driver if he chose to sue him, or against the road contractors, or both. The road contractors' solicitor says in her affidavit that she thought—and no one can doubt for a moment that this is no more than the exact truth—that it was likely that Mr. Harrison had a legal aid certificate, limited to issuing a writ but not serving it. I understand that that solicitor is not altogether unacquainted with how the legal aid system works, and any of us who knows anything about it knows that this was the practice in those days, because it was thought that that practice might save costs. It is however a practice that has recently been discouraged by this court, but it had not been discouraged at the relevant time. In those circumstances, not only was it not the duty of the solicitor to go and see Mr. Harrison but also she might well have been criticised had she done so. Therefore to my mind the first principle in *Ladd v. Marshall* (3) is here satisfied.

That the evidence of Mr. Harrison and Mr. Gregory, the bar steward, if believed, would be likely to have an important influence on the result of both actions really cannot be doubted for a moment: it is self-evident. As far as the driver is concerned, if the evidence to which I have referred is true, then obviously he was guilty of a high degree of contributory negligence. As far as his wife is concerned, if the evidence is true, again, she must have known of her husband's condition—unless hers was such that she was unable to appreciate it; and, if this is so, here again she would be guilty of some contributory negligence. In Mr. Bills's action exactly the same criticism can be made in respect of Mr. Bills's claim. He is in the same position, or may be in the same position, as the driver's wife. It may well be that, although he may still recover in the new action, if the fresh evidence is believed he will bear a substantial proportion of the blame and the damages which he recovers would be correspondingly reduced.

On the question whether the evidence is credible, all that we have before us are the affidavits sworn by Mr. Harrison and by Mr. Gregory. It is true that Mr. Harrison appears to be a disappointed and disgruntled man who may have some grudge against the driver, and I have no doubt that when he gives evidence he will be strenuously—and may be successfully—cross-examined. But there is nothing in his evidence, apart from the matters to which I have referred, which makes it at all unlikely that he may be speaking the truth when he says that during this evening the driver had a good deal more to drink than he should

- A have done. As far as Mr. Gregory's affidavit is concerned, again there is nothing on the face of it which is at all unlikely, and he may be believed. I do not, of course, wish to be understood as saying that in my view these witnesses *will* be believed. I have not any idea at all whether they will or will not be believed. Everything will depend on the impression which they make on the judge who tries the case, and the impression which Mr. Bills and the driver and his wife and any
- B of the other witnesses who may give evidence on this issue make on the judge.

I have no doubt at all that, this evidence having now come to light, justice demands that there should be a new trial, and I therefore agree with the order proposed by HARMAN, L.J.

WIDGERY, L.J.: I agree that there should be a new trial in this case.

- C The road contractors' first task on their notice of motion is to persuade this court that fresh evidence should be heard. For that purpose they have to establish the three points in *Ladd v. Marshall* (4) to which reference has already been made.

So far as the first point is concerned, namely whether the road contractors have shown that the evidence could not have been obtained with reasonable diligence, I agree with everything which has been said. This is an issue on which the

- D respondent must, of course, be heard, and one on which no doubt the respondent can lead evidence if he wishes, because it is a matter which has to be finally decided at this stage: but counsel for Mr. Bills, the passenger, no doubt for good reasons, has not sought to dispute the primary facts relied on in the road contractors' affidavits and in the ensuing argument arising out of those facts. I am quite satisfied that the road contractors have succeeded in establishing that the new
- E evidence could have not been obtained with reasonable diligence earlier.

The second and third points arising at this stage seem to me to depend primarily on taking a look at the evidence proffered and considering it against the background of the original trial. On that footing, as it has been said, it is beyond argument, I think, that evidence of the driver's insobriety would have an important influence on the hearing of this case, and would also have an important

F influence on the hearing of Mr. Bills's case, assuming that the pleadings are amended, as now proposed, so as to allege contributory negligence against Mr. Bills in allowing himself to be driven by the driver in that condition.

Of course, once the evidence is admitted in this court, the conclusion that there must be a new trial is a very obvious one. The admission of the fresh evidence raises a new issue of fact which has never been decided and which has to be

G correlated to the other issues which were canvassed in the original trial.

The only course which is appropriate to a consideration of those matters is a new trial, and accordingly, so it seems to me, a new trial is inevitable in each of these cases. Though I recognise and accept the contention of counsel for Mr. Bills that there will be some instances—albeit somewhat special ones—in which a respondent may seek to contest in this court, at this stage, the quality of the

H new evidence which is relied on and its bearing on the need for a new trial, in this case a new trial seems to me to be quite inevitable; and I content myself with that.

*Appeal allowed in each case. Order for new trials before different judge. Costs of all parties in court below, and in Court of Appeal so far as such costs would have been properly incurred on an application for a new trial, reserved to discretion of judge at further hearing. Respondents' (5) costs of the appeal other than as aforesaid to be their costs in new trial.*

I

(4) [1954] 3 All E.R. 745.

(5) The respondents to the appeals were the plaintiffs in the actions, viz., the driver and his wife and Mr. Bills. Apparently a substantial part of the costs was incurred in preparation for questions, e.g., whether the judgments should be reversed, which were not argued on appeal as new trials were ordered.

Solicitors: *Wilkinson, Kimbers & Staddon* (for the defendant road contractors); *A Routh, Stacey & Co.*, agents for *Colton & Franks*, Newark (for the plaintiff driver and his wife); *Hancock & Willis*, agents for *Tallents & Co.*, Newark (for the plaintiff, Mr. Bills).

[Reported by HENRY SUMMERFIELD, ESQ., Barrister-at-Law.]

## R. v. BONE.

[COURT OF APPEAL, CRIMINAL DIVISION (Lord Parker, C.J., Widgery, L.J., and Roskill, J.), May 3, 1968.]

*Criminal Law—Duress—Defence—Burden of proof—Prosecution has onus of negating duress.*

*Criminal Law—Evidence Corroboration—Accomplice—Duress by one accused alleged as defence by other accused—Direction to jury.*

The appellant and one H. were charged with housebreaking and larceny. H. pleaded guilty and gave evidence for the prosecution. The appellant's defence was that, although he admitted committing the acts charged, he had acted throughout under duress by H., who threatened him with a knife. H. denied this. The jury were given no direction on the way in which they should approach the evidence of H., who was an accomplice, nor were they given any direction to the effect that it was for the prosecution to negative duress; but they were told that it was for them to decide whether they believed the appellant or not. On appeal against conviction,

**Held:** the conviction would be quashed, because—

(i) the jury should have been directed to approach the evidence of H. that he had not had a knife with great care, should have been given the usual warning with regard to the need for corroboration and should have been told that there was no corroboration (see p. 645, letter G, post); and

(ii) the jury should have been directed that it was for the prosecution to negative duress, and that, if the jury had thought that the appellant's account of duress might be true, then he should be acquitted (see p. 645, letter I, and p. 646, letter C, post).

Appeal allowed.

**[Editorial Note.]** As to evidence and the burden of proof where an accused raises duress as a defence, the present case, may be compared with *R. v. Gill*, ([1963] 2 All E.R. 688).

As to corroboration of evidence by accomplices, see 10 HALSBURY'S LAWS (3rd Edn.) 459, para. 844; and for cases on the subject, see 14 DIGEST (Repl.) 527, 528, 5107, 5108.

As to coercion and threats, see 10 HALSBURY'S LAWS (3rd Edn.) 290, 291, paras. 538, 539; and for cases on the subject, see 14 DIGEST (Repl.) 74-76, 340-361.]

### Appeal.

This was an appeal by Michael Edward Bone, who was fifteen years old, against his conviction at Norfolk Quarter Sessions before the chairman (ROGER NORTH, Esq.) and a jury on a charge on indictment for housebreaking and larceny contrary to s. 26 (1) of the Larceny Act, 1916, in that on Sept. 30, 1967, in the county of Norfolk the appellant broke and entered the dwelling-house of Thomas William George Bone and stole £44 in Bank of England notes, two hundred Reyno cigarettes, eleven Castella cigars, two ounces of Old Holborn tobacco, two packets of Rizla cigarette papers and a Ronson cigarette lighter, the property of Thomas William George Bone in the dwelling-house. The facts are set out in the judgment of the court.



A The authority and the case noted below\* were cited during the argument.

*D. R. Chance* for the appellant.

*F. P. Keysell* for the Crown.

LORD PARKER, C.J., delivered the following judgment of the court:  
 What happened was that the appellant, who was fifteen, and another youth,  
 B Hadley, who was seventeen, were cycling out in the country on Sept. 30 and came near a public house which was occupied by the appellant's uncle. One of them apparently suggested breaking in. At any rate they did break in, and they stole £44 in cash and a small amount of tobacco and a cigarette lighter. That resulted in their being jointly charged with this offence. Hadley pleaded guilty and was dealt with, and gave evidence for the prosecution. The defence was  
 C the defence of duress. The appellant said that the older boy Hadley had a knife and had threatened him with that knife unless he went into his uncle's public house and stole; the appellant thereby admitted that he did in fact go into his uncle's public house and did steal. In the course of the case for the prosecution Hadley gave evidence that the appellant did go in, and, because of the question of duress had already been raised in a statement given by the appellant to the  
 D police, Hadley was asked whether he did threaten the appellant. Hadley denied that he had threatened him and, indeed, said that he had not had a knife at all. There was the issue, and the jury convicted.

There are two points that arise in this case. The first, and that on which leave to appeal was given, concerns the absence of any direction by the chairman as to the way in which the jury should approach the evidence of Hadley, who  
 E was clearly an accomplice. There was no direction at all along the usual lines in this case, and when the chairman had concluded his summing-up counsel for the appellant rose to his feet and suggested that there ought to have been a direction. It is clear to this court that the chairman felt that he had been right in not giving a direction because in fact the appellant had admitted that he had broken in and stolen. In other words, in an ordinary case it would have  
 F been academic to tell the jury the usual formula in regard to corroboration, since the chairman would have gone on to tell the jury that they need not bother about that because it is admitted that the appellant broke into his uncle's public house.

In the opinion of the court, however, that is not in this case a complete answer. The chairman should have directed the jury along the usual lines in regard to  
 G this matter of duress. He should have told the jury that they must approach the evidence that Hadley had given that he had not had a knife and had not threatened the appellant with great care, and given the usual warning in regard to corroboration. Finally, he should have told them that, in fact, there was no corroboration. On that ground alone this court feels, though reluctantly, that this conviction must be quashed.

H There is, however, another ground to which the court would like to draw attention. It concerns the burden of proof. Duress, like self-defence and like drunkenness, is something which must in the first instance be raised by the defence; but at the end of the day it is always for the prosecution to prove their case, which involves negating the defence which has been set up. It has been  
 I said in many cases, particularly self-defence cases, that to ensure that the jury are not confused it is not sufficient to give the general direction at the beginning in regard to the burden and standard of proof, but the jury should be told specifically that it is for the prosecution to negative, in that case, the self-defence (1). In the present case the chairman gave an impeccable direction at the beginning as regards the burden and standard of proof, but thereafter in dealing with this

\* ARCHBOLD'S CRIMINAL PLEADING, EVIDENCE AND PRACTICE (36th Edn.), paras. 45, 1293; *Davies v. Director of Public Prosecutions*, [1954] 1 All E.R. 507; [1954] A.C. 378.

(1) See, e.g., *R. v. Gill*, [1963] 2 All E.R. 688.

matter of duress he gave no further direction, and time and again referred to the issue as being whether the jury believed that a knife was used. He said: A

"... but [the appellant], if you believe him, and it is a matter for you to decide whether you believe him or not, if you believe him, that his companion produced his knife and pointed it towards him and [the appellant] says 'I was so frightened for my life I thought I had to do as he told me'. If you think that to be the case, it is your duty to acquit... If you do believe it, do you think the threat was such as to deprive [the appellant] of the power to resist. If you think he was so afraid that he had to do what he was told, you must find him not guilty." B

Throughout the issue was being left to the jury as a matter of whether they believed the appellant, and not on the basis that if they thought what the appellant said might be true they should acquit. On that ground also the court has come to the conclusion that the verdict should not be allowed to stand. Accordingly, this appeal is allowed. C

*Appeal allowed.*

Solicitors: *Registrar of Criminal Appeals* (for the appellant); *Kenneth F. M. Bush & Co.*, Kings Lynn (for the Crown). D

[Reported by N. P. METCALFE, ESQ., *Barrister-at-Law.*]

## CARTWRIGHT v. POST OFFICE. E

[QUEEN'S BENCH DIVISION (Willis, J.), March 11, 12, 13, 18, 1968.]

*Telegraphs and Telephones—Telegraphic lines—Placing of telegraph line across private land—Public interest—Consent of land owner sought by Post Office—Failure to give consent—"Amenities" not impaired—Two farming households in neighbourhood thereby deprived of telephone service—Whether failure to give consent was contrary to public interest—Wayleave—Telegraph (Construction) Act, 1916 (6 & 7 Geo. 5 c. 40), s. 1.* F

By notice given in August, 1966, in the exercise of statutory powers under the Telegraph Acts, 1863-1962, the Post Office required (pursuant to s. 1 of the Telegraph (Construction) Act, 1916\*) the consent of C., as landowner and occupier, to the placing of a telegraphic line across three sections of her property and the fixing of a telegraphic wall-bracket on a farmhouse which she owned and had let, so as to enable two neighbouring farmhouses to have their own telephone service. The area was remote and exposed, and communications in winter were sometimes precarious due to snow. Both farms (twenty acres and 120 acres in size respectively) carried livestock and were approximately 2½ miles from the nearest village (at which a fire engine was located) and seven miles from a town which was the centre for veterinary and other farming services; their households, including in one case three school children at different schools, comprised nine persons. C.'s property consisted of a restored seventeenth century house on land which was partly wooded and of some, but not of very great, landscape value. The court was satisfied, for the purposes of the proviso to s. 1 of the Act of 1916, that the route proposed by the Post Office for their line (a flying wire over two sections of C.'s property and taking the wire under the surface of C.'s drive in the remaining section) involved no depreciation in value of the land nor any reduction in its amenities†. C. did not give her consent. On appeal from an order of the county court giving consent G

\* Section 1 of the Act of 1916 is set out at p. 651, letters D to F, post.

† Viz., visual appearance and pleasure of its enjoyment; see p. 641, letter D, post. H

**A** under s. 1 to the Post Office's proposal subject to a small annual wayleave payment,

**Held:** consent would be granted for the placing of the telegraphic line on the route proposed by the Post Office (see p. 654, letter D, post.), since C.'s failure to give consent was contrary to the public interest for the following reasons—

**B** (i) an efficient farming industry was in the public interest, and the telephone service was necessary for the efficient operation of the two farms, as also for the emergencies of accidents, sickness and fire (see p. 653, letter F, and p. 653, letter I, to p. 654, letter A, post.).

**C** (ii) although neither a class of persons nor a large number of persons was involved but only two households were denied a telephone, the court was not precluded from finding that the failure to give consent was contrary to the public interest, for the public interest was to be considered on the facts of each case at the time when the question arose for decision (see p. 653, letter E, post.).

**D** **Semble:** the maintaining of personal contacts between members of the community, particularly in remote areas, was also in the public interest (see p. 654, letter B, post.).

**E** [As to the meaning of the terms "telegraph" and "telegraphic line", see 36 HALSBURY'S LAWS (3rd Edn.) 621, para. 971, text and note (e), and p. 665, note (x): as to the power to place and maintain telegraphs on private land and the procedures connected therewith, see *ibid.*, pp. 664-667, paras. 1061-1065; as to the determination of differences arising under the Telegraph Acts, 1863 to 1962, see *ibid.*, pp. 676-679, paras. 1080-1082.]

For the Telegraph (Construction) Act, 1916, s. 1, see 24 HALSBURY'S STATUTES (2nd Edn.) 1058.]

Case referred to:

**F** *Postmaster-General v. Pearce* (Nov. 22, 1922), unreported; *on appeal*, C.A. (Feb. 23, 1923), unreported.

### Appeal.

**G** This was an appeal by way of re-hearing under s. 4 of the Telegraph Act, 1878, as substituted by the Railway and Canal Commission (Abolition) Act, 1949, s. 2 (1), by the appellant, Mrs. Lucy Cartwright, of Sharpcliffe Hall, Ibstones, Stoke-on-Trent, in the county of Stafford, from an order of His Honour JUDGE HARRINGTON made in the Leek county court on Sept. 4, 1967, whereby he gave consent to the placing of a telegraph line by the respondents, the Post Office, across land owned by the appellant ("Mrs. Cartwright") and to the placing on a farm known as Cottage Farm all telegraphs and contrivances necessary for provision of a telephone service to the occupants of the building. The telegraphic line was to be carried across (a) the northern part of Whitehough Wood, (b) under the drive of Sharpcliffe Hall, at positions shown on a plan, and (c) across Sharpcliffe Wood at a position shown on the plan to the building known as Cottage Farm. The purpose of the placing of the line was to enable telephone facilities to be enjoyed by two neighbouring farms, of which Cottage Farm was one. The consent given by the court was subject to certain terms, one of which was for the carrying of the telegraphic line underground between positions shown on the plan, i.e., crossing under the drive to Sharpcliffe Hall; and the other was for the payment to Mrs. Cartwright of annual sums of 2s. 6d. in respect of the wayleaves first and last referred to above. By notice dated Dec. 30, 1967, Mrs. Cartwright appealed, seeking that the order of the county court judge be set aside and alleging, among other grounds, that his judgment was contrary to provisions of the Telegraph Acts, 1863-1962, including s. 1 of the Telegraph (Construction) Act, 1916, the terms of which are set out at p. 651, letters D to F, post.



The following statement of fact is summarised from the judgment of WILLIS, J. The area in question was land with an attractive landscape rising to the north of Sharpeliffe Hall and falling to the south, this being of importance in relation to the siting of telegraph poles from the point of view of their appearance. Sharpeliffe Hall itself was a seventeenth century house, restored in 1860. During the world war of 1939-45 it was occupied by the Red Cross, later by the Youth Hostel Association, and in 1955 it was bought by a firm and application was made in 1956 for outline planning permission to site caravans. Mrs. Cartwright acquired it in 1959, when it was unoccupied; she made application for a siting of further caravans, which was refused. The telegraph lines were to cross at a neck of Whitehough Wood by flying wires, by a route which would not involve the topping of trees. The other section which was not to be carried underground was again a flying wire, in this instance across Sharpeliffe Wood to Cottage Farm. Mrs. Cartwright was in process of clearing rhododendron and undergrowth from the wood there, but, although the wire would be clearly visible, it would not be obtrusive. Mrs. Cartwright had objection to the wires, but this was a general objection to overhead wires. His Lordship (WILLIS, J.) intimated that he was quite satisfied that the Post Office's proposals would involve no depreciation in value of the land nor result in any significant reduction in its amenity, using that word as referring to its visual appearance and the pleasure of its enjoyment. The siting of the poles on the route proposed by the Post Office was such that all the poles would be on the land of Home Farm which was not owned or occupied by Mrs. Cartwright.

Three hereditaments were concerned: Sharpeliffe Hall, which was a house and estate owned by Mrs. Cartwright; Home Farm, owned by a Mr. Barker, and Cottage Farm, which was a smaller farming unit, owned by Mrs. Cartwright and leased to a Mr. Morris. Before Mrs. Cartwright acquired Sharpeliffe Hall in 1959, Mr. Morris and Mr. Barker both had telephones, and there had previously been a coin-operated private box at Sharpeliffe Hall. Mrs. Cartwright's husband became a subscriber for a telephone at Sharpeliffe Hall and remained a subscriber between 1959 and 1965, during which time some £82 arrears of Post Office dues accumulated. In June, 1965, a sum of £70 was owing to the Post Office. This sum had never been paid. On June 9, 1965, the Post Office, having given Mr. Cartwright considerable latitude, eventually cut off the telephone. His LORDSHIP said that thereafter Mrs. Cartwright had conducted a skilful and determined guerilla against the Post Office. She required the Post Office to remove all telegraph poles from her property. Various other steps were taken. His LORDSHIP intimated that the Post Office had shown themselves ready to consider any reasonable alternative to the removal of the telephone line, which would cut off the other two subscribers, but that Mrs. Cartwright was not prepared to compromise in relation to a wayleave claimed in respect of the period for which the poles had been on her land at a rate, it seemed, of £26 annually. By letter in February, 1966, she offered the Post Office three alternatives: first, that the arrears of the wayleave as claimed should be paid off and that the Post Office should thereafter pay an annual wayleave of £2 per pole; alternatively that the suggested wayleave of £26 per annum should be paid as from May, 1965; and last, the alternative that all poles and equipment should be removed from her property. Agreement on these terms was not reached. On Apr. 27, 1966, the Post Office removed the equipment which at that date was still on Mrs. Cartwright's property. The line was reconstructed, in so far as it had passed over Mrs. Cartwright's land, so as to afford some telephone service to Mr. Barker and Mr. Morris. In May, 1966, the Post Office requested that the line should be re-routed, using poles of the Electricity Board which were in the vicinity of Sharpeliffe Hall. That move was checked by Mrs. Cartwright. On Aug. 15, 1966, the Post Office requested Mrs. Cartwright, pursuant to s. 1 of the Telegraph (Construction) Act, 1916, for consent to the construction of a line over three sections of her property and to allow apparatus to be fixed to Cottage Farm.

- A The route which the Post Office requested, which was the subject of the consent, involved the placing of no poles on her land, but that there should be flying wires over the neck of land, part of Whitebough Wood, and over Sharpeliffe Wood to Cottage Farm, but that the line should pass underground under the drive leading to Sharpeliffe Hall. There was an alternative route, on which apparently agreement with Mrs. Cartwright could have been reached. This, however,
- B would involve the line being taken up a drive which led from the main road to Sharpeliffe Hall for something like a mile. It was feasible from an engineering point of view but was rejected by the Post Office for four reasons: first, that it would be too near the trees; secondly, in effect, that they would be unwilling to have the whole of this line dependent on such security as there might exist for a line which was solely on Mrs. Cartwright's property; thirdly, this alternative
- C would involve greater cost, and fourthly, as all poles, or almost all poles, would be on Mrs. Cartwright's land that fact might give rise to demand of wayleave payment of £2 per pole. His LORDSHIP intimated that the Post Office officials had endeavoured to meet Mrs. Cartwright's reasonable requirements and to continue the service both to her and to her neighbours, but that Mrs. Cartwright had shown herself to be obstructive in these matters and prepared to
- D conduct a vendetta with the Post Office rather than to pay the money which was due. No alternative route, at any rate by reference to a plan, had been put forward until some eighteen months' negotiations had elapsed.

- Mr. Morris, the tenant of Cottage Farm, was not a farmer, but an employee of Leek Rural District Council. His wife farmed some twenty acres. He had a grown-up daughter and a brother living with him and his wife, both of whom
- E worked outside some distance away, so that his wife used the telephone for shopping and in connexion with the farm. The next village, Ibstones, was two and a half miles away. Leek, which was the centre of a number of services in relation to farming, was about seven miles away. The main farming needs, e.g., ordering corn, communication with the artificial insemination service, communication with the veterinary surgeon and communication with the agriculture advisory services, all required the use of the telephone; the communications being to points seven to ten miles distant. The fire engine was at Ibstones and the doctor was at Leek. Mr. Barker bought Home Farm in 1952, with a telephone in situ. He was married and had three children of school age, all of whom went to different schools. This was a remote and exposed area and, particularly in winter, communications were a bit precarious. Mr. Barker
- G farmed 120 acres and had 105 head of cattle on his land. He needed the telephone in connexion with the farm, e.g., to summon the veterinary surgeon quickly, particularly in connexion with fever or magnesium deficiency. There was evidence that unless the veterinary surgeon was on the spot within half-an-hour of getting the complaint, the matter might prove fatal. There was evidence that some ninety-nine per cent. of farms in remote areas did have telephones
- H and a witness, Mr. Kenny, the vice-chairman of the National Farmers' Union in Staffordshire, testified that the business of farming made the telephone essential.

- Mrs. Cartwright raised a number of points on appeal by way of objection. She claimed that no consent had been asked for by, or given to, the Post Office for the line which provided a service to the three hereditaments prior to that
- I line's partial dismantling in April, 1966. His LORDSHIP intimated that, if that were right, the matter was covered by s. 4 (1) of the Telegraph Act, 1892, which was incorporated in s. 2 of the Telegraph (Construction) Act, 1916, whereby lawful presumption was given to a line which was constructed without compliance with the requirements of the Acts until removal was requested. Mrs. Cartwright further claimed that the consent of the "occupier" had not been sought by the Post Office, nor given, as required by s. 21 of the Telegraph Act, 1863, on the basis that the occupier was her husband who was rated as such. His LORDSHIP intimated that Mrs. Cartwright owned the estate, lived in the house with her

husband and family and was plainly an occupying owner. Accordingly, in serving Mrs. Cartwright the Postmaster-General had complied with the requirement to serve the owner and occupier. Mrs. Cartwright further claimed that under s. 1 of the Act of 1916 the Post Office must give her a service. She based this on an interpretation of the proviso to s. 1 which, His LORDSHIP intimated, he could not accept and would not deal with. Mrs. Cartwright submitted that it was not permissible to take into account, for the purposes of the re-hearing, a cost of £220 incurred in April, 1966, by the Post Office in removing the telegraph poles from her land and re-routing such service as thereafter could be given to Mr. Barker at Home Farm. His LORDSHIP intimated that the Post Office were right to recognise their moral obligation to Mr. Barker, and that in so far as His LORDSHIP took cost into account, he would have regard to this matter. Mrs. Cartwright finally asked that the alternative route was to be preferred to that for which the Post Office sought consent. His LORDSHIP intimated that he entertained no real doubt that the alternative route was only a tactical move. Any doubt that he might have had would have been dispelled by Mrs. Cartwright's scarcely covered threat during the case that if the route proposed by the Post Office were to be approved they could expect refusals of consent each time that they sought to maintain that route.

The case noted below\* was cited in argument in addition to the case referred to in the judgment.

The appellant appeared in person.

*J. H. R. Newey* for the Post Office.

*Cur. adv. vult.*

Mar. 18. **WILLIS, J.**, read the following judgment: This is an appeal by Mrs. Cartwright from the decision of His Honour JUDGE HARINGTON at the Leek, Staffordshire county court, under s. 4 of the Telegraph Act, 1878, as amended (1) by the Railway and Canal (Abolition) Act, 1949 (2). This section provides for an appeal by way of re-hearing to a nominated judge of the High Court from the determination of a county court judge, on the reference to him of a difference arising between the Postmaster-General and a private landowner (to use a compendious phrase). By his order the county court judge gave his consent to the placing of telegraph lines across the land owned by Mrs. Cartwright and attached to Sharpcliffe Hall, Ibstones, Stoke-on-Trent, in the county of Stafford. The order then specified three sections of the line crossing Mrs. Cartwright's land, and, further, gave consent to the placing of what is called in the order, a contrivance, which in fact is a telegraph bracket, on the wall of a house called Cottage Farm, and then continued by imposing certain conditions on the consent. The counterclaim, or what was treated as a counterclaim by Mrs. Cartwright, was dismissed by the county court judge.

I am told that this is the first time since its enactment ninety years ago that a High Court judge has been invited to exercise this appellate jurisdiction and to thread his way through the labyrinthine provisions of the Telegraph Acts (3). Even with such an expert guide as counsel for the Post Office, it is easy to lose one's way in the jungle of cross-references. Indeed, both parties went off on a false trail in this case and found themselves in the Court of Appeal: a very venial error, if I may say so, for which there is respectable precedent since in an earlier case to which I have been referred (4) it was not until the parties were on appeal from a county court judge to the Railway and Canal Commission that it was discovered that the county court judge had had no jurisdiction and

\* *A.-G. v. Edison Telegraph Co. of London*, (1880), 6 Q.B.D. 244.

(1) For s. 4 of the Act of 1878 as amended, see 24 HALSBURY'S STATUTES (2nd Edn.) 1015.

(2) For the Railway and Canal (Abolition) Act, 1949, see 19 HALSBURY'S STATUTES (2nd Edn.) 1136.

(3) I.e., the Telegraph Acts, 1863-1962.

(4) *Postmaster-General v. Brooks*, [1922] 2 K.B. 176.



- A that the matter of difference should have been determined by the Railway and Canal Commission at first instance. It is against this background that I should like to congratulate Mrs. Cartwright on the skill with which she has argued her case, and to express the hope that those who are concerned to look into legislation of antique provenance and considerable obscurity might be able to consider whether some simplification of the Telegraph Acts is possible and desirable.
- B In the course of his most able and helpful opening counsel for the Post Office took me through the various Acts, which start with the Telegraph Act, 1863 (5), when landowners had an absolute right to refuse telegraph companies consent to place works on their land, and which show how the development of the telegraph and telephone required frequent legislation, and the extent to which, and the conditions subject to which, the Postmaster-General can exercise what is called
- C monopolistic right and perform his duties. I do not find it necessary to refer to any of them, at all events at this stage, except, of course, s. 1 of the Telegraph (Construction) Act, 1916, under which the present difference arises, and which reads as follows:

- D “ If the owner, lessee, or occupier of any land or building refuses or fails to give his consent to the placing of a telegraphic line under, in, upon, over, along or across the land or building within two months after being required to do so by notice from the Postmaster-General, a difference shall be deemed to have arisen between the Postmaster-General and that owner, lessee, or occupier, and ss. 3, 4 and 5 of the Telegraph Act, 1878, shall apply accordingly as if it were a difference arising under that Act (6): Provided that the tribunal to which the difference is referred under these sections shall not
- E give its consent to the placing of the line unless satisfied that such refusal or failure is contrary to the public interest; and in deciding whether to give its consent or to impose any terms, conditions, or stipulations, including the carrying of any portion of the line underground, the tribunal shall, among other considerations, have regard to the effect, if any, on the amenities or value of the land of the placing of the line in the manner proposed: Provided
- F also that, subject as aforesaid, all the provisions of the Telegraph Act, 1863 (5), shall apply in the case of the exercise of any powers authorised to be exercised under this section and such owner, lessee, or occupier, shall have and enjoy all the benefits of such provisions.”

- There is, as is to be expected, no definition of “ the public interest ”; but the onus of satisfying the tribunal that the refusal of, or failure to grant, consent is
- G plainly on the Postmaster-General, and this, I take it, is to be discharged on a balance of probabilities. I take it also that the question of public interest is to be decided not only by reference to the matters enjoined by s. 1 of the Act of 1916, but in the light of all the circumstances and conditions as they exist at the present time, notwithstanding that they would probably not have been specifically envisaged by the legislature in 1916.

- H [His LORDSHIP then reviewed the facts and circumstances and the guerilla which Mrs. Cartwright had conducted against the Post Office since the telephone to Sharpcliffe Hall was cut off in June, 1965, and referred to the circumstances of Mr. Morris and Mr. Barker, to their need for the telephone, to the area itself and the amenity or value of the land, and to the matters raised by Mrs. Cartwright by way of claim or objection. His LORDSHIP said that as counsel for
- I the Post Office had asked him to express a view on the position in regard to possible refusals of consent each time the Post Office might seek to maintain the route that they had proposed, His LORDSHIP would comply with the request, though the matter did not arise in the context of the present hearing, and he would express a view on the position. His LORDSHIP continued:] Under s. 4 of the Telegraph (Construction) Act, 1916, it is provided that:

(5) For the Telegraph Act, 1863, see 24 HALSBURY'S STATUTES (2nd Edn.) 962.

(6) For the Telegraph Act, 1878, see 24 HALSBURY'S STATUTES (2nd Edn.) 1013.

"Before entering on land or buildings for the purpose of the construction or maintenance of any telegraphic line the Postmaster General shall, except in case of emergency, endeavour to make an arrangement with the occupier of the land as to the times of entry for such purpose, and if any difference arises between the Postmaster General and the occupier it shall be determined in manner aforesaid."

The opening shots in respect of that question have already been fired, because after the learned county court judge had given his decision, and before Mrs. Cartwright had decided to appeal, the Postmaster-General desired to enter on the land (7) to construct the line and Mrs. Cartwright has refused consent. Therefore, there is already before the county court judge a difference as between the parties as to the times of entry for the purpose of constructing the line, and that has been stayed pending the decision of this appeal. It seems to me that this is a consequential provision. Section 1 of the Act of 1916 provides for the question of principle to be determined, whether consent shall be granted to a line on a proposed route, and when that is decided s. 4 seems to me to provide that the Post Office shall act reasonably in relation to their requirements for constructing and maintaining the line; that is to say, they are required to try, except in the case of emergency—whatever that means—to make suitable arrangements with the occupier of the land, so that he is as little disturbed as possible, no doubt whether they wish to construct a line or whether they wish to maintain it. Parliament seems to me to have made provision for the Post Office to act reasonably in the matter, and, at the same time, to have given an intransigent owner the opportunity to delay the construction of the line and to make it inconvenient for the Postmaster-General to carry out his duties, notwithstanding that he would get permission to put the line there under s. 1. I do not know whether it is proper to say this, but I intend to: I can only express the hope, in the circumstances, that Mrs. Cartwright may feel, when the question of principle has been established, that she would not take advantage of whatever rights she has under s. 4, merely to be obstructive and difficult.

I hope I have fairly considered and dealt with most, if not all, of the points—and of course there were many of them—raised by Mrs. Cartwright. None of them seems to me to go to, or affect the root point of this appeal, which is, whether her failure to give consent is contrary to the public interest. This, as is made clear in the judgment in the unreported case of *Postmaster-General v. Pearce* (8) decided in 1923, is a question of fact. The failure to give consent in this case means that two households, comprising nine people, those of Mr. Morris and Mr. Barker, would be denied a telephone in their houses. They clearly cannot be regarded as "a class of persons", nor "a large number of persons". If, therefore, the test set forth by Mr. Tindal Atkinson, in *Pearce's* case (8) was the correct one, then the Post Office, on whom the onus lies, must fail. I am not satisfied that that is the correct test.

Counsel for the Post Office referred me to s. 2 of the Telegraph Act, 1892, which opens with these words in sub-s. (1):

"If the Postmaster General considers that the inhabitants of any district or any public authority are debarred from the public convenience of telegraphic communication owing to the refusal or failure of any person . . ."

and he points out that that subsection has been repealed (9) and that there is an inference to be drawn that, in the rather more general words under which I have to consider this matter there is a bias on the construction against the wide and specific words of s. 2 (1), and there seems to me to be some force in that

(7) The Post Office had applied to the county court under s. 4 of the Act of 1916 for the determination when their employees might enter on Mrs. Cartwright's land to construct the lines, and the application had been suspended pending the appeal to the designated judge.

(8) (Nov. 22, 1922), *Railway and Canal Commission*, unreported.

(9) Repealed by the Act of 1916, s. 5 (3).

A argument. However, the way in which the matter was put by Mr. Tindal Atkinson in *Pearce's* case (10) was this:

B “The word ‘public’ must, in my opinion, in this connexion be treated as comprising a considerable body of persons. I do not think that the public interest is involved because one person or a few persons are unable to obtain the telephone service by the refusal of an owner to allow his land to be used for the purpose. In any case there must be no reasonable alternative method open to the Postmaster-General to effect a service.”

C As I have said, in my judgment that is not the correct test, and I am fortified in that view by the reference to what was said by ATKIN, L.J., when *Pearce's* case (10) went to the Court of Appeal (11). It is true that what he said was obiter, but, coming from that source, it is a statement obiter which would necessarily carry the greatest weight. He said this:

D “It is said the Railway and Canal Commission in dealing with this matter have laid down as a general rule that a refusal could not be contrary to public interest unless either a district or a large number of persons were prevented from enjoying the telephone. I do not think it is necessary to lay down whether that would in itself be a true proposition; I am inclined to think it would be too wide and not correct.”

E I think that the public interest is to be considered on the facts of each case at the time when the question arises for decision and that I am not inhibited from considering whether, on the facts, the failure to give consent is contrary to the public interest because only two households are denied a service. Since I am satisfied that the granting of consent would have no significant effect on the amenity or value of Mrs. Cartwright's land and that Mr. Morris and Mr. Barker will suffer hardship by the denial of services, for which the present make-shift arrangement is no real remedy, I have to consider, it seems to me, whether this hardship goes beyond a private inconvenience which would not justify a consent being imposed on Mrs. Cartwright, however capricious and unneighbourly F her attitude might, at the time, be. In other words, is it in the public interest that these two farmers and their households should have the telephone? If it is, it seems to me that it must be contrary to the public interest that they should be denied it.

G The learned county court judge has set out the matter of public interest which seemed to him to be involved and he said this:

H “I accept that it is in the public interest that many private difficulties be either prevented or speedily remedied. If a child is ill I think it is the public interest that a doctor be called as quickly as possible. We provide a free medical service for this purpose and it is in the public interest. On farms accidents sometimes happen with machinery and, although it is an individual who is hurt, there appears to be a public interest that the individual should be treated and cured as efficiently as possible. If a beast is sick, it should be possible to summon the vet. speedily. If a hayrick catches fire it is in the public interest that the fire brigade should be called to put out the fire as quickly as possible. There is an Agricultural Advisory service and it is desirable that it should be possible to call for its services. In winter I made for taking children to and from school.”

I I respectfully agree with that catalogue of matters, all of which seem to me to be in the public interest. Farming is an important national industry: it seems to me that it must be in the public interest that it should operate as efficiently as possible, and it seems to me that there is great force in Mr. Kenny's view,

(10) (Nov. 22, 1922), Railway and Canal Commission, unreported.

(11) (Feb. 23, 1923), C.A., unreported



that in these modern days a farmer, particularly in a remote area, cannot operate efficiently without a telephone. One has only to mention the artificial insemination service, the need to be in communication with the vet., and in communication with dairies, and milk supplies; the whole matter being underlined by the recent outbreaks of foot-and-mouth disease. I agree with JUDGE HARINGTON that in 1967 and 1968 the public interest in schooling and medical care is involved in telephonic communication, if possible, between parents and school, and patient and doctor. Indeed, I would go further and hold that it is also in the public interest that personal contact between members of the community, particularly in remote areas, be maintained by telephone. Whether or no what I have called the social needs—which I have just enumerated—of these two households for a telephone are in the public interest, as I think they are, it seems to me to be beyond argument on the facts of this case that it must be in the public interest that these two farms should be on the telephone.

I have considered whether there is a practical alternative to the line for which consent is asked. In all the circumstances, which I need not repeat, I am satisfied that neither the route shown on the plan nor the variant further to the north of the avenue offers a practical alternative. I conclude, therefore, that the failure to give consent is contrary to the public interest, and that consent should be granted for the three sections of the kind which are set out in the county court decision and for the fixing of the contrivance on Cottage Farm.

I have considered what conditions should be imposed on the Post Office and I see no reason to differ from the conditions imposed by the county court judge. These are, first, that the section [crossing the drive of Sharpcliffe Hall], as, indeed, is offered by the Post Office, should be constructed underground. So far as the wayleave payments for the two spans of wire are concerned, I have been told that the normal practice is that no payment is asked for, but that in the rare cases in which it is no more than 4s. a span is paid, and in the circumstances I see no reason to differ from the figure of half-a-crown which was chosen by the county court judge in respect of each of the two spans of wire. I should not leave this matter without mentioning, at Mrs. Cartwright's request, that one of the conditions, if consent were to be granted, should be that the Post Office should make a contribution to the making up of the drive, in respect of which there are apparently already covenantors, by reason of such use as they would make of it when they had to use their vehicles for maintenance. This seems to me to be a quite unreal and unreasonable request to make. No one, of course, can possibly tell how many times a year—or if it will be more than, perhaps, once a year—that the Post Office would need to use the avenue. There seems to me to be some contest as to whether there is some public right of way over the avenue. The Post Office consider, on evidence which I do not have to determine, that there is at least a public footpath, a right of pedestrian way, over the whole length of the avenue. This is not accepted by Mrs. Cartwright, but, as I say, happily that is not a matter on which I have to give any decision. At all events, I have certainly not got evidence before me which would enable me to judge this matter one way or the other, and I do not impose on the Post Office any condition in relation to the making up of the avenue.

*Appeal dismissed.*

Solicitors: *Solicitor, the Post Office.*

[Reported by K. DIANA PHILLIPS, Barrister-at-Law.]

# A BAMFORD AND ANOTHER v. BAMFORD AND OTHERS.

[CHANCERY DIVISION (Plowman, J.), March 21, 22, 26, 27, April 3, 1968.]

*Company—Ultra vires—Allotment of ordinary shares by directors to counter take-over bid—Directors empowered by articles to issue unissued shares—Directors' action approved by company in general meeting—Whether, assuming directors' action was not in best interests of company and in excess of their powers, the allotment could be ratified by the company in general meeting—Inherent residual power of company over unissued shares.*

By way of a defence to a take-over bid directors allotted five hundred thousand unissued ordinary shares of the company to a third company at par for cash. By art. 12 of the company's articles of association all unissued shares were to be at the disposal of the directors. Two shareholders issued a writ against the directors of the company and the company seeking a declaration that the allotment was void and should be set aside. This claim was based on the allegation that the allotment was not made in good faith in the interests of the company and was therefore in excess of the director's power. There was no suggestion that the directors had acted fraudulently. A general meeting of the members of the company was convened at which the action of the directors in making the allotment was approved by a majority of votes. On a preliminary point of law in the action whether, assuming that the directors had not acted bona fide in the interests of the company, the allotment was capable of being ratified by an ordinary resolution of the members of the company,

**Held:** assuming, as was required for the decision of the preliminary point of law, that the allotment was not made bona fide in the interests of the company, nevertheless the company had a residual power over allotments of shares, which power was exercised at the general meeting and could be validly exercised by the members at the meeting for their own interests, they not being subject to the fiduciary duty of directors to act in the best interests of the company; therefore, the ordinary resolution of the members in general meeting was effective, on the assumption mentioned, to ratify the allotment and did not constitute a usurpation of the powers conferred by the articles on the directors (see p. 665, letters A and H, and p. 668, letters G and H, post).

*Hogg v. Cramphorn, Ltd.* ([1966] 3 All E.R. 420) followed.

*Automatic Self-Cleansing Filter Syndicate Co., Ltd. v. Cuninghame* ([1906] 2 Ch. 34); *Gramophone and Typewriter, Ltd. v. Stanley* ([1908-10] All E.R. Rep. 833) and *Salmon v. Quin & Axtens, Ltd.* ([1909] 1 Ch.D. 311) considered. *Irvine v. Union Bank of Australia* (1877), 2 App. Cas. 366 applied.

[As to how far members of a company can impose their will on directors in regard to the exercise of powers under articles, see 6 HALSBURY'S LAWS (3rd Edn.) 298, para. 602; and for cases on the subject, see 9 DIGEST (Repl.) 498, 3282-3284.]

As to acts of the directors ratified by the company, see 6 HALSBURY'S LAWS (3rd Edn.) 299, para. 603; and for cases on this subject, see 9 DIGEST (Repl.) 506, 507, 3332-3341.

As to the exercise by directors of their powers over the issue of shares, see 6 HALSBURY'S LAWS (3rd Edn.) 295, 296, para. 598; and for cases on the exercise of such powers over the issue of shares, see 9 DIGEST (Repl.) 301, 302, 1895-1902.]

Cases referred to:

*Automatic Self-Cleansing Filter Syndicate Co., Ltd. v. Cuninghame*, [1906] 2 Ch. 34; 75 L.J.Ch. 437; 94 L.T. 651; 9 Digest (Repl.) 498, 3282.

*Edwards v. Halliwell*, [1950] 2 All E.R. 1064; 45 Digest (Repl.) 545, 1231.

*Foss v. Harbottle*, (1843), 2 Haro, 461; 67 E.R. 189; 9 Digest (Repl.) 506, 3333.

- Gramophone and Typewriter, Ltd. v. Stanley*, [1908-10] All E.R. Rep. 833; A  
[1908] 2 K.B. 89; 77 L.J.K.B. 834; 99 L.T. 39; 9 Digest (Repl.)  
30, 14.
- Grant v. United Kingdom Switchback Rys. Co.*, (1888), 40 Ch.D. 135; 58 L.J.Ch.  
211; 60 L.T. 525; 9 Digest (Repl.) 507, 3337.
- Hogg v. Cramphorn, Ltd.*, (1963), [1966] 3 All E.R. 420; [1967] Ch. 254;  
[1966] 3 W.L.R. 995; Digest (Cont. Vol. B) 98, 1903a. B
- Huddersfield Police Authority v. Watson*, [1947] 2 All E.R. 193; [1947] K.B.  
842; [1948] L.J.R. 182; 177 L.T. 114; 111 J.P. 463; 30 Digest (Repl.)  
229, 734.
- Irvine v. Union Bank of Australia*, (1877), 2 App. Cas. 366; L.R. 4 Ind. App.  
86; 46 L.J.P.C. 87; 37 L.T. 176; 9 Digest (Repl.) 503, 3312.
- North-West Transportation Co., Ltd. v. Beatty*, (1887), 12 App. Cas. 589; 56 C  
L.J.P.C. 102; 57 L.T. 426; 9 Digest (Repl.) 506, 3336.
- Oakbank Oil Co. v. Crum*, (1882), 8 App. Cas. 65; 48 L.T. 537; 9 Digest  
(Repl.) 636, 4234.
- Pender v. Lushington*, (1877), 6 Ch.D. 70; 46 L.J.Ch. 317; 9 Digest (Repl.)  
609, 4039.
- Salmon v. Quin & Axtens, Ltd.*, [1909] 1 Ch. 311; 78 L.J.Ch. 367; 100 L.T. 161; D  
affd. H.L. sub nom. *Quin & Axtens, Ltd. v. Salmon*, [1909] A.C. 442;  
78 L.J.Ch. 506; 100 L.T. 820; 9 Digest (Repl.) 498, 3283.
- Shaw (John) & Sons (Salford), Ltd. v. Shaw*, [1935] All E.R. Rep. 456; [1935]  
2 K.B. 113; 104 L.J.K.B. 549; 153 L.T. 245; 9 Digest (Repl.) 504,  
3322.
- Wood v. Odessa Waterworks Co.*, (1889), 42 Ch.D. 636; 58 L.J.Ch. 628; 9 E  
Digest (Repl.) 636, 4236.

### Preliminary point of law.

This was a preliminary point of law in an action begun by writ issued on Nov. 21, 1967, by the plaintiffs, Rupert Cyril Bamford and Anthony Paul Bamford, suing on their own behalf and on behalf of other shareholders of Bamfords, Ltd. other than the defendants, against Henry Vincent Bamford, Richard F Hawthorn Bamford, John George Bamford and Frederick H. Burgess, Ltd. (herein called "Burgesses") and Bamfords, Ltd. (herein called "Bamfords").

On Nov. 9, 1967, J. C. Bamford (Excavators), Ltd. made a take-over bid for Bamfords. On Nov. 20, 1967, the directors of Bamfords allotted five hundred thousand ordinary shares in Bamfords at par for cash to Burgesses. The directors' meeting on Nov. 20, 1967, at which the allotment was approved, was G attended by the four members of the board of Bamfords, viz., the first three defendants and the plaintiff Rupert Cyril Bamford, who voted against the allotment. The first plaintiff was a substantial shareholder in Bamfords; the second plaintiff was also a shareholder in that company. On Nov. 20, 1967, the first plaintiff resigned as a director of Bamfords. On the following day the writ beginning this action was issued whereby the plaintiffs claimed a declaration H that the allotment of five hundred thousand shares by Bamfords to Burgesses was void and ought to be set aside, and an injunction restraining the first three defendants and Bamfords from issuing any unissued shares of Bamfords without the sanction of a general meeting. By notice dated Nov. 28, 1967, an extraordinary general meeting of Bamfords was convened for Dec. 15, 1967, at which a resolution would be proposed to ratify and approve the allotment to Burgesses I of five hundred thousand shares. By writ issued on Dec. 1, 1967, the plaintiffs claimed against defendants who included the first three defendants in the present action, Bamfords and two other defendants, a declaration, among other relief, that the allotment of the five hundred thousand shares could not be ratified by the members of the company in general meeting. At the meeting of Bamfords on Dec. 15 the resolution ratifying and approving the allotment was duly passed. By order made on Mar. 8, 1968, in the present action, it was ordered that the preliminary point of law set forth in the schedule should be set down for hearing



A and be disposed of forthwith. The terms of the point of law are bellow at letter I, post: the question raised was whether, assuming that the allotment of five hundred thousand shares was not made bona fide in the interests of Bamfords, it was capable of being effectively ratified or approved by an ordinary resolution at a general meeting of Bamfords. It was not alleged that in making the allotment the board had acted fraudulently, but the assumption on which the point

B of law came before the court was that the board had exceeded its powers.

The cases noted below\* were cited during the argument in addition to those referred to in the judgment.

*H. E. Francis, Q.C., and Paul V. Baker for the plaintiffs.*

*Michael Wheeler, Q.C., and C. Drake for the first, second and third defendants and for Bamfords (the fifth defendants).*

*Muir Hunter, Q.C., and R. A. K. Wright for Burgesses (the fourth defendants).*

*Curr. adv. vult.*

Apr. 3. PLOWMAN, J., read the following judgment: This is a preliminary point of law which was ordered to be set down for hearing in the following

D circumstances: early in November, 1967, a company called J. C. Bamford (Excavators), Ltd. (which I will call "Excavators") made a take-over bid for the shares of the fifth defendants, Bamfords, Ltd. (which I will call "Bamfords"). On Nov. 20 the directors of Bamfords allotted half a million unissued 4s. shares of Bamfords to the fourth defendants, Frederick H. Burgess, Ltd. (which I will call "Burgesses") for cash at par. This allotment was attacked by the plain-

E tiffs, who were in favour of the take-over, on the ground that it was not made in good faith for the benefit of Bamfords but in order to thwart Excavators' efforts to obtain control. As a counter to this attack, the board of Bamfords called an extraordinary general meeting of that company for Dec. 15, to consider an ordinary resolution ratifying and approving the allotment to Burgesses. The notice convening the meeting was accompanied by a circular explaining

F the position and stating that the board had been advised that it was right and proper that the opinion of the members should be obtained whether or not they wished the allotment to stand. The extraordinary general meeting was duly held and passed the proposed resolution by a substantial number of votes. Burgesses' half million shares were not voted.

The writ in this action was issued on Nov. 21, 1967, that is to say three weeks or so before the extraordinary general meeting and claimed, among other relief,

G a declaration that the allotment made by the board of Bamfords to Burgesses in November was void and ought to be set aside. Since, however, the question whether the board's allotment had been made bona fide for the benefit of Bamfords would be irrelevant if the resolution of the extraordinary general meeting was effective to cure any possible defect in the board's action the parties

H consented to the following order being made on Mar. 8 last:

"It is ordered that the preliminary point of law set forth in the schedule hereto be set down for hearing and be disposed of forthwith and before the trial of the issues of fact and other issues in this action."

The schedule is as follows:

I "On the assumption (which is made solely for the purposes of the hearing of this preliminary point of law) that the allotment by the board of Bamfords, Ltd. of five hundred thousand shares at par to Fredk. H. Burgess, Ltd. on Nov. 20, 1967, was not made bona fide in the interests of Bamfords, Ltd. because it was a tactical move in a battle for control of Bamfords, Ltd.,

\* *Fraser v. Whalley*, (1864), 2 Hem. & M. 10; *Punt v. Symons & Co., Ltd.*, [1903] 2 Ch. 506; *Ving v. Robertson and Woodcock, Ltd.*, (1912), 56 Sol. Jo. 412; *Piercy v. S. Mills & Co., Ltd.*, [1918-19] All E.R. Rep. 313; [1920] 1 Ch. 77; *Re Surrey Garden Village Trust, Ltd.*, [1964] 3 All E.R. 962.

having as its primary purpose to make it more difficult for J. C. Bamford (Excavators), Ltd. to obtain such control

"Whether as a matter of law and on the true construction of the memorandum and articles of association of Bamfords, Ltd. such allotment was capable of being effectively ratified and/or approved by an ordinary resolution of a general meeting of Bamfords, Ltd."

I should make it clear that though I am to assume that the directors did not exercise their power of allotment bona fide in the interests of the company, there is no suggestion and never has been any suggestion that they acted fraudulently. The assumption is merely that the board exceeded its powers, not that it acted mala fide.

Bamfords' articles, which were adopted in 1958, include the following:—art. 6 provides:

"The present capital of the company is £1,000,000, divided into 2,500,000 ordinary shares of 4s. each and 2,500,000 deferred ordinary shares of 4s. each."

A special resolution was subsequently passed amalgamating the issued and unissued ordinary and deferred shares into one class of ordinary shares, and, prior to the allotment to Burgesses, all the company's shares had been issued except for five hundred thousand.

Article 12 is as follows:

"Subject as provided by art. [53], all shares for the time being unissued shall be at the disposal of the directors, who may allot, grant options over or otherwise dispose of them to such persons on such terms and at such times as the directors may think fit, and provided that no shares shall be issued at a discount except as provided by s. 57 of the Companies Act, 1948. The directors may for valuable consideration enter into any agreement giving to any person any call or right of pre-emption in respect of or any option to take shares and may (subject to the provisions of any Act of Parliament for the time being in force) issue any shares as fully or partially paid up as the consideration or part of the consideration for any property acquired by or work or services done or rendered or to be done or rendered for or at the request of the company."

Article 53 is as follows:

"The company may by ordinary resolution direct that the new shares or any of them shall be offered in the first instance to the then members or any class thereof for the time being in proportion to the number of shares or shares of the class held by them respectively or make any other provisions as to the issue of the new shares."

It is common ground that the five hundred thousand shares in question were not new shares for the purposes of art. 53.

If the decision of BUCKLEY, J., in *Hogg v. Cramphorn, Ltd.* (1) is good law, the question which I am called on to decide must be answered in the affirmative, because I can see no difference in principle between that case and the present case. *Hogg v. Cramphorn, Ltd.* (1) concerned a company, the articles of which conferred on the directors a power similar to that conferred on the directors of Bamfords by art. 12. A take-over bid was made for the company's shares. The directors, acting in good faith and believing that their actions were for the benefit of their company, devised a scheme the primary purpose of which was to ensure that the board would retain control of the company. The scheme involved the issue of shares to certain trustees with special voting rights.

BUCKLEY, J., in a reserved judgement, held that the power to issue shares was a fiduciary power; that if it was exercised for an improper motive, the

A allotment was liable to be set aside even if it was made in the bona fide belief that it was in the interests of the company. He went on to hold that, the primary purpose of the scheme being to retain control for the directors, the issue of shares pursuant to that scheme was ultra vires the board and—this is the important point in the present case—invalid unless ratified by the company in general meeting.

B I will read the part of his judgment dealing with this aspect of the matter (2):

“Counsel for the plaintiff says, no doubt rightly, that the company in general meeting could not by ordinary resolution control the directors in the exercise of the powers under art. 10. He goes on to say, I think with less justification, that what they could not ordain a majority could not ratify. There is, however, a great difference between controlling the directors’ exercise of a power vested in them and approving a proposed exercise by the directors of such a power, especially where the proposed exercise of the power is of a kind which might be assailed if it had not the manifest approval of the majority. Had the majority of the company in general meeting approved the issue of the 5,707 shares before it was made, even with the purported special voting rights attached (assuming that such rights could have been so attached conformably with the articles), I do not think that any member could have complained of the issue being made; for in these circumstances, the criticism that the directors were, by the issue of the shares, attempting to deprive the majority of their constitutional rights would have ceased to have any force. It follows, in my opinion, that a majority in a general meeting of the company at which no votes were cast in respect of the 5,707 shares could ratify the issue of those shares. Before setting the allotment and issue of the 5,707 shares aside, therefore, I propose to allow the company an opportunity to decide in general meeting whether it approves or disapproves of the issue of these shares to the trustees. Counsel for the defendants will undertake, on behalf of the trustees, not to vote at such a meeting in respect of the 5,707 shares.”

E A footnote (3) to the report states that in due course a general meeting gave its approval. As I said, if that case was rightly decided, the plaintiffs in the present action must, in my opinion, fail; but counsel, on their behalf, has argued that the decision is wrong and that I ought not to follow it.

I approach the matter in the light of what LORD GODDARD, C.J., said in *Huddersfield Police Authority v. Watson* (4):

G “... I think the modern practice, and the modern view of the subject, is that a judge of first instance, though he would always follow the decision of another judge of first instance, unless he is convinced the judgment is wrong, would follow it as a matter of judicial comity. He certainly is not bound to follow the decision of a judge of equal jurisdiction.”

H I will say at once that I am not convinced that the decision of BUCKLEY, J., was wrong, but as the matter was very fully argued before me, and does not appear to have been very fully argued before BUCKLEY, J. (5), I will consider the arguments in some detail.

I Counsel for the plaintiffs submitted the following propositions. (i) The articles of a company constitute a contract binding on the company and all its members, and each member is entitled as against the company and every other member to require that the affairs of the company shall be conducted according to the articles for the time being in force. This proposition is merely an exegesis of s. 20 (1) of the Companies Act, 1948 (6). Its purpose is to demonstrate that

(2) [1966] 3 All E.R. at p. 429; [1967] Ch. at p. 269.

(3) [1966] 3 All E.R. at p. 430; [1967] Ch. at p. 272.

(4) [1947] K.B. 842 at p. 848; [1947] 2 All E.R. 193 at p. 196.

(5) [1966] 3 All E.R. 420; [1967] Ch. 254.

(6) For s. 20 (1) of the Companies Act, 1948, see 3 HALSBRURY'S STATUTES (2nd Edn.) 477.



the plaintiffs are suing in respect of their own individual contractual rights and that the rule in *Foss v. Harbottle* (7) is therefore excluded (see *Edwards v. Halliwell* (8)). This proposition is not challenged by the defendants. (ii) A simple majority of shareholders in general meeting has only such powers as the articles expressly or by necessary implication confer on it. It cannot alter the articles and is contractually bound by them according to their tenor. (iii) Whether a simple majority of members in general meeting has, in any particular case, a power to direct how unissued shares of the company shall be allotted, depends on the construction of the articles. (iv) On the true construction of the articles of Bamfords the power to allot the half million unissued shares was vested by art. 12 in the directors and in them alone; they had no power to delegate that power to the shareholders in general meeting and any concurrent power in the company itself was necessarily excluded.

In support of his second proposition counsel for the plaintiffs referred to *Wood v. Odessa Waterworks Co.* (9), and in particular to a citation in the judgment of STIRLING, J., from the judgment of the EARL OF SELBORNE, L.C., in *Oakbank Oil Co. v. Crum* (10), where he said:

"It appears to me that directors and general meetings of companies of this sort can have no powers by implication except such as are incident to, or properly to be inferred from, the powers expressed in the memorandum and articles of association. Their powers are entirely created by the law and by the contract founded upon the law which enables such companies to be constituted."

No exception is taken on behalf of the defendants to this statement as a statement of principle; any dispute lies in the area of implication; counsel for the plaintiffs does not, as I understand it, dissent from the view that in the absence of anything in its articles to the contrary, a company would have an inherent power to allot its unissued shares by ordinary resolution. He cited to me the judgment of SIR RICHARD BAGGALLAY in the Privy Council in *North-West Transportation Co., Ltd. v. Beatty* (11), where he said:

"The general principles applicable to cases of this kind are well established. Unless some provision to the contrary is to be found in the charter or other instrument by which the company is incorporated, the resolution of a majority of the shareholders, duly convened, upon any question with which the company is legally competent to deal, is binding upon the minority, and consequently upon the company, and every shareholder has a perfect right to vote upon any such question, although he may have a personal interest in the subject-matter opposed to, or different from, the general or particular interests of the company."

Counsel for the plaintiffs, of course, relied on the opening words of that passage—"Unless some provision to the contrary is to be found in the charter or other instrument by which the company is incorporated."

Nor, I think, is counsel's third proposition challenged. The main dispute concerns the fourth proposition and is whether there is any residual power of allotment in the company, notwithstanding art. 12.

Counsel for the plaintiffs relied on a number of cases to which I will now refer. The first was *Automatic Self-Cleansing Filter Syndicate, Co., Ltd. v. Cuninghame* (12). The headnote to that case is as follows:

"A company had power under its memorandum of association to sell its undertaking to another company having similar objects, and by its articles

(7) (1843), 2 Hare 461.

(8) [1950] 2 All E.R. 1064.

(9) (1889), 42 Ch.D. 636 at p. 642.

(10) (1882), 8 App. Cas. 65 at p. 71.

(11) (1887), 12 App. Cas 589 at p. 593.

(12) [1906] 2 Ch. 34.

A of association the general management and control of the company were vested in the directors, subject to such regulations as might from time to time be made by extraordinary resolution, and, in particular, the directors were empowered to sell or otherwise deal with any property of the company on such terms as they might think fit. At a general meeting of the company a resolution was passed by a simple majority of the shareholders for the sale of the company's assets on certain terms to a new company formed for the purpose of acquiring them, and directing the directors to carry the sale into effect. The directors being of opinion that a sale on those terms was not for the benefit of the company, declined to carry the sale into effect:—  
B Held (affirming the decision of WARRINGTON, J.) upon the construction of the articles, that the directors could not be compelled to comply with the  
C resolution.”

I would like to read one or two passages from the judgment of WARRINGTON, J. He said (13):

“The question I have to determine in this case is whether the shareholders of a company have power by a resolution passed by a simple majority of their number to order the directors to seal an agreement for the sale of the whole of the assets of the company notwithstanding that the directors may think that the sale is improvident, and that the terms on which it is to be carried out are not fit terms on which the company ought to carry out such a sale. To my mind this question depends upon the true construction of the articles. The only articles which are material are arts. 96 and 97  
D [His LORDSHIP read the articles and continued:] The effect of this resolution, if acted upon, would be to compel the directors to sell the whole of the assets of the company, not on such terms and conditions as they think fit, but upon such terms and conditions as a simple majority of the shareholders think fit . . . It seems to me on the true construction of these articles that the management of the business and the control of the company are vested  
E in the directors, and consequently that the control of the company as to any particular matter, or the management of any particular transaction or any particular part of the business of the company, can only be removed from the board by an alteration of the articles, such alteration, of course, requiring a special resolution.”

Then in the Court of Appeal SIR RICHARD HENN COLLINS, M.R., said (14):

G “...the question is whether under the memorandum and articles of association here the directors are bound to accept, in substitution of their own view, the views contained in the resolution of the company. WARRINGTON, J., held that the majority could not impose that obligation upon the directors, and that on the true construction of the articles the directors were the persons authorised by the articles to effect this sale, and that unless the  
H other powers given by the memorandum were invoked by a special resolution, it was impossible for a mere majority at a meeting to override the views of the directors. That depends, as WARRINGTON, J., put it, upon the construction of the articles.”

A little later on SIR RICHARD HENN COLLINS, M.R., said (15):

I “In these circumstances it seems to me that it is not competent for the majority of the shareholders at an ordinary meeting to effect or alter the mandate originally given to the directors, by the articles of association. It has been suggested that this is a mere question of principal and agent, and that it would be an absurd thing if a principal in appointing an agent should in effect appoint a dictator who is to manage him instead of his managing the

(13) [1906] 2 Ch. at pp. 37-39.

(14) [1906] 2 Ch. at pp. 41, 42.

(15) [1906] 2 Ch. at pp. 42, 43.

agent. I think that that analogy does not strictly apply to this case. No doubt for some purposes directors are agents. For whom are they agents? You have, no doubt, in theory and law one entity, the company which might be a principal, but you have to go behind that when you look to the particular position of directors. It is by the consensus of all the individuals in the company that these directors become agents and hold their rights as agents. It is not fair to say that a majority at a meeting is for the purposes of this case the principal so as to alter the mandate of the agent. The minority also must be taken into account. There are provisions by which the minority may be overborne, but that can only be done by special machinery in the shape of special resolutions. Short of that the mandate which must be obeyed is not that of the majority—it is that of the whole entity made up of all the shareholders. If the mandate of the directors is to be altered, it can only be under the machinery of the memorandum and articles themselves. I do not think I need say more.”

That, I think, is all I need read of that case. What it decides, and what the cases which follow, to which I will refer in a moment, decide, in my judgment, is this: that a company cannot by ordinary resolution dictate to or overrule the directors in respect of matters entrusted to them by the articles. To do that it is necessary to have a special resolution.

That case was applied by the Court of Appeal in *Gramophone and Typewriter, Ltd. v. Stanley* (16), where FLETCHER MOULTON, L.J., said this (17):

“It has been decided in this court, in *Automatic Self-Cleansing Filter Syndicate Co., Ltd. v. Cuninghame* (18), that in an English company, by whose articles of association certain powers are placed in the hands of the directors, shareholders cannot interfere with the exercise of those powers by the directors, even by a majority at a general meeting. Their course is to obtain the requisite majority to remove the directors and put persons in their place who agree to their policy. This shows that the control of individual corporators is something wholly different from the management of the business itself. Nor is this principle less true when the holding of the individual corporator is so large that he is able to override the wishes of the other corporators in matters relating to the control of the business of the company.”

Then BUCKLEY, L.J., said (19):

“This court decided not long ago in *Automatic Self-Cleansing Filter Syndicate Co., Ltd. v. Cuninghame* (18), that even a resolution of a numerical majority at a general meeting of the company cannot impose its will on the directors when the articles have confided to them the control of the company’s affairs. The directors are not servants to obey directions given by the shareholders as individuals; they are not agents appointed by and bound to serve the shareholders as their principals, they are persons who may by the regulations be entrusted with the control of the business, and if so entrusted they can be dispossessed from that control only by the statutory majority which can alter the articles. Directors are not, I think, bound to comply with the directions even of all the corporators acting as individuals; of course, the corporators have it in their power by proper resolutions, which would generally be special resolutions, to remove directors who do not act as they desire, but this in no way answers the question here to be considered, which is whether the corporators are engaged in carrying on the business of the corporation. In my opinion, they are not. To say that they are involves a complete confusion of ideas.”

(16) [1908-10] All E.R. Rep. 833; [1908] 2 K.B. 89.

(17) [1908-10] All E.R. Rep. at p. 838; [1908] 2 K.B. at p. 98.

(18) [1906] 2 Ch. 34.

(19) [1908-10] All E.R. Rep. at p. 842; [1908] 2 K.B. at p. 105.



A That was, of course, in the days before s. 184 of the Companies Act, 1948 (20).

These cases were followed in the third of the cases cited by counsel for the plaintiffs under this head, *Salmon v. Quin & Axtens, Ltd.* (21). The headnote of this case reads:

B “By the articles of association of a company the general management of the business of the company was vested in the directors subject to such regulations (being not inconsistent with the provisions of the articles) as might be prescribed by the company in general meeting, and it was provided that no resolution of a meeting of the directors having for its object (among other things) the acquisition or letting of any premises should be valid unless twenty-four hours’ notice of the meeting should have been given to each of the managing directors A and B and neither of them should have dissented therefrom in writing before or at the meeting. A and B held the bulk of the ordinary shares in the company. Resolutions were passed by the directors for the acquisition of certain premises and for the letting of certain other premises, but B dissented from each of these resolutions in accordance with the articles. At an extraordinary general meeting of the company resolutions to the same effect were passed by a simple majority of the shareholders. Held, applying the principle of *Automatic Self-Cleansing Filter Syndicate Co. v. Cuninghame* (22), that the resolutions of the company were inconsistent with the provisions of the articles and that the company ought to be restrained from acting upon them.”

FARWELL, L.J., said this (23):

E “Now the management is entrusted to the board of directors, and there is a curious provision which I will read in a moment. The difficulty has arisen in this way. The majority of the board desired to acquire a lease of certain premises for the sum of £2,000 or upwards. They also desired to demise certain vacant premises belonging to the company. The material articles are arts. 75 and 80. Article 75 provides as follows: [HIS LORDSHIP read it]. F Pausing there for a moment, it appears to me to be plain that this is a contract by which the business of the company shall be managed by the board. The articles, by s. 16 of [the Companies Act, 1862] are made equivalent to a deed of covenant signed by all the shareholders.”

That is now s. 20 of the Act of 1948 (24). Then FARWELL, L.J., continued:

G “Now the general power of the board to manage here is qualified by the stipulation which follows, that it is to be subject to the provisions of these articles. I therefore turn to art. 80, and I find this provision to which these general powers of management are made subject.”

He then read the article, and continued (25):

H “In the present case Mr. Salmon did so dissent according to the terms of that article, and therefore the veto therein provided came into operation. That was met by the company being called together by a requisition of seven shareholders and by passing general resolutions for the acquisition of this property and the letting of the vacant premises. It is said that those resolutions are of no effect, and I am of opinion that that contention is right. I base my opinion on the words of art. 75, ‘subject, nevertheless, to the provisions of any Acts of Parliament or of these articles’, which I read to be ‘subject, nevertheless, to art. 80’, ‘and to such regulations (being not inconsistent with any such provisions of these articles) as may be prescribed

(20) For s. 184 of the Companies Act, 1948, see 3 HALSBURY'S STATUTES (2nd Edn.) 603.

(21) [1909] 1 Ch. 311.

(22) [1906] 2 Ch. 34.

(23) [1909] 1 Ch. at p. 318.

(24) For s. 20 of the Companies Act, 1948, see 3 HALSBURY'S STATUTES (2nd Edn.) 477.

(25) [1909] 1 Ch. at pp. 318-320.

by the company in general meeting'. That is to say, 'subject also to such regulations not inconsistent with art. 30 as may be prescribed by the company in general meeting'. But these resolutions are absolutely inconsistent with art. 80; in truth this is an attempt to alter the terms of the contract between the parties by a simple resolution instead of by a special resolution. The articles forming this contract, under which the business of the company shall be managed by the board, contain a most usual and proper requirement, because a business does require a head to look after it, and a head that shall not be interfered with unnecessarily. Then in order to oust the directors a special resolution would be required. The case is, in my view, entirely governed, if not by the decision, at any rate by the reasoning of the lords justices in *Automatic Self-Cleansing Filter Syndicate Co. v. Cuninghame* (26), and *Gramophone and Typewriter, Ltd. v. Stanley* (27). I will only refer to one passage in BUCKLEY, L.J.'s judgment in the latter case. He says (28) 'This court decided not long ago, in *Automatic Self-Cleansing Filter Syndicate Co. v. Cuninghame* (26), that even a resolution of a numerical majority at a general meeting of the company cannot impose its will upon the directors when the articles have confided to them the control of the company's affairs. The directors are not servants to obey directions given by the shareholders as individuals; they are not agents appointed by and bound to serve the shareholders as their principals; they are persons who may by the regulations be entrusted with the control of the business, and if so entrusted they can be dispossessed from that control only by the statutory majority which can alter the articles. Directors are not, I think, bound to comply with the directions even of all the corporators acting as individuals.' That appears to me to express the true view. Any other construction might, I think, be disastrous, because it might lead to an interference by a bare majority very inimical to the interests of the minority who had come into a company on the footing that the business should be managed by the board of directors."

That was therefore a case of a bare majority of the company in general meeting trying to nullify a power of veto given to one of the managing directors by the articles.

The last case cited by counsel for the plaintiffs was *John Shaw & Sons (Salford), Ltd. v. Shaw* (29). In that case, GREER, L.J., having reached the conclusion that the articles of the company conferred the power to bring actions in the name of the company on the permanent directors, and that they had given the necessary authority, said this (30):

"I am, therefore, of opinion that the learned judge was right in refusing to dismiss the action on the plea that it was commenced without the authority of the plaintiff company. I think the judge was also right in refusing to give effect to the resolution of the meeting of the shareholders requiring the chairman to instruct the company's solicitors not to proceed further with the action. A company is an entity distinct alike from its shareholders and its directors. Some of its powers may, according to its articles, be exercised by directors; certain other powers may be reserved for the shareholders in general meeting. If powers of management are vested in the directors, they and they alone can exercise these powers. The only way in which the general body of the shareholders can control the exercise of the powers vested by the articles in the directors is by altering their articles, or, if opportunity arises under the articles, by refusing to re-elect the directors of whose actions they disapprove. They cannot themselves

(26) [1906] 2 Ch. 34.

(27) [1908-10] All E.R. Rep. 833; [1908] 2 K.B. 89.

(28) [1908-10] All E.R. Rep. at p. 842; [1908] 2 K.B. at p. 105.

(29) [1935] All E.R. Rep. 456; [1935] 2 K.B. 113.

(30) [1935] All E.R. Rep. at p. 464; [1935] 2 K.B. at p. 134.

- A   usurp the powers which by the articles are vested in the directors any more than the directors can usurp the powers vested by the articles in the general body of shareholders.”

What the lord justice is saying is that a bare majority of shareholders cannot “control” the exercise of or “usurp” the powers vested in the board by the articles except by altering the articles.

- B   Did the extraordinary general meeting of Bamfords on Dec. 15, 1967, attempt to do any such thing? I think not. What happened was that the directors referred to a general meeting of the company, to which they were answerable, the question whether it wished the allotment to stand, and the general meeting said “Yes”. There was no question of the general meeting usurping the powers of the directors under art. 12 or controlling or dictating their exercise, and none
- C   of the cases cited by counsel for the plaintiffs, in my judgment, goes to the length of saying that the result was a nullity.

Nevertheless, replies counsel, if you allow a general meeting to determine how shares shall be allotted you are altering the whole nature of the power; it is a fiduciary power for the protection of the minority and if you allow it to be exercised in general meeting you are allowing it to be exercised by persons

D   who (as was decided in *Pender v. Lushington* (31)) are entitled to consult their own interests and who, unlike the directors, are not bound to consult only the benefit of the company. Further, counsel argues, the fact that under art. 53 the company can give directions in regard to the issue of new shares implies that it has so much power in regard to old shares.

- E   The validity of these arguments depends, I think, on the question whether arts. 12 and 53 leave a residual power of allotment in the company. If they do, then, in my judgment, there is no question of altering the nature of the power, because the residual power is the company’s, not the directors’, and the company exercises it in its own right and not in right of the board.

- F   The arguments submitted by both counsel for the defendants may be summarised as follows: (i) Subject to any provision to the contrary in the articles, the power to issue capital validly created is in the company in general meeting. (ii) Article 12 confers a power of allotment on the directors but this is subject to the built-in limitation which applies to all powers of directors, namely that it is to be exercised bona fide in the best interests of the company. (iii) This power is less extensive than the company’s inherent power, which is not subject to any such implied limitation. (iv) Ergo, the company has a residual power of allotment. (v) The only limitation on this residual power is that it cannot,
- G   except by special resolution, be exercised in such a way as to conflict with the express power given by art. 12. Thus, the company cannot by ordinary resolution usurp that power or dictate to the board how it shall exercise it. (vi) The assumption being, for the purposes of the issue, that the board exceeded its own power of allotment, the action of the extraordinary general meeting on Dec. 15
- H   was an exercise of the company’s residual power which did not involve any conflict with art. 12 and was effectual to validate the allotment.

I accept these arguments. Moreover, they appear to me to derive some support from two earlier decisions to which I was referred. The first is *Irvine v. Union Bank of Australia* (32). I refer first to part of the headnote:

- I   “By art. 50 of the articles of association of the O.R. Company (which was limited by guarantee, and registered in Victoria under a local Act corresponding with the English Companies Act, 1862), it was provided that the directors’ power of borrowing sums on the credit of the company ‘should not exceed in the aggregate as an existing debt at the same time one-half of the then actually paid-up capital’. The articles contained no restriction upon the company’s power of borrowing; and the directors’ power to borrow was capable of being extended under art. 31, by one-half of the votes of all



the shareholders given at a general meeting ... *Held*, that the limitation of the power of borrowing and mortgaging contained in art. 50 was merely a limitation of the authority of the directors conferred by the same article; that it was not a limitation of the general powers of the company, and that the acts of the directors in excess of their authority might be ratified by the company and rendered binding. The ratification of the report of Oct. 29, 1868, did not authorise the directors to obtain letter of credit number 153, in September, 1869, or to borrow £5,000 thereon in February, 1871. The ratification of letter of credit number 150, for £10,000 did not authorise the renewal of it, or the acting upon it after the time originally limited had expired. Although it might be competent for a majority of shareholders present (though not a majority of the shareholders of the company) at an extraordinary meeting convened for that object, and of which object due notice had been given, to ratify an act previously done by the directors in excess of their authority; yet if the object was to give the directors in future an extended authority beyond what is given by art. 50, that could only be effected by a vote of one-half of all the shareholders of the company."

The judgment in the Privy Council was delivered by SIR BARNES PEACOCK, and I will quote certain passages from his judgment. He said this (33):

"The articles of association contain no restriction or limitation on the company's powers of borrowing. As regards the directors, however, their authority to borrow was limited; for it was expressly stipulated by art. 50 ..."

He went on to say (34):

"It was, therefore, clearly beyond the authority of the directors to borrow or take up upon the credit of the company as an existing debt at the same time an amount or amounts exceeding one-half of the actually paid-up capital of the company. There is no doubt that the authority of the directors, limited as it was by the articles of association, was capable of being extended under the provisions of art. 31. But by that article one-half of the votes of all the shareholders given at a general meeting called for the purpose was necessary."

After referring to art. 31, he said this (35):

"It was not contended that the authority of the directors either to borrow or to mortgage was ever extended at a general meeting of the shareholders called for the purpose, but it was contended by the learned counsel for the respondent, that the limitation of the power of borrowing and of mortgaging, contained in art. 50, was merely a limitation of the authority of the directors conferred by the same article; that it was not part of the constitution of the company, which, if the company had been originally formed under the Companies Act of 1862, must have been contained in the memorandum; and, consequently, that it was not a limitation of the general powers of the company, or of the whole body of shareholders; and that the acts of the directors in excess of their authority might be ratified by the company and rendered binding. Their lordships are of opinion that the above contention is correct, and they will proceed to consider whether the acts of the directors in borrowing in excess of their authority was ever duly ratified by the company."

Later he said (36):

"Their lordships think that it would be competent for a majority of the shareholders present (though not a majority of the shareholders of the

(33) (1877), 2 App. Cas. at p. 372.

(34) (1877), 2 App. Cas. at p. 373.

(35) (1877), 2 App. Cas. at pp. 373, 374.

(36) (1877), 2 App. Cas. at p. 375.

A company), at an extra-ordinary meeting convened for that object, and of which object due notice had been given, to ratify an act previously done by the directors in excess of their authority; and they are not prepared to say that if a report had been circulated before a half-yearly meeting distinctly giving notice that the directors had done an act in excess of their authority, and that the meeting would be asked by confirming the report to ratify the act, this might not be sufficient notice to bring the ratification within the competency of the majority of the shareholders present at the half-yearly meeting. But if the object was to give the directors in future an extended authority beyond what is given by art. 50, their lordships think that it would be an alteration of the provisions contained in the articles which, under cl. 31, could only be made by a vote of one-half of all the shareholders of the company. There is a wide distinction between ratifying a particular act which has been done in excess of authority, and conferring a general power to do similar acts in future."

The other case was *Grant v. United Kingdom Switchback Rys. Co.* (37). The headnote which, in the interests of accuracy, I slightly amend, is, so far as material, as follows:

"The [memorandum] of the T. Company authorised the sale of part of its undertaking to any other company, and [the articles] contained a provision prohibiting any director from voting in respect of any contract in which he was interested. The directors entered on behalf of the company into a contract for sale of part of its undertaking to the U. Company, of which all the directors of the T. Company except one were directors. A general meeting of the T. Company was called by a notice stating that it was called to consider a resolution for approving and adopting the agreement, but not stating any ground for a meeting being necessary. The resolution was passed as an ordinary resolution, but not as a special resolution. Held, that though a resolution giving the directors powers to do certain acts in future which they were not authorised by the articles to do, would be an alteration of the articles, and would require to be passed as a special resolution, the adoption of a contract which was within the objects of the company, but which the directors had entered into without authority, was not an alteration of the articles, and could be effected by ordinary resolution."

Counsel who argued the case in the Court of Appeal on behalf of the appellant said, (38):

"I contend that, so long as the articles were in force, a contract entered into by directors who were interested in the subject matter, and therefore had no right to vote, was void, and a resolution confirming it was an alteration of the articles which could only be made by a special resolution. The agreement was ultra vires the directors, was a nullity, and could not be ratified in this way . . ."

As will appear in a moment, that argument was rejected. COTTON, L.J., said this (39):

"It was urged for the appellant that the directors could not, being interested, make a contract which would bind their company, and that a general meeting could not, by a mere ordinary resolution, affirm that contract, for that this would be an alteration of the articles, which could only be effected by a special resolution. This is a mistake. The ratifying a particular contract which had been entered into by the directors without authority, and so making it an act of the company, is quite a different thing

(37) (1888), 40 Ch.D. 135.

(38) (1888), 40 Ch.D. at p. 137.

(39) (1888), 40 Ch.D. at pp. 138, 139.

from altering the articles. To give the directors power to do things in future which the articles did not authorise them to do, would be an alteration of the articles, but it is no alteration of the articles to ratify a contract which has been made without authority. It was urged that the contract was a nullity, and could not be ratified. That is not the case. There was a contract entered into on behalf of the company, though it was one which could not be enforced against the company. Article 100 prevented the directors from binding the company by the contract, but there was nothing in it to prevent the company from entering into such a contract. Two passages in *Irvine v. Union Bank of Australia* (40) were referred to. Being in the same judgment, they must be taken together, and they appear to me to express what I have said—that power to do future acts cannot be given to directors without altering the articles, but that a ratification of an unauthorised act of the directors only requires the sanction of an ordinary resolution of a general meeting, if the act is within the powers of the company.”

LINDLEY, L.J., said (41):

“The appellant contends that the company could not ratify this contract except by special resolution. In my opinion that contention is unfounded. There is a broader distinction between altering the articles and merely saying ‘this act was not authorised by the articles, but we will ratify it’. The shareholders can ratify any contract which comes within the powers of the company, and this contract clearly does, for the articles expressly authorise selling any part of the undertaking of the company.”

BOWEN, L.J., said (42):

“The company did not purport to alter the limits of the authority given generally by the articles to the directors. The articles limit that authority, but there is nothing in them to prevent the company from giving special power to the directors in a particular case as to a particular contract. The company at a general meeting adopt this agreement, and make it their own. That is a ratification of an unauthorised act, not an alteration of the articles.”

Those cases show that where, under the articles, a limited power of borrowing or contracting is given to the board and the board borrows or enters into a contract in excess of its power, its action can be ratified or approved by the company in general meeting by virtue of the residual power remaining in the company.

I accept, however, that they are not of themselves decisive of the question whether, whenever a limited power is conferred on directors, a residual power is necessarily left in the company. Whether any such residual power does or does not exist in any particular case will depend not only on the general law but also on the memorandum and articles of association of the company in question.

In my judgment, notwithstanding art. 12, Bamfords did retain a residual inherent power to allot its half-million unissued shares which formed part of the capital mentioned in art. 6, and following *Hogg v. Cramphorn* (43), I am of the opinion that, if the allotment of Nov. 20 was in excess of the power conferred by art. 12 (as I am to assume that it was), it was capable of being validated by ordinary resolution of the company in general meeting.

I therefore answer the preliminary point of law in the affirmative.

Had I been driven to the contrary conclusion, it would have been with some misgiving, because as a matter of business commonsense it seems to me that

(40) (1877), 2 App. Cas. 366.

(41) (1888), 40 Ch.D. at pp. 139, 140.

(42) (1888), 40 Ch.D. at p. 140.

(43) [1966] 3 All E.R. 420; [1967] Ch. 254.



A directors ought to be free to refer questions affecting the exercise of their powers to the body which can, if it wishes, remove them or initiate proceedings against them.

*Preliminary point of law answered in the affirmative (44).*

Solicitors: *Allen & Overy*, agents for *Wilkins & Thompson*, Uttoxeter (for the plaintiffs); *Theodore Goddard & Co.* (for the first, second and third defendants and for Bamfords, the fifth defendants); *Ward, Bowie & Co.*, agents for *Lane, Clutterbuck & Co.*, Birmingham (for Burgesses, the fourth defendants).

[Reported by JACQUELINE METCALFE, Barrister-at-Law.]

## C PEARSON v. NORTH WESTERN GAS BOARD.

[MANCHESTER WINTER ASSIZES (Rees, J.), April 10, 1968.]

*Negligence—Res ipsa loquitur—Explosion caused by escape of gas from underground metal gas main—Expert evidence that fracture of pipe due to frost, but pipe in good condition and no reasonable steps available to safeguard public from consequences of such fractures—Negligence not established.*

D The plaintiff and her husband were injured, and their home was destroyed, by an explosion of gas on Jan. 1, 1963; the plaintiff's husband died as a result of his injuries. The explosion was of gas which had escaped from a three inch metal gas main and had accumulated under the floor boards of the house. On the evidence the cause of the escape of gas was fracture of the gas main owing to the movement of earth caused by severe frost. The pipes were at a depth of two feet nine inches beneath the flagstones of the public footway; the main had been laid in 1878, the metal was in good condition and the expectation of life of such a pipe was 120 years. The expert evidence for the defendants, the gas board, who supplied gas through the main, though not to the plaintiff's house, was that no reasonable steps were open to safeguard the public from the consequences of fractured gas mains. In an action by the widow for damages under the Fatal Accidents Acts, 1846 to 1959, and the Law Reform (Miscellaneous Provisions) Act, 1934, and in her own right.

F Held: even if the doctrine of *res ipsa loquitur* applied so as to establish a prima facie case of negligence against the defendants, the expert evidence rebutted it, and accordingly negligence was not proved and the action failed (see p. 672, letter E, post).

G Quaere whether the decision in *Dunne v. North Western Gas Board* ([1963] 3 All E.R. 916) that the rule in *Rylands v. Fletcher*\* ([1861-73] All E.R. Rep. 1) was inapplicable, as the defendants had merely done, without negligence, what statute required of them, would find favour in the House of Lords (see p. 672, letter A, post).

H [As to the application of the maxim *res ipsa loquitur*, see 28 HALSBURY'S LAWS (3rd Edn.) 77-79, para. 80; and for cases on the subject, see 36 DIGEST (Repl.) 143-146, 753-778.

I As to the common law liability of a gas undertaker for nuisance from gas, see 18 HALSBURY'S LAWS (3rd Edn.) 349-351, para. 668; and for a case on explosion caused by escaping gas, see 25 DIGEST (Repl.) 533, 93.

(44) The preliminary point of law is set out at bottom of p. 657, ante. On Apr. 4, 1968, PLOWMAN, J., on a summons of that date treated as adjourned to him, made an order consolidating the two actions referred to at p. 656, letters H and I, ante, and ordered that the consolidated actions be dismissed.

\* The rule in *Rylands v. Fletcher* is thus stated in 28 HALSBURY'S LAWS (3rd Edn.) 145: "A person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes must keep it at his peril and, if he fails to do so, is prima facie liable for all the damage which is the natural consequence of its escape."

As to the rule in *Rylands v. Fletcher*, see 28 HALSBURY'S LAWS (3rd Edn.) 145-149, paras. 192-198; and for cases on the subject, see 36 DIGEST (Repl.) 282-285, 334-342 and 298, 423-429.] A

Cases referred to:

- Charing Cross, West End, and City Electricity Supply Co., Ltd. v. London Hydraulic Power Co.*, [1914-15] All E.R. Rep. 85; [1914] 3 K.B. 772; 83 L.J.K.B. 1352; 111 L.T. 198; 36 Digest (Repl.) 284, 338. B
- Dunne v. North Western Gas Board*, [1963] 3 All E.R. 916; [1964] 2 Q.B. 806; [1964] 2 W.L.R. 164; 47 Digest (Repl.) 595, 124.
- Moore v. R. Fox & Sons*, [1956] 1 All E.R. 182; [1956] 1 Q.B. 569; [1956] 2 W.L.R. 342; (Cont. Vol. A) 1175, 7646.
- Rylands v. Fletcher*, [1861-73] All E.R. Rep. 1; (1868), L.R. 3 H.L. 330; 37 L.J.Exch. 161; 19 L.T. 220; 36 Digest (Repl.) 282, 334. C

### Action.

In the early morning of Jan. 1, 1963, an explosion occurred, caused by the ignition of a mixture of coal gas and air; the coal gas had escaped from the defendants' gas main, and the explosion occurred under the floor boards of Nos. 25 and 27, Cromwell Street, West Gorton, Manchester. In the explosion the plaintiff was seriously injured, her husband received injuries from which he later died and their home, No. 27, Cromwell Street, together with its contents was totally destroyed. The coal gas had escaped from a three inch gas main running at a distance of five feet six inches from the building line of the houses at a depth of two feet nine inches beneath the flagstones of the public footway. The gas main, which was made of metal, had been laid in 1878 and was the property and under the control of the defendants. The escape was due to a fracture in the pipe at a point opposite the corner of the frontage of No. 25 furthest from No. 27. The metal of which the pipe was composed was in good condition. The expectation of useful life of such a pipe was at least 120 years. On the expert evidence the fracture was sudden and complete, the time lapse between the fracture of the pipe and the explosion probably having been about three or four hours. There was evidence from the defendants' district distribution engineer, that shortly after the explosion there was no cavity or void close to the point of fracture of the pipe, with the consequence that the fracture could not have been caused by such a cavity. On the expert evidence in the case the only other possible cause of the fracture of the gas main was the effect of frost. On nine successive nights from Dec. 22 to Dec. 31, 1962, the minimum temperature had been below freezing point. The cold was exceptionally severe at this time. The ground above the fracture of the gas main was frozen to a depth of about eight inches at the time of the occurrence of the explosion. All witnesses called on behalf of the defendants were of the opinion that ground movements caused by frost fractured the gas main: there was no evidence to the contrary. D

The plaintiff sued the defendants for damages for personal injuries to herself, and as administratrix of her husband, under the Fatal Accidents Acts 1846 to 1959, and under the Law Reform (Miscellaneous Provisions) Act, 1934. The defendants were the sellers and suppliers of gas in pursuance of the Gas Act, 1948, to the area in which the plaintiff and her late husband resided, but the plaintiff and her husband were not consumers of gas. E

*G. Heilpern, Q.C.*, and *H. Gore* for the plaintiff.

*D. Hodgson, Q.C.*, and *K. W. Devhurst* for the defendants. F

Apr. 10. REES, J., stated the nature of the action and, having summarised the facts and reviewed the evidence regarding the cause of the explosion, continued: The explanation placed before the court as to the manner in which frost to a depth of eight inches may fracture a cast-iron gas main in good condition, lying two feet nine inches below the surface of the ground was as follows: the severe cold causes the water content of the ground to become ice and so to expand. One witness considered that the eight-inch layer of frozen ground might G

I

A expand by about  $\frac{1}{4}$  to  $\frac{3}{8}$  of an inch. The thrust set up by this expansion must travel upwards or downwards or in both directions. If the upper surface of the ground is resistant to upward movement, e.g., because of flagstones or even of a top layer of frozen ground, then the thrust will travel downwards, setting up pressures and possibly soil movement which may finally cause a fracture of the pipe. No expert evidence was called on behalf of the plaintiff which could form  
B the basis of any attack on this hypothesis.

The only evidence in this case, therefore, supported the view that an expansion of the order of  $\frac{1}{4}$  or  $\frac{3}{8}$  of an inch could travel through some two feet of subsoil to reach and to rupture a cast-iron gas main in good condition. Other evidence in another case might or might not support that view.

All the witnesses called on behalf of the defendants stated that the risk of the fracture of gas mains caused by frost and the dangers resulting therefrom were well-known. One witness stated that during the months of January and February, 1963, well over four hundred fractures of gas pipes caused by extreme cold occurred in the Southern Gas Board area alone, but, he added, fortunately nobody was killed as a result. No evidence was placed before the court as to the numbers of persons who were killed or injured throughout the whole country as a result of  
D fractures of gas mains during these two particular months or indeed at any other time. All the defendants' witnesses stated that there was no known method of ascertaining in advance whether a gas main would be likely to fracture as a result of the effect of extreme cold, nor of preventing a fracture from taking place.

The precautions taken by the defendants were directed to dealing with the effects of a fracture during cold weather by causing maintenance men to stand  
E by ready to go to the scene in the hope of arriving before an explosion has taken place or a fire broken out. The witnesses were at pains to make the point that whenever work is undertaken which involves exposing a gas main, e.g., when a connexion to a house is being made, the length of pipe so exposed is inspected by the workmen concerned for any visible defects. Also there is a method for routine inspection of a gas main designed to detect whether gas is actually escaping  
F from the pipe. This method was used to test the gas main in Cromwell Street in November, 1959, by inserting into the earth a probe sensitive to coal gas at six-foot intervals along the line of the gas main in the street.

It perhaps hardly needs to be stated that neither the fortuitous inspection of small portions of some pipes by workmen, nor the routine tests for leakage of gas from fractures which have already occurred or from existing defects in joints,  
G is a practical means of safeguarding the public from death or injury arising as it did in this case. It may be that in some future case expert evidence coming from foreign gas engineers or drawn from experts in soil mechanics or other scientific fields may be available to contest the assertion of a gas board's experts that no reasonable steps are open to them to safeguard the public from the dire consequences which may follow from a fractured gas main. It might then appear  
H that there are practical means of identifying the presence of cavities or voids close to gas mains or of protecting a gas main from the effects of frost, or of constructing a main of material which will accept without fracture the degree of earth movement capable of being set up by frost.

At least this case will have served the public interest to the extent of drawing attention to the dangers to which a fractured gas main may give rise, and also  
I to possible lines of enquiry which may lead to the discovery of a means of safeguarding the public from them or, possibly as a last resort, of enabling those injured in future to establish liability and to recover compensation from gas undertakers. So much for the facts.

Counsel for the plaintiff felt obliged to concede—and he expressly did so—that he could not succeed under the rule in the well-known case of *Rylands v. Fletcher* (1), on the ground of the strict liability of the defendants for the escape



of a dangerous substance such as coal gas, or on the ground of nuisance. He made this concession in face of the decision of the Court of Appeal in the recent case of *Dunne v. North Western Gas Board* (2). Whether at another time and in the highest tribunal the *Dunne* case will find favour as a matter of principle and when examined afresh in the light of the decision also of the Court of Appeal in *Charing Cross, West End, and City Electricity Supply Co., Ltd. v. London Hydraulic Power Co.* (3), is not for me to express any opinion.

The plaintiff's case before me was presented exclusively on the footing that in order to succeed, negligence for which the defendants are responsible, must be established. The plaintiff's case in negligence was firmly based on the doctrine of *res ipsa loquitur* as stated in the case of *Moore v. R. Fox & Sons* (4). It was argued that the offending gas main was owned by, and was under the control of, the defendants at all relevant times and that its fracture so as to allow the escape of coal gas would not, in the ordinary course of things, happen if those responsible for it used proper care. Consequently, it was urged that proof of the fracture of the pipe and the consequent escape of gas raised a *prima facie* case of negligence against the defendants which they were required to rebut.

Counsel for the defendants did not accept that in the circumstances of this case the proof of the fracture of the pipe and the escape of gas did "speak" to a *prima facie* case of negligence calling for an answer. In any event, he argued that his evidence had rebutted any *prima facie* case against him and had positively established on a balance of probabilities that the accident had happened as a result of frost damage and without any negligence for which the defendants are responsible.

In my judgment, assuming, but not deciding, that the doctrine of *res ipsa loquitur* applied so as to establish a *prima facie* case of negligence against the defendants, their evidence rebutted it. I further find on a balance of probabilities that the explanation for the explosion put forward by the defendants has been established and that this explanation does not connote negligence on their part but points to its absence as being more probable. In these circumstances, the plaintiff's claim for damages must fail. Accordingly, on the evidence as presented in this case and the law as argued, the plaintiff must suffer without any compensation the gravest consequences flowing from the killing of her husband, the destruction of her home and her own personal injuries and their sequels. Nor is she likely to draw any comfort from the reflection that without any fault on her part or that of her late husband, these consequences arise from a risk which is well known to exist but which, according to the evidence in this case, cannot be avoided by the exercise of reasonable care on the part of the defendants. Nor can it be avoided by anyone who happens to live close to one of their main pipes. The plaintiffs' claims will be dismissed.

*Judgment for the defendants.*

Solicitors: *Leslie M. Lever & Co.*, Manchester (for the plaintiff); *James Chapman & Co.*, Manchester (for the defendants).

[Reported by M. D. CHORLTON, Barrister-at-Law.]

(2) [1963] 3 All E.R. 916; [1964] 2 Q.B. 806.

(3) [1914-15] All E.R. Rep. 85; [1914] 3 K.B. 772.

(4) [1956] 1 All E.R. 182; [1956] 1 Q.B. 596.

# A THE WORLD BEAUTY.

OWNERS OF THE STEAM TANKER ANDROS SPRINGS v.

OWNERS OF THE STEAM TANKER WORLD BEAUTY.

B [PROBATE, DIVORCE AND ADMIRALTY DIVISION (Willmer, L.J., sitting as an additional judge), March 11, 12, 13, 14, 15, 18, 19, April 10, 1968.]

*Shipping—Collision—Damages—Detention—Mitigation—Vessel on charter—Subsequent charter arranged before collision—Substitution of slower ship with smaller carrying capacity under current charter—Vessel becoming free before time when current charter would have ended—Subsequent charter brought forward to begin at earlier date—Assessment of value to owners of vessel of advancement of commencement of subsequent charter—Amount so computed allowed in mitigation of damages.*

C The plaintiffs' vessel Andros Springs was damaged in collision at Suez Bay on Apr. 21, 1958. The defendants accepted responsibility for three-quarters of the damage. In consequence of the collision the vessel lost considerable time by way of detention for temporary repairs, reduced speed in completing her current voyage and detention for final repairs. The total period of such detention was about thirty-seven days. She became free on June 7, 1958. At the time of the collision she was chartered on a very profitable charter, by charterparty dated July 22, 1957, for a maximum number of successive voyages, which would end on or before Sept. 15, 1958. Her further employment was arranged for about seven years under a second charter (the M. charter); hire under this charter would not commence before Aug. 1, 1958, and the vessel had to be tendered before Oct. 31, 1958. This also was a very valuable charter. In order to mitigate the damage the plaintiffs substituted for the Andros Springs under the 1957 charterparty another smaller and slower vessel, which completed three successive voyages before the 1957 charterparty ended. They also arranged for the M. charter to be advanced to July 11, 1958. Accordingly the Andros Springs was idle from June 7, 1958 to July 11, 1958. On the assessment of damages for detention attributable to the collision, after allowing for the profits earned by the substituted vessel,

E **Held:** the value of what the plaintiffs gained by advancing the commencement of the M. charter must be taken into account by way of deduction from the loss of profits during the period of detention of the Andros Springs, since that gain resulted from the collision; on the evidence the commencement of the M. charter had been advanced by one hundred days, with the consequence that the profits on it were earned throughout one hundred days earlier, and, therefore, the amount to be taken into account by way of deduction in assessing the damages was seven years' compound interest at five per centum on the sum representing the plaintiffs' profits under the M. charter for one hundred days (see p. 681, letters B, C, G and I, post).

H *Re Vic Mill, Ltd.* ([1913] 1 Ch. 465) considered.

I [As to loss of profits by detention of vessel damaged in collision being reasonable as damages, and as to the effect of substituting an undamaged vessel, see 35 HALSBURY'S LAWS (3rd Edn.) 713, 714, paras. 1078, 1079; and for cases on the subject, see 42 DIGEST (Repl.) 937-939, 7289-7303; 942, 943, 7335-7343.]

Cases referred to:

*Argentino, The*, (1888), 13 P.D. 191; 58 L.J.P. 1; 59 L.T. 914; *affd.* sub nom. *Gracie (Owners) v. Argentino (Owners)*, *The Argentino*, (1889), 14 App. Cas. 519; 59 L.J.P. 17; 61 L.T. 706; 6 Asp. M.L.C. 433; 42 Digest (Repl.) 937, 7290.

- British Westinghouse Electric and Manufacturing Co., Ltd. v. Underground Electric Rys. Co. of London, Ltd.*, [1911-13] All E.R. Rep. 63; [1912] A.C. 673; 81 L.J.K.B. 1132; 107 L.T. 325; 17 Digest (Repl.) 108, 226.
- Daniels v. Jones*, [1961] 3 All E.R. 24; [1961] 1 W.L.R. 1103; Digest (Cont. Vol. A) 1205, 1163e.
- Strathfillan (S.S.) (Owners) v. S.S. Ikala (Owners), The Ikala*, [1929] A.C. 196; 98 L.J.P. 49; 140 L.J. 177; 17 Asp. M.L.C. 555; 32 Lloyd L.R. 159; B 42 Digest (Repl.) 943, 7347.
- Vic Mill, Ltd., Re*, [1913] 1 Ch. 465; 82 L.J.Ch. 251; 108 L.T. 444; 39 Digest (Repl.) 797, 2676.

### Motion.

This was a motion in objection to a decision of the Admiralty registrar, dated June 29, 1967, on a reference to assess the amount of the plaintiffs' damages arising out of a collision between their steam tanker Andros Springs and the defendants' steam tanker World Beauty, which took place in Suez Bay on Apr. 21, 1958. By terms of settlement filed on Feb. 9, 1962, the question of liability for the collision was resolved on the basis, inter alia, that the defendants should pay to the plaintiffs seventy-five per cent. of the plaintiffs' proved or agreed claim. In due course a claim was filed on behalf of the plaintiffs containing some sixty-seven items of claim. With regard to most of the items claimed the parties were able to reach agreement. The main dispute was with regard to the plaintiffs' claim in respect of the detention of the Andros Springs during the repair of the collision damage. The plaintiffs alleged that the vessel was detained for thirty-seven days twenty-two hours, and claimed a total of \$170,455.92, representing in part loss of profit and in part the expenses of maintaining the vessel during the period of detention. The registrar allowed this item as claimed.

The Andros Springs sailed under the Liberian flag. She was owned by a Panamanian company called Maroceanio Compania Naviera, S.A., and was at the material time, managed by an American company called the Orion Shipping & Trading Co., of New York. She was a tanker of 23,252 tons gross, with a cargo capacity of about 36,000 tons. At the time of the collision she was in the course of a voyage from Umm Said in the Persian Gulf to Le Havre, laden with a cargo of 34,652 tons of crude oil. In the collision the starboard bow of the Andros Springs sustained serious damage. The area of the damage was well forward of the forward cofferdam, which separates the main cargo-carrying part of the ship from the fore-castle where the forward fuel tanks are located. Temporary repairs were executed. She was then able to complete her voyage to Le Havre, but at reduced speed. From Le Havre the vessel proceeded, after survey to Rotterdam, where the collision repairs were finally completed on June 7. Opportunity was also taken to execute repairs in respect of bottom damage which had been sustained through grounding in the Suez Canal some two months before the collision. It is common ground, however, that the bottom damage did not impair the vessel's seaworthiness, and its repair could if necessary have been deferred.

The plaintiffs' claim for detention in its final form was made up as follows:—

Detention in Suez Bay	10 days 6 hours 35 minutes.
Time lost on passage	2 days 3 hours 56 minutes
Detention for permanent repairs in Rotterdam	24 days 13 hours 10 minutes
Estimated time to steam from Rotterdam to a position off Le Havre	22 hours 20 minutes
Total detention	37 days 22 hours

But for the collision the Andros Springs would have completed discharge of her cargo at Le Havre on May 1, 1958. Because of the repairs consequent on the



A collision, however, she was not in fact at the disposal of the plaintiffs until June 7.

At the time of the collision the Andros Springs was chartered to a French company, Compagnie Française de Raffinage (hereafter called "C.F.R.") under a charterparty dated July 22, 1957. This was a charter for successive voyages, cl. 24 providing that—

B "The vessel shall perform with all convenient despatch the maximum number of consecutive voyages . . . in respect of which she can tender for loading within the period between the date she first gives notice to load and Sept. 15, 1958."

This charterparty was fixed at a time when freights were still high following the Suez crisis of 1956, and was exceedingly valuable to the plaintiffs. While C running under this charter the Andros Springs was able to earn a net profit of \$3,659.48 per day. The plaintiffs' claim (item 67) included loss of profit at this rate for thirty-seven days twenty-two hours, and expenses incurred during detention for the like period at the rate of \$836.14 per day, which was also an agreed figure. The Andros Springs was employed in running between various ports in the Persian Gulf and France, alternate voyages being made up to the D date of the collision to Le Havre in the North and L'Avera in the South of France. The vessel was capable of a speed of sixteen knots, and the round voyage occupied thirty-nine days when Le Havre was the destination, or thirty-two days when she discharged at L'Avera. If the same pattern continued, the vessel would complete another four voyages after the collision voyage before the period of the charter came to an end.

E The Andros Springs was already fixed for further employment following the conclusion of the C.F.R. charter. By a time charter dated Aug. 8, 1957, she was chartered to Mobil Shipping Co., Ltd. (hereafter referred to as "Mobil") for a term of about seven years, three weeks more or less at charterers' option, to be employed in any part of the world, subject to certain exclusions not relevant to this case, at a monthly rate of hire of twenty-five shillings per ton on the vessel's F deadweight. Hire was not to commence before Aug. 1, 1958, and the charterers had liberty to cancel if the vessel was not tendered before Oct. 31. This charter also was an exceedingly valuable one, and under it the Andros Springs was able to earn a net profit at the rate of \$3,597.05 per day. If there had been no collision it was intended that, after completion of four more voyages under the C.F.R. G charter, the vessel would be put into dry dock for cleaning, painting, annual survey and owners' repairs. It was hoped to include repair of the bottom damage though this repair could if necessary have been deferred. The period while the vessel would have been out of use would have been twenty-two days, if the bottom damage was repaired, but otherwise twelve days. In either event it was expected that the vessel would be ready in ample time to tender under the Mobil charter.

H With a view to mitigating the loss to the plaintiffs by the detention of the Andros Springs for repairs, it was agreed by an agreement of May 7, 1958 (i.e., some seventeen days after the collision), by way of addendum to the C.F.R. charter that on completion of her discharge at Le Havre the Andros Springs should be withdrawn from service under the charter and substituted by the Andros Thunder. The Andros Thunder was expressed to be expected ready to I load on or about June 7, 1958 (she being at Los Angeles in May, 1958). For the purpose of giving effect to this agreement the Andros Thunder was chartered by Marocano, under a charterparty dated May 28, 1958, to perform three consecutive voyages, loading on the first voyage at a port in the Persian Gulf. The Andros Thunder in fact performed the three voyages contracted for, and having been chartered at a low rate of hire, was able to earn good profits for the plaintiffs. She was, however, a vessel of rather smaller carrying capacity than the Andros Springs, and was able to make a speed of only fourteen knots, instead of sixteen knots. On each of the three voyages made by the Andros Thunder the port of

discharge was in fact Le Havre, and the round voyage between Le Havre and the Persian Gulf took about four days longer than would have been required by the Andros Springs. Accordingly the plaintiffs, with the aid of the Andros Thunder, were able to earn only somewhat reduced profits on three voyages under the C.F.R. charter, instead of the full profits on four voyages which, but for the collision, the Andros Springs would have been able to earn. A

Freights on the spot market were very low in June, 1958; the profit to be expected from employing the Andros Springs through that market would only be about \$392 per day, little more than a tenth of what she had been earning under the C.F.R. charter. It was, therefore, arranged with Mobil that the Andros Springs should be delivered to the charterers at Rotterdam on July 11. The result was that the vessel remained idle at Rotterdam from June 7, to July 11, 1958, but she then came once more under profitable employment in pursuance of the Mobil charter, in which employment she continued for another seven years. B C

In these circumstances the registrar determined the claim for damages in respect of the detention of the Andros Springs on the basis of detention for thirty-seven days twenty-two hours.

The authority and the cases noted below\* were cited during the argument in addition to the cases referred to in the judgment. D

*R. H. W. Dunn, Q.C., and J. D. H. Rochford* for the plaintiffs.

*J. Franklin Willmer, Q.C., and J. S. Hobhouse* for the defendants.

*Cur. adv. vult.*

Apr. 10. **WILLMER, L.J.**, read the following judgment in which after stating the nature of the motion and reviewing the facts, he continued: The issues to be decided may be summarised under four heads, as follows:—1. The defendants contended that the period of detention claimed ought to be reduced by two days four hours forty minutes, by reason of time alleged to have been unnecessarily spent in gas-freeing the vessel's tanks. 2. The defendants contended that the period of detention claimed ought to be further reduced by twenty-two hours twenty minutes—being the time allowed for a notional voyage from Rotterdam back to Le Havre, which in fact never took place. 3. The defendants further contended that prompt steps could and should have been taken to charter a substitute vessel for service under the C.F.R. charter, and argued that if this had been done it would have been possible to complete all four of the voyages which, but for the collision, the Andros Springs would have made. 4. Lastly, the principal contention of the defendants was that the formulation of the claim for detention was wrong in principle, in that it was directed solely to the detention of the Andros Springs, as if the vessel herself were the claimant, instead of being based on what the plaintiffs had lost, less what they had gained by the steps which they took to mitigate their loss. It was contended that on a proper reckoning of the plaintiffs' losses and gains it could be shown that they had suffered no loss at all, or alternatively a loss considerably less than that claimed under item 67. E F G H

It will be convenient to discuss these issues in the order in which I have set them out; but first I should observe that the registrar decided all questions in dispute in favour of the plaintiffs. His "Reasons for Decision" are set out at considerable length, but if I may most respectfully say so I have not found them particularly helpful. For in truth, apart from recording that he preferred the evidence given by the witnesses for the plaintiffs to that of the defendants' I

\* MAYNE AND MCGREGOR ON DAMAGES (12th Edn., 1961) paras. 144, 173; *Staniforth v. Lyall*, (1830), 7 Bing. 169; *Johsen v. East and West India Dock Co.*, [1874-80] All E.R. Rep. 615; (1875), L.R. 10 C.P. 300; *The Argentino*, (1889), 14 App. Cas. 519; *The City of Peking*, (1890), 15 App. Cas. 438; *Hill & Sons, Ltd. v. Edwin Shouell & Sons, Ltd.*, (1918), 87 L.J.K.B. 1106; *The Soya*, [1955] 3 All E.R. 621; *affd.* [1956] 2 All E.R. 393; *Interoffice Telephones, Ltd. v. Robert Freeman & Co., Ltd.*, [1957] 3 All E.R. 479; [1958] 1 Q.B. 190; *The Hebridean Coast*, [1961] 1 All E.R. 82; [1961] A.C. 545.

A witnesses, the registrar gave virtually no reasons for his decision. Most of the questions to be decided depended, not on the credibility of the evidence given on the one side or the other, but on the proper inferences to be drawn from facts which were never really in issue. In the circumstances I have felt more than usually free to approach the questions in dispute *de novo*, though always bearing in mind the registrar's preference for the plaintiffs' witnesses.

B [His LORDSHIP then turned to the dispute about the time occupied in gas-freeing. Although the collision damage was forward of the forward cofferdam, so that the collision repairs would not involve hot work in the vessel's cargo tanks (which were not forward of the cofferdam), yet on the evidence the registrar had found in favour of the view that it was reasonable that the whole vessel should be gas-freed and a chemist's certificate obtained for the whole ship,

C and on the whole matter His LORDSHIP had concluded, in agreement with the registrar, that the method adopted for butterworthing the ship's tanks was not so wrong as to amount to a breach of duty on the part of the plaintiffs; accordingly no deduction should be made on account of time consumed in gas-freeing. His LORDSHIP then turned to the question of the inclusion of a period of twenty-two hours and twenty minutes claimed for detention in respect of a notional voyage from Rotterdam to Le Havre. The voyage was in fact never made; in so far, therefore, as the registrar dismissed the defendants' objection to the inclusion of this period, he had, His LORDSHIP intimated, been wrong, and consequently, if a period of detention of the Andros Springs for repairs was in fact to be the basis of computation, the period would have to be reduced to thirty-six days twenty-three hours forty minutes. On the suggestion that the plaintiffs ought to have taken prompter steps to mitigate their loss by substituting a vessel for service under the C.F.R. charter in place of the Andros Springs His LORDSHIP agreed with the registrar in rejecting the defendants' criticisms. His LORDSHIP continued:] I come now, at long last, to what is after all the main question in dispute, namely, whether the plaintiffs' claim in respect of detention was formulated on the right basis. As I have already explained, the only claim

F put forward before the registrar was a claim for loss of profit and expenses thrown away during the actual period of detention of the Andros Springs. There was no alternative formulation of the claim before the registrar, although, as appears from his reasons, he did permit the plaintiffs to argue in the alternative that what was lost was in substance one round voyage. The registrar recorded that he was invited to make certain findings of fact in relation to this alternative way of

G formulating the claim. He, however, decided that the basis on which the claim had been formulated in item 67 was the correct basis, and allowed the claim as pleaded. In those circumstances he declined to deal with the alternative way of formulating the claim or to make any findings of fact relevant thereto.

When the matter came before me, I took the view that having regard to the unusual nature of the facts disclosed, and the obvious difficulties of the case,

H both parties should be free to discuss various possible ways in which the plaintiffs' claim might be formulated. In consequence the argument before me has ranged over a wide field, and a number of possibilities have been canvassed. At the conclusion of the argument, and in case the dispute might be taken to a higher court on appeal, I thought it right to direct that the plaintiffs should formulate in writing the various alternative ways in which their claim might be put,

I including the method contended for by the defendants—namely, that of striking a balance between overall losses and gains—showing in each case what the result in figures would be. That has been done, and a document entitled "Amended Further and Better Particulars of item 67 of the plaintiffs' claim" has been placed before me. The difficulty of this case is that of applying well established principles of law to the peculiar facts disclosed. There is, I think, no room for doubt as to the law to be applied. Counsel for the defendants in opening the appeal put forward three basic propositions of law, to which counsel for the plaintiffs in his turn added a fourth. I restate them, because I agree with counsel



that they are fundamental to the task of ascertaining the true measure of the plaintiffs' loss. A

(i) The plaintiffs are entitled to be placed, so far as is possible, in the same pecuniary position as they would have been if there had been no collision.

(ii) The plaintiffs were under a duty to take reasonable steps to mitigate their loss, and are accordingly not entitled to recover any part of their loss which results from failure to take such steps. These two propositions are so well established and elementary that at this date I do not think it necessary to cite authority in support of them. B

(iii) Where the plaintiffs have taken action arising out of the casualty, which has avoided or diminished their loss, they cannot recover in respect of such avoidance or diminution. Put more shortly, they cannot recover for avoided loss. Authority for this proposition may be found in *British Westinghouse Electric and Manufacturing Co., Ltd. v. Underground Electric Rys. Co. of London, Ltd.* (1)—see especially per VISCOUNT HALDANE, L.C. C

(iv) The fourth proposition added by counsel for the plaintiffs is that profits which have in fact been made by the plaintiffs have to be set off against the loss claimed only if they are such as could not have been made but for the tort or breach of contract complained of. In support of this proposition I was referred to the decision of the Court of Appeal in *Re Vic Mill, Ltd.* (2)—see especially per HAMILTON, L.J. This last proposition is of especial importance in the present case, because one of the difficult questions which I am asked to determine is how far, if at all, it can be said that profits earned by the Andros Springs under the Mobil charter during such time as the C.F.R. charter was still current were profits which could not have been made but for the collision. D

In the first instance, however, the plaintiffs adhered to their claim as originally formulated, namely, a loss of profit together with expenses thrown away during the period ending on June 7 while the Andros Springs was laid up for repairs. To the question posed by BOWEN, L.J., in the course of his oft quoted judgment in *The Argentino* (3), viz.: E

“... what is the use which the shipowner would, but for the accident, have had of his ship, and what (excluding the element of uncertain and speculative and special profits) the shipowner, but for the accident, would have earned by the use of her.” F

Counsel for the plaintiff answers:

“But for the collision the Andros Springs would have continued running under the C.F.R. charter, and would have continued to earn profits at the rate of \$3,659.48 cents per day for a period of some thirty-seven days.” G

Moreover, he points out that the whole of this loss had been sustained by June 7, which was the date when the Andros Thunder first started to run under C.F.R. charter, so as to salve some of the plaintiffs' profits under that charter. The profits which the Andros Springs would have made, but for her detention during those thirty-seven days, were thus lost to the plaintiffs for ever; they had gone for good before the plaintiffs' remedial measures in mitigation had even started to come into operation. The fact that subsequently the Andros Springs was able to resume earning high profits under the Mobil charter was said to be completely irrelevant; for her ability to do this arose, not out of the collision, but out of the previously negotiated charterparty. These profits were accordingly not such that it could be said of them that they could not have been earned but for the collision within the principle of *Re Vic Mill, Ltd.* (4). They were profits which could have been earned in any event, the only difference being that thanks to the collision it was possible to earn them some weeks earlier than would otherwise have been the case. H I

(1) [1911-13] All E.R. Rep. 63 at pp. 69, 70; [1912] A.C. 673 at pp. 689-690.

(2) [1913] 1 Ch. 465 at pp. 471, 472.

(3) (1888), 13 P.D. 191 at p. 201.

(4) [1913] 1 Ch. 465.

A The argument for the plaintiffs was most attractively put, and I hope that in this brief summary I have done it justice. In the end, however, I do not feel able to accept it, or to take the view that the case is quite so easy as the plaintiffs sought to make it. I agree with the submission put forward on behalf of the defendants that to concentrate solely on the loss of profits sustained by the Andros Springs during her thirty-seven days detention is to fall into the fallacy exposed by VISCOUNT SUMNER in *The Ikala* (5), when he remarked, that :

“A ship’s day is not like a unit of currency, always good for so many shillings.”

C There are no doubt numerous simple cases where the loss can be assessed in this way. The present is not, however, a simple case. The ship which was damaged and laid up for repair was but a unit in a complicated organisation which somehow had to be maintained. It was in the plaintiffs’ own interest, as well as their duty in law, to take such reasonable steps as were open to them to mitigate their loss by preserving, so far as they could, the smooth running of their organisation. This they sought to do (a) by substituting the Andros Thunder for the Andros Springs under the C.F.R. charter, so as to ensure at least that that profitable charter was not lost, and (b) by arranging to accelerate the commencement date of the Mobil charter. It seems to me obvious that in so far as these measures resulted in avoidance or diminution of the plaintiffs’ overall loss they must be taken into account and set against the loss. But in order to enable this to be done it is vitally necessary to take an overall view of the plaintiffs’ business as a whole and, as was suggested by LORD HALDANE in the *Westinghouse* case (6), to look at what actually happened and balance the gains against the losses.

F So far I am disposed to accept the submissions put forward on behalf of the defendants. Unhappily for them, however, when they were before the registrar they over stated their case to such an extent as to produce a manifestly absurd result. They sought to show that the plaintiffs were so successful in the steps which they took in mitigation that, so far from being involved in a loss, they were actually able to earn higher profits in consequence of the collision, that is, that their gains exceeded their losses. Counsel for the defendants prepared and submitted to the learned registrar two documents which purported to show the balance of gains and losses on two alternative hypotheses. One hypothesis was that, but for the collision, the Andros Springs would have made two further voyages to L’Avera and two to Le Havre. The other hypothesis was that she would have made four voyages to Le Havre. I refrain from setting out any of the figures contained in these documents, for in the course of the development of the case in argument here and below they have been amended and re-amended to such an extent as to become almost unrecognisable. It is sufficient to say that each of these documents was devised in the form of a balance sheet. On the “Loss” side the defendants set out:—

H (a) the gross freights which but for the collision the Andros Springs would have earned, from which were deducted commissions and the daily running expenses of the ship at an agreed rate; and (b) a sum for expenses incurred by the ship during the period of detention for repairs, as well as for the period subsequent thereto up to July 11.

I On the “Gain” side the defendants set out:

(a) the freight in fact earned by the Andros Thunder in the three voyages which she made under the C.F.R. charter, less the cost of hire of the Andros Thunder, and less commission; and (b) the whole of the profits earned by the Andros Springs under the Mobil charter from July 11 down to the date when she would have been expected to commence trading under that charter if there had been no collision.

(5) [1929] A.C. 196 at p. 205.

(6) [1911-13] All E.R. Rep. at p. 70; [1912] A.C. at p. 691.

The result of these calculations was to show that on either of the assumed hypotheses the plaintiffs must have gained substantially more than they lost. This result is so obviously absurd that I am reminded of the words of HOLROYD PEARCE, L.J., with reference to the assessment of damages in *Daniels v. Jones* (7), when he said:

"Since the question is one of actual material loss, some arithmetical calculations are necessarily involved in an assessment of the injury. But they do not provide a substitute for commonsense. Much of the calculation must be in the realms of hypothesis, and in that region arithmetic is a good servant, but a bad master."

It is not difficult to see where the calculation put forward on behalf of the defendants has gone wrong. The fundamental fallacy lies in the assumption that the profits earned by the Andros Springs in running under the Mobil charter were earned in consequence of the plaintiffs' efforts to mitigate their loss arising from the collision. The earning of these profits flowed not from measures taken in consequence of the collision, but from the fact of the charter having been negotiated months previously. Collision or no collision, these profits would have been earned in any event. I think, therefore, that the plaintiffs are justified in invoking the principle of *Re Vic Mill, Ltd.* (8) to show that the profits earned under the Mobil charter cannot as such be included in the calculation as a gain arising from the collision.

That is not, however, the end of the matter. It seems to me that the plaintiffs in their turn put their case much too high, when they submitted that the earnings of profits under the Mobil charter could be ignored altogether. The plain fact is that what the plaintiffs gained, and gained in consequence of the measures which they took arising out of the collision, was the ability to earn these high profits under the Mobil charter some three months earlier than they would have done if there had been no collision, and to earn them at the same time as the Andros Thunder was earning for them profits under the C.F.R. charter. This was an advantage which could not have been gained but for the collision. The real problem—and it is a difficult and in my experience an unusual problem—is how to assess in terms of money the value of this gain, so that it may be given its proper place in the overall balance of losses and gains.

I reject as merely derisory the suggestion put forward on behalf of the plaintiffs that the highest figure at which this gain should be assessed is on the basis of three months' interest on the first month's profit, plus two months' interest on the second month's profit, plus one month's interest on the third month's profit, which I am told amount to a mere \$2,628. The matter can, I think, be tested in this way. If the plaintiffs had taken no steps to advance the commencement date of the Mobil charter, they would have to credit for the fact that the Andros Springs would have become a free ship on June 7. Her value as a free ship from the date when, if there had been no collision, she would have commenced running under the Mobil charter would have represented a gain to be brought into the account of losses and gains. According to the figures with which I have been furnished the lowest rate of freight which could have been obtained by trading the Andros Springs on the spot market would have yielded a profit of \$392 per day. If one takes a period from June 7 to a date in mid-October that would have represented a gain of about \$45,000 or more. It must be assumed from the course which they took that the plaintiffs in their wisdom thought it more profitable to advance the commencement date of the Mobil charter, even at the cost of keeping the vessel idle from June 7 to July 11, rather than trade her on the spot market. This seems to indicate that in the plaintiffs' own view the advancement of the Mobil charter represented a gain of very considerable value.

After giving the matter the best consideration that I can, I have come to the

(7) [1961] 3 All E.R. 24 at p. 28.

(8) [1913] 1 Ch. 465.



A conclusion that the right way to look at the matter is to regard the whole of the Mobil charter as having been advanced by something like three months. Every penny profit earned under that charter over the whole of the seven years for which it lasted was earned some three months earlier than would have been the case had there been no collision. Put another way, the profit which in the event was earned by the Andros Springs between July 11 and some date in October, 1958, took the place of profit which would otherwise have been earned in the period between July 11 and the corresponding date in October, 1965. That being so, I think that the defendants are justified in their alternative contention that the value of what the plaintiffs gained by advancing the commencement of the Mobil charter can fairly be taken as the equivalent of seven years compound interest on the profits earned during the period whereby the charter was advanced.

C I think that I am now in a position to state my conclusions of fact and to set out my calculations of the financial results that flow therefrom. I am satisfied that the plaintiffs took reasonable steps to mitigate the losses flowing from the collision (a) by substituting the Andros Thunder for the Andros Springs for service under the C.F.R. charter, (b) by advancing the commencement date of the Mobil charter, and (c) with a view thereto keeping the Andros Springs idle at Rotterdam from June 7 to July 11. The overall loss of trading time for the Andros Springs was thus seventy-two days; but of this period twenty-two days would in any event have been lost in carrying out survey, cleaning, painting and owners' repairs (including repair of the bottom damage) in preparation for service under the Mobil charter. I find that if there had been no collision the Andros Springs would have completed four more voyages after the collision voyage under the C.F.R. charter. On a balance of probabilities I find that the first of these four voyages would have been to L'Avera (for which conclusion I rely on a letter from the charterers' agents of Apr. 30, 1958), and that the other three voyages would have been to Le Havre (which is what the Andros Thunder in fact did). Including the collision voyage, this would have occupied 168 days down to the completion of discharge of the final cargo at Le Havre. The Andros Springs would then have been delayed for a further twenty-two days for reasons already stated, making a total of 190 days before she would have been ready for tendering under the Mobil charter. This means that if there had been no collision she would have started to run under the Mobil charter on or about Oct. 19. The effect of what was done, therefore, was to advance the date of commencement of the Mobil charter by one hundred days.

G The financial results which flow from these findings seem to be as follows. The figures which I set out are those with which I have been supplied by the parties, but they will no doubt be carefully checked before the order is drawn up. The plaintiffs' losses were:

H	(1) profit on one L'Avera and three Le Havre voyages by the Andros Springs	\$542,068.55 cents
	(2) expenses thrown away during fifty days detention of the Andros Springs	\$41,807.00

Total lost	<u>\$583,875.55 cents</u>
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I	The plaintiffs' gains to be set against these losses were:	
	(1) profit earned by the Andros Thunder on three Le Havre voyages	\$369,169.08 cents
	(2) seven years compound interest at five per cent. on \$350,705 representing profits for 100 days under the Mobil charter	\$142,772.00

Total gained	<u>\$511,941.08 cents</u>
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The resulting net loss is \$71,934.47 cents, which sum should be substituted for the sum allowed by the learned registrar in respect of item 67 of the claim. The result is that in my judgment the objection succeeds in relation to item 67 of the claim to the extent which I have indicated, but fails in relation to the other items in dispute.

*Order accordingly. Leave to appeal granted.*

Solicitors: *Constant & Constant* (for the plaintiffs); *Coward, Chance & Co.* (for the defendants).

[*Reported by N. P. METCALFE, Esq., Barrister-at-Law.*]

## CRESSWELL AND ANOTHER (TRUSTEES OF THE COBBETT SETTLEMENT) v. PROCTOR AND OTHERS (TRUSTEES OF THE CONVENT OF THE HOLY FAMILY).

[COURT OF APPEAL, CIVIL DIVISION (HARMAN, DANCKWERTS and WINN, L.JJ.), April 4, 1968.]

*Restrictive Covenant—Restrictive covenant affecting land—Discharge or modification—Covenant imposed in February, 1963, application to modify in February, 1965—No change of circumstances affecting land—Applicants covenantors, respondents covenantees—Modification refused—Law of Property Act, 1925 (15 & 16 Geo. 5 c. 20), s. 84 (1).*

Purchasers, owners of a neighbouring bungalow, bought in February, 1963, a piece of garden land adjoining their premises. They entered into a restrictive covenant with their vendors not to erect any building on the land but to use it as a private garden. In 1964, their circumstances having changed, they sold the bungalow and land, but not this piece of garden land as the purchaser did not want it. In February, 1965, they applied to the Lands Tribunal to modify the restrictive covenant so as to permit development of the garden land. There was evidence before the tribunal that the proposed modification would not harm the vendors who sold the garden land in 1963.

**Held** (per HARMAN, L.J., and DANCKWERTS, L.J.): even if the application were within s. 84 (1) (c) of the Law of Property Act, 1925, it would be a wrong exercise of discretion to sanction the modification of this restrictive covenant, for in substance the application was to legalise a breach of covenant freely entered into only two years previously; and (per WINN, L.J.) the Lands Tribunal had not wrongly exercised its discretion in refusing modification of the restrictive covenant (see p. 684, letters G and I, and p. 685, letter G, post).

Appeal dismissed.

[As to grounds for discharge or modification of restrictive covenants, see 14 HALSBURY'S LAWS (3rd Edn.) 572, para. 1063; and for cases on the subject, see 40 DIGEST (Repl.) 364-367, 2925-2936.]

For the Law of Property Act, 1925, s. 84 (1), see 20 HALSBURY'S STATUTES (2nd Edn.) 605.]

### Case Stated.

The applicants appealed by way of Case Stated against a decision of the Lands Tribunal (JOHN WATSON, Esq.) given on Dec. 12, 1966, dismissing their application to the tribunal to modify a covenant which they had entered into in respect of a piece of land adjoining Broom Gardens, Coombe, in the county of Surrey, which they had acquired by a conveyance dated Feb. 4, 1963. The grounds of

A appeal were as follows—(i) That the tribunal misdirected itself in law in holding that

“ to grant such an application within four years of the date it was imposed, when in effect the applicants are the original covenantors and the objectors the original covenantees in the circumstances I have narrated, would in my opinion be contrary to public policy and an abuse of the tribunal’s powers.”

B Further there was no evidence on which the tribunal could so find. (ii) That the tribunal misdirected itself in law as to the true construction and effect of s. 84 (1) of the Law of Property Act, 1925. (iii) That the tribunal having found the following: (a) that the respondents (the trustees of the Convent of the Holy Family, who had sold the land to the applicants in February, 1963) appeared as objectors because of what they deemed a moral obligation to the residents’ association and that even that obligation was doubtful; and (b) that the applicants had satisfied the conditions laid down in s. 84 (1) (c); should have exercised its discretion in favour of the applicant. (iv) That the tribunal having found that there was no injury to the respondents was wrong in law to award compensation. (v) That there was no evidence on which the tribunal could assess the compensation at £2,000. (vi) That the tribunal erred in law as to the principles on which such compensation should be awarded.

D *George Dobry* for the applicants.  
The respondents did not appear and were not represented.

E **HARMAN, L.J.:** In the year 1962 a Mr. Cobbett and his wife purchased a part of the garden ground of a property known as “The Haven” at New Malden. It is coloured orange on a map which has been conveniently put before us. They got planning permission to erect on that ground and did erect a bungalow. In order to extend their garden they bought in the same year a small piece of land to the south coloured green on the plan. In order to extend themselves still further they brought in the same year a little later a plot of land coloured yellow on the plan, and they paid £500 for it. They bought it from F the trustees of a convent which was being run as a girls’ school in a large house to the north of them, which abutted on a different road, George Road, and which had a long garden behind it. The bit of yellow land was the southernmost bit of that garden. It had no outlet to a road. The orange land had such an outlet, because Mr. Cobbett, when he purchased “The Haven”, before he sold G off the bit with the existing house on it to the west, kept for himself a strip so as to enable him to get to a public road called Brook Gardens. The conveyance of the yellow land was dated Feb. 4, 1963. It was a registered transfer, and there was a covenant entered into by the purchasers

H “ not to erect any building whatsoever whether of a permanent nature or not on the said land [and] to use the said land for the purpose of a private garden and for no other purpose whatsoever.”

I Now there was an alteration in the circumstances of Mr. Cobbett which made it desirable for him to move to a larger house where he could have his parents to stay. Therefore early in 1964 he sold the orange and the green land. What profit he made does not appear; but the purchaser did not want the yellow land, he had enough garden already, and so Mr. Cobbett and his wife were left with the yellow land on their hands. They thought that they would, as it is called, “develop” that piece of land, and they applied for planning permission in May, 1964, and obtained it. There was still, however, the covenant which they had entered into with the trustees for the convent and they applied to them to release the covenant. There was another covenant with their purchaser, a Mr. Wilson; they applied to him and he eventually apparently did release his rights, but the trustees of the convent (or the Mother Superior) were not willing to do so. Their reasons were perfectly good moral reasons; they felt



under a moral obligation not to do so by reason of the fact that, when they themselves had purchased their property in the 1950s, they had entered into a number of restrictive covenants which they felt that they ought to observe and which the local residents' association were very anxious that they should observe. Therefore they refused their permission, as they felt bound to do. A

On that, in February, 1965, Mr. and Mrs. Cobbett applied to the Lands Tribunal to have their covenant modified. That was a surprising state of affairs. One has never heard of any parallel case at all. The idea that a covenant, voluntarily entered into, can be modified within a year or so, without any change in circumstances of the property at all, is to me shocking. It is not beyond the jurisdiction of the court to modify a covenant the day after it is made if it saw fit to do so; but the powers of the court, or the tribunal indeed before whom the matter first comes, are discretionary powers, and I cannot imagine circumstances in which, within a few months, a covenant solemnly entered into would be released. I do not think that it is a matter which depends on whether Mr. and Mrs. Cobbett got the land cheaper because they said that they would not build on it, though one may suspect that they did. I do not think that it is even a matter that they now propose to make a large profit (the extent of which has been in dispute) by developing the land and giving it an outlet down their own drive. It seems to me to be a matter within the discretion of the court and one in which the member of the tribunal who decided the case decided it in the exercise of his discretion, saying that he felt that what he called "public policy" demanded that such an application should not be acceded to, even if the applicant could bring himself within the grounds of s. 84 (1) (a), (b) or (c) of the Law of Property Act, 1925. He thought that these applicants were within para. (c) because, as he said, the only evidence given—there being no counter-evidence called, that being against the conscience of the nuns—was that a surveyor came along and said that he did not think that the modification of the covenant would hurt them, and that would therefore bring the applicants within para. (c). The member of the tribunal said: "But I do not think this is a case where I ought to exercise my discretion in favour of the applicants." The position there is, as I see it, that the applicants have entered into a covenant under seal; it is one that could be enforced by injunction and would be so enforced unless modification can be obtained from the tribunal. In my judgment it is quite out of the question to modify it in circumstances such as those. The only reason that Mr. Cobbett says that it should be modified is that his circumstances have changed and he does not want to live there any more. As a reason for being allowed to act in 1965 contrary to a covenant solemnly made in 1963, it is a suggestion I have never heard made before, and I hope that I shall never hear it made again. B C D E F G

I think that the decision of the tribunal was perfectly right and that this appeal ought to be dismissed. H

DANCKWERTS, L.J.: I agree. The covenant which is under consideration in this case was entered into between Mr. and Mrs. Cobbett and the convent on Feb. 4, 1963. Application under s. 84 of the Law of Property Act, 1925 was made by the Cobbetts on Feb. 5, 1965, just two years after the completion of the purchase of the land by them. On Mar. 30, 1965, the land was transferred to the trustees of a voluntary settlement made by the Cobbetts, and the application was amended accordingly. In substance, however, the application is one seeking to legalise a breach of the covenant thus freely entered into within such a short period. In my opinion such a case was not within the true intention of s. 84 and sanction should not be given in the exercise of the discretion which the tribunal undoubtedly possesses under the section. The sanctity of contract must have some relevance. The section no doubt allows a modification of contractual obligations in certain circumstances; but in my opinion this is not a case which was contemplated by the section. I agree that the tribunal was I

A perfectly right in refusing to exercise its discretion in favour of it in this case, and I also would dismiss the appeal.

WINN, L.J.: I would not feel justified myself in saying that there is any real reason to doubt that the Lands Tribunal member acted within his discretion in refusing this application. I would be very diffident indeed, in any case, in expressing, ignorant as I am of this type of problem, any view which differed at all from that expressed by my lords. On the other hand, I would think it wrong to refrain from saying this much for myself: that I do not think that there is any ground for suspicion in this case that Mr. Cobbett has tried to take any unfair advantage of his covenantees, or has set out to produce a situation which will enable him to obtain a profit for this yellow land, otherwise than by necessary response to a family situation which has compelled him to take the course which he has adopted. I would like to say also that I think that his offer of £1,000 (1) was perfectly realistic and fair as a basis for sharing the appreciation of the value of this land, which is attributable not only to the increase in the value of land during the years which have elapsed between 1963 and 1965-66-67, but also—much more directly, of course—to the access that has been provided to that land in the meantime. I think that the member missed this point and, indeed, misapplied the factor of potential profit: his observations about increased value should be rejected.

There was, of course, a startlingly prompt attempt to escape from a voluntarily undertaken contractual obligation—to which my lords have referred. No attempt to conceal the truth of that situation can be imputed to Mr. Cobbett, since he began the application in his own name and that of his wife, who were replaced by trustees during the pendency of the application. I think myself that there is considerable merit in the view that this land would be better used to carry a bungalow and provide living accommodation than it will if it remains sterile in the sense of having no building on it. This is a neighbourhood in which a number of planning permissions exist, which, as the evidence shows, will presumably result in the building of more houses in the immediate vicinity. However, whilst those are affirmative considerations which might have led another mind to override the sanctity-of-contract argument in favour, on balance, of modifying the covenant, I do not think that I could possibly say, any more than my lords have thought it possible to say, that this tribunal member abused his discretion or acted on wrong grounds—poorly as he expressed himself—in exercising that discretion. I also agree that this appeal must fail.

*Appeal dismissed.*

Solicitors: *Argles & Court*, agents for *Martin A. E. Cresswell* (for the applicants).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

(1) This offer was made by letter dated Nov. 9, 1963, from the applicants' solicitor. Subsequently the amount of compensation was determined by the Lands Tribunal (cf., p. 683, letter D, ante).

# THE PHARMACEUTICAL SOCIETY OF GREAT BRITAIN AND ANOTHER v. DICKSON.

[House of Lords (Lord Reid, Lord Morris of Borth-y-Gest, Lord Hodson, Lord Upjohn and Lord Wilberforce), March 18, 19, 20, 21, 25, 26, May 29, 1968.]

*Trade—Restraint of trade—Corporation—Professional society—Resolution of members restricting trading activities of members—Part of code of professional conduct, binding in honour but enforceable only through disciplinary statutory committee—Justiciable issue—Member entitled to court's determination of validity of resolution—No evidence of reasonableness of restriction in public interest—Whether restriction in unreasonable restraint of trade—Whether ultra vires the society as not sufficiently related to relevant main object of society.*

Among the objects of the Pharmaceutical Society of Great Britain, which was incorporated by royal charter in 1843, since replaced by a royal charter of 1953, was one, which was the object relevant to the present case, "to maintain the honour and safeguard and promote the interests of the members in the exercise of the profession of pharmacy". All registered pharmacists were required by law to be members. In general, pharmacists had both professional activities and also trading activities, the society being primarily concerned with the former activities, and the trading interests of owners of pharmacies being mainly dealt with by the National Pharmaceutical Union. Limited companies could not be members of the society nor be registered pharmacists, but they could employ registered pharmacists and must do so if they were to be authorised sellers of poisons. There were 29,004 members of the society. The council of the society issued a code of conduct for the guidance of pharmacists and corporate bodies carrying on business under the Pharmacy Acts, which most pharmacists regarded as binding on them. It was a code of ethics, of which the council of the society sought to secure observance, primarily without reference to the statutory committee, which was a disciplinary body with powers of striking a pharmacist off the register or removing a company chemist from the register, subject to appeal to the High Court. The statutory committee provided the only means of compelling observance; in the last resort proceedings before the committee might be initiated in regard to conduct infringing the code of ethics.

In July, 1965, a motion was passed by a large majority of members of the society, consequent on a report of a committee set up in 1955. The motion was designed to raise the status of the profession and check extension of trading activities. It was as follows—"New pharmacies should be situated only in premises which are physically distinct, and should be devoted solely to: (i) professional services, as defined [the dispensing of medicines and the sale of pharmaceutical goods]; (ii) . . . non-professional services as defined [the sale of traditional goods, e.g., cosmetics and photographic requisites]; (iii) such other services as may be approved by the council [the sale of non-traditional goods]; and the range of services in existing pharmacies, or in pharmacy departments of larger establishments, should not be extended beyond the present limits, except as approved by the council". This resolution was intended to be included in the code of ethics. On appeal from an order upholding a declaration that the proposed restrictions embodied in the motion were invalid and an injunction restraining the society from acting on them, the order having been obtained at the instance of a registered pharmacist and member of the society, who was also a director of a public company owning many chemists' shops,

**Held:** the declaration and the injunction had been rightly granted for the following reasons—

(i) since the restrictions expressed in the motion, even though binding only in honour, would become rules of professional conduct of which the



A council of the society would do their best to secure observance, the respondent was entitled to have the question of their validity determined by the court, and the issues so raised were justiciable (see p. 689, letter H, p. 695, letter B, p. 697, letter H, p. 700, letter H, p. 701, letter E, and p. 704, letters E and H, post).

(ii) (LORD HODSON not deciding this point) the motion was ultra vires as it was not sufficiently related to the only relevant main object of the society, viz., maintaining the honour and safeguarding and promoting the interests of the members in their exercise of the profession of pharmacy (see p. 691, letter A, p. 694, letters B and E, p. 702, letter H, and p. 706, letter F, post, cf., p' 698, letter D, post).

(iii) the restrictions to be imposed by the motion were in restraint of trade and had not been justified as reasonably necessary for achieving the objects of the society's charter (see p. 690, letters B and I, p. 695, letter C, p. 696, letter B, p. 698, letter F, p. 699, letter C, p. 704, letter B, p. 706, letter G, and p. 707, letter F, post).

Dicta of WILLES, C.J., in *Gunmakers etc. (Master, etc.) v. Fell* ((1742), Willes at p. 388) and of LORD MACNAGHTEN in *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co., Ltd.* ([1891-94] All E.R. Rep. at p. 18) applied.

Decision of the COURT OF APPEAL (sub nom. *Dickson v. The Pharmaceutical Society of Great Britain* [1967] 2 All E.R. 558) affirmed.

[Editorial Note. While recognising that in the present case the members of the profession concerned were normally engaged not only in their professional activities but also in trading activities, the decision is nevertheless authority that professional bodies are not outside the general doctrine of restraint of trade; see, e.g., at p. 703, letters A and D, post.

As to the classification of the restraints to which the doctrine against restraint of trade applies, see 38 HALSBURY'S LAWS (3rd Edn.) 16, para. 10.

As to restraint of trade being void unless reasonable in relation to parties and the public and the onus of proof of reasonableness, see 38 HALSBURY'S LAWS (3rd Edn.) 21, para. 15; and for cases on the subject, see 45 DIGEST (Repl.) 443-449, 271-297.

For the Pharmacy Act, 1953, see 33 HALSBURY'S STATUTES (2nd Edn.) 368.

For the Pharmacy Act, 1954, see 34 HALSBURY'S STATUTES (2nd Edn.) 478.]

#### Cases referred to:

G *A.-G. of Commonwealth of Australia v. Adelaide Steamship Co., Ltd.*, [1911-13] All E.R. Rep. 1120; [1913] A.C. 781; 83 L.J.P.C. 84; 109 L.T. 258; 12 Asp. M.L.C. 361; 45 Digest (Repl.) 395, 119.

*Boulting v. Association of Cinematograph, Television and Allied Technicians*, [1963] 1 All E.R. 716; [1963] 2 Q.B. 606; [1963] 2 W.L.R. 529; 45 Digest (Repl.) 543, 1229.

H *City of London Case*, (1610), 8 Co. Rep. 121b; 77 E.R. 658; 45 Digest (Repl.) 383, 17.

*Dyson v. A.-G.*, [1911] 1 K.B. 410; 81 L.J.K.B. 217; 105 L.T. 753; 11 Digest (Repl.) 593, 314.

*Eastham v. Newcastle United Football Club, Ltd.*, [1963] 3 All E.R. 139; [1964] Ch. 413; [1963] 3 W.L.R. 574; 45 Digest (Repl.) 505, 933.

I *Esso Petroleum Co., Ltd. v. Harper's Garage (Stourport), Ltd.*, [1967] 1 All E.R. 699; [1968] A.C. 269; [1967] 2 W.L.R. 871; Digest (Repl.) Supp. *Gunmakers, etc. (Master, etc.) v. Fell*, (1742), Willes 384; 125 E.R. 1227; 45 Digest (Repl.) 464, 483.

*Hughes v. Architects' Registration Council of the United Kingdom*, [1957] 2 All E.R. 436; [1957] 2 Q.B. 550; [1957] 3 W.L.R. 119; 7 Digest (Repl.) 471, 523.

*Ipswich Tailors' Case*, (1614), 11 Co. Rep. 53a; 77 E.R. 1218; 45 Digest (Repl.) 391, 86.

- Jenkin v. Pharmaceutical Society of Great Britain*, [1921] 1 Ch. 392; 90 L.J.Ch. 47; 124 L.T. 309; 13 Digest (Repl.) 274, 970. A
- McEllistrim v. Ballymacelligott Co-operative, Agricultural and Dairy Society, Ltd.*, [1919] A.C. 548; 88 L.J.P.C. 59; 120 L.T. 613; 45 Digest (Repl.) 462, 454.
- Mitchel v. Reynolds*, (1714), 1 P. Wms. 181; 24 E.R. 347; 45 Digest (Repl.) 395, 110. B
- Nagle v. Feilden*, [1966] 1 All E.R. 689; [1966] 2 Q.B. 633; [1966] 2 W.L.R. 1027; Digest (Cont. Vol. B) 323, 535a.
- Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.*, [1891-94] All E.R. Rep 1; [1894] A.C. 535; 63 L.J.Ch. 908; 71 L.T. 489; 45 Digest (Repl.) 444, 275.
- Rossi v. Edinburgh Corpn.*, [1905] A.C. 21; 38 Digest (Repl.) 180, \*449. C
- Swaine v. Wilson*, (1889), 24 Q.B.D. 252; 59 L.J.Q.B. 76; 62 L.T. 309; 54 J.P. 484; 45 Digest (Repl.) 527, 1118.
- U.S. v. Standard Oil Co.*, (1911), 221 U.S. 1 (the series of reports is the UNITED STATES REPORTS).

### Appeal.

This was an appeal by the appellants, the Pharmaceutical Society of Great Britain and their president, against an order of the Court of Appeal (LORD DENNING, M.R., DANCKWERTS and SACHS, L.J.J.), dated Jan. 26, 1967, and reported [1967] 2 All E.R. 558, upholding the judgment of PENNYCUIK, J., reported [1966] 3 All E.R. 404, declaring that it was not within the competence of the appellant society to enforce or carry out or attempt to enforce or carry out the provisions of the resolution passed by a large majority at a general meeting on July 25, 1965. The respondent, Robert Campbell Miller Dickson, was a member of the appellant society and the retail director of Boots Pure Drug Co., Ltd. The facts are set out in the opinion of LORD MORRIS OF BORTH-Y-GEST at p. 691, et seq., post. D

*R. I. S. Bax, Q.C.*, and *R. N. Thomas* for the appellants.

*R. J. Parker, Q.C.*, *F. P. Neill, Q.C.*, and *G. M. Waller* for the respondent. F

Their lordships took time for consideration.

May 29. The following opinions were delivered.

**LORD REID:** My Lords, the first appellant is a society incorporated by royal charter in 1843. Its objects are now set out in a supplemental charter of 1953. The second appellant is its president. By statute all registered pharmacists are members of the society. It is claimed, I think rightly, that pharmacy is a profession. It is necessary to pursue a course of study and training and to pass a wide ranging examination before one can become a registered pharmacist, and the work of a pharmacist in dispensing medicine is highly skilled and responsible. G

A main object of the society is "to maintain the honour and safeguard and promote the interests of the members in their exercise of the profession of pharmacy". In addition to statutory provisions there are a number of rules for the guidance of members, which have been adopted by the society from time to time. When necessary the council of the society seek to enforce these rules by bringing pressure to bear on those who do not comply with them, and ultimately by bringing the matter before a statutory committee, which has power to order removal from the register of the name of a pharmacist who has been guilty of misconduct which in its opinion renders him unfit to have his name on the register. H

There are about twenty-nine thousand registered pharmacists. Some, such as those employed in hospitals, have no other duties than the professional task of dispensing; but the typical pharmacist owns or is employed in a chemist's shop where goods other than dispensed medicines are sold to the public. Such I

A goods have been divided into three classes: first "professional", which includes, besides medicines and sick room requirements, agricultural, horticultural and industrial chemicals and various scientific and other appliances; secondly, "traditional" which, largely for historical reasons, includes cosmetics and photographic requisites; and thirdly "non-traditional", which includes a wide variety of articles which many pharmacists have found it profitable and convenient to sell in chemists shops. So most pharmacists act in a dual capacity, combining retail trading with their professional work.

B That pharmacists should be engaged in trade is regarded by many pharmacists as undesirable; but it is generally recognised that comparatively few chemist's shops could survive without engaging in some degree of trading. The present policy of the council of the society is to restrict trading activities so far as is economically practicable as well as to ensure that such activities are carried on in a manner compatible with the professional character of pharmacists. It has been one of their objects to raise the status of the profession. In 1955 a committee was set up, and, after extensive consultation, it submitted a report. A number of its recommendations, with some alteration, were incorporated in a motion which was passed by a large majority at a largely attended general meeting on July 25, 1965. The motion was as follows:

E "New pharmacies should be situated only in premises which are physically distinct, and should be devoted solely to: (i) professional services, as defined in para. 19 of the report of the committee on the general practice of pharmacy, (ii) within the limits recommended in the report non-professional services as defined in para. 19 of the report, and (iii) such other services as may be approved by the council; and the range of services in existing pharmacies, or in pharmacy departments of large establishments should not be extended beyond the present limits except as approved by the council."

F The respondent is a director of Boots Pure Drug Co., Ltd., and is a member of the society. In this action he seeks a declaration and injunction and on June 23, 1966, PENNYCUICK, J. (1) made an order declaring

G "That it is not within the powers purposes or objects of The Pharmaceutical Society of Great Britain hereinafter called the society to enforce or carry out or attempt to enforce or carry out the provisions of the motion specified in the pleadings and set forth in the schedule hereto or any of the said provisions on the ground that the said provisions are in restraint of trade."

That order was affirmed by the Court of Appeal (2).

H The appellants maintain for a number of reasons that this declaration should not be made. In the first place they say that there is no justiciable issue; but I agree with your lordships that this contention must be rejected. If this motion stands it becomes a rule of professional conduct and the appellants do not deny that they will do their best to enforce it. So a pharmacist who does not restrict his trade in this way may be reported to the statutory committee and he will be at risk of that committee finding that he has been guilty of misconduct and of being deprived of his professional qualification. In my judgment the court has I the power and duty to determine this question at this stage.

In every profession, of which I have any knowledge, there is a code of conduct, written or unwritten, which makes it improper for members of the profession to engage in certain activities in which ordinary members of the public are quite entitled to engage. Normally this is regarded as a domestic matter within the profession; but it appears to me that if a member of a profession can show that

(1) [1966] 3 All E.R. 404; [1967] Ch. 708.

(2) [1967] 2 All E.R. 558; [1967] Ch. at p. 722.



a particular restriction on his activities goes beyond anything which can reasonably be related to the maintenance of professional honour or standards, the court must be able to intervene. In the present case there is also a question whether these restrictions are within the objects of the society. In *Jenkin v. Pharmaceutical Society of Great Britain* (3) it was held that certain attempts to regulate trading by the members were ultra vires. But the respondent does not dispute that the society is entitled to regulate such trading activities in so far as that is reasonably necessary to achieve the society's objects set out in the charter. So it becomes a question whether these restrictions can properly be related to the maintenance or improvement of the status of the profession of pharmacy. That these restrictions are in restraint of trade cannot be doubted. Any pharmacist who opens a new chemist's shop can only sell professional or traditional goods in it, and in any existing chemist's shop no new classes of non-traditional goods can be sold unless the council consents. This restraint may severely hamper the shopkeeper, and indeed it may make the business so unprofitable that the shop has to be closed. I need not consider the wider aspect of public interest, whether that might seriously inconvenience members of the public who wish to have prescriptions dispensed or to buy medicines.

The respondent argues that, as this motion would operate in restraint of trade, the ordinary principles of restraint of trade apply so that the appellants must plead and prove justification. I am very doubtful whether that is so where restraints exist as part of a code of professional conduct. If the ordinary rule were to apply, any member of a profession who wanted to make more money by disregarding some long standing rule of professional conduct could require the restraint to be justified without himself having to allege and prove that the rule was unreasonable. The onus would be on the body defending the standards of the profession and, unless the tests laid down in the authorities are to be altered, I do not see how the court could limit the extent to which it would interfere in the domestic affairs of the profession. On the general question of the ordinary rules of restraint of trade I may be permitted to refer to what I said in *Esso Petroleum Co., Ltd. v. Harper's Garage (Stourport), Ltd.* (4). I do not, however, think it necessary to pursue this matter because, wherever the onus may lie in this case, I am of opinion that these restraints cannot reasonably be related to the objects of the society.

The appellants' pleadings are silent on this matter and the evidence is very vague. Three suggestions were made. First, that the adoption of the motion would make the profession more attractive to new entrants; secondly, that it would avoid pharmacists being distracted from their professional work; and thirdly, that it would raise, or at least prevent lowering, the status of the profession. The first is not now maintained; such evidence as there is indicates that entrants tend to go where there is trading as well as professional work because prospects are better. The second could be a formidable point but it is not supported by the evidence. No doubt the distraction is greater where the proportion of trading to professional work is greater, but there is no evidence that selling non-traditional goods is more distracting than selling professional or traditional goods. It is the third point, status, which is now chiefly relied on. There is, however, no evidence that members of the public, or indeed members of the society, have a higher opinion of the pharmacist who does not sell non-traditional goods than they have of the pharmacist who does. I could well understand the status would be improved by only selling high class goods, or by limiting the proportion of trading to professional work, or by having premises of dignified appearance. The motion has not, however, been related to such considerations; it permits the sale of lower class traditional goods to any extent but forbids even high class non-traditional goods of a new character.

(3) [1921] 1 Ch. 392.

(4) [1967] 1 All E.R. 699 at p. 704, [1968] A.C. 269 at p. 293.

A I do not doubt that this motion was proposed and supported with the belief that it would assist in maintaining and raising the standards of the profession; but I cannot find from the evidence or from common knowledge any reasonable support for this belief. So I must hold that the motion has not been sufficiently related to the objects of the society to be *intra vires*.

I would dismiss the appeal.

B **LORD MORRIS OF BORTH-Y-GEST:** My Lords, for many years past most of those who have been in general practice as pharmacists have also been engaged in certain retail trade activities. In addition to supplying medicines, whether on prescriptions or otherwise, retail chemists sell what are called pharmaceutical (or professional) goods. Medical and surgical appliances are within that description. Generally retail chemists also sell goods which, though non-professional, have traditionally been closely associated with pharmacy. These include not only such goods as perfumes, cosmetics and toilet requisites but also cameras and photographic materials. Furthermore a very considerable number of retail chemists sell goods which are in no way associated with pharmacy. These are referred to as non-traditional goods. Within their range might be found some of such articles as greeting cards, thermos flasks, handbags, beachwear, jewellery, books or even wines and spirits.

D It is widely accepted that it would not be economically practical to provide dispensing services without at the same time selling pharmaceutical or professional goods. The judge (5) has found that it would be highly disadvantageous economically to exclude the sale of traditional goods. As to the non-traditional goods the view of the judge was that, though most existing retail shops would probably be viable if non-traditional goods were not sold, it would be disadvantageous economically if their sale was on a much smaller scale than as it is at present.

E The state of affairs that has evolved over the years is therefore that most pharmacists have dual rôles. The one is that of the practitioner in pharmacy as such. The other is that of a retail trader. The former involves professional activities. The latter involves trading activities. It has, however, been the view of many that the sale of non-traditional goods if carried on to any significant extent is undesirable and is out of keeping with the practice of pharmacy. In pursuance of this view, a plan was formed which, if fully observed, would clamp down on trading activities and impose restrictions in regard to new pharmacies. The motion that was carried was designed to give effect to the plan. Under it a halt is to be called. There is to be a standstill. Activities in trade as they have developed are not to be forbidden, but certain extensions of them are only to be permitted if approved by the council of the Pharmaceutical Society of Great Britain. The litigation concerns the question whether it is within the competence of the society to resolve that members should conform to the scheme of the plan. In effect the respondent in commencing these proceedings has asked—by what right do you require that the trading activities of members are to be restricted or curtailed either in new pharmacies or in existing ones? The respondent claims that the society has no such right.

H It becomes necessary first to consider what are the objects and purposes of the society. The society came into being as the result of a voluntary association of chemists and druggists. A royal charter of incorporation was granted in 1843. I The society was formed for the purpose of advancing chemistry and pharmacy and promoting a uniform system of education “of those who should practice the same and also for the protection of those who carry on the business of chemists and druggists” and for certain benevolent purposes. There have been various Acts of Parliament dealing with the duties and powers of the society. In 1920 there was litigation (*Jenkin v. Pharmaceutical Society of Great Britain* (6)),

(5) [1966] 3 All E.R. 404; [1967] Ch. 708.

(6) [1921] 1 Ch. 392.

the object of which was to test the extent of the society's powers under the royal charter and the Pharmacy Acts (7). It was held, *inter alia*, that it was not within the objects, powers or purposes of the society to regulate the hours of business of members or to regulate the wages and conditions of employment as between master and employee members of the society or to regulate the prices at which members might sell their goods. Soon after that case a trade union was formed (The National Pharmaceutical Union). That union has dealt with matters relating to the trading interests of owners of pharmacies. After the passing of the Pharmacy Act, 1953, the society was granted a supplemental charter. It is under this charter that the society now functions.

Without referring in detail to legislative provisions it is sufficient to say that membership of the society consists of all persons whose names are registered as pharmaceutical chemists in accordance with the provisions of the Pharmacy Act, 1954. Corporate bodies are not members of the society, but they may employ members. They must do so if they wish to be authorised sellers of poisons under the Pharmacy and Poisons Act, 1933. Under its current charter the objects of the society are different from those under the charter of 1843. One object stated in the new charter is: "To maintain the honour and safeguard and promote the interests of the members in their exercise of the profession of pharmacy".

The council of the society issue a statement on matters of professional conduct. The statement records that standards of professional conduct for pharmacy are necessary in the public interest to ensure an efficient service. The society has an ethical committee whose duties are to keep the statement under review and to advise generally on questions of professional conduct. In the statement it is recited:

"The council in considering whether action should be taken on any matter are not limited to matters mentioned in this statement, nor on the other hand does it follow that all instances of conduct at variance with the statement would, when receiving such consideration, be treated as of equal importance. It is desired to emphasise that this statement is not primarily a basis for applying compulsion but a means of assisting pharmacists to discharge the moral obligation resting upon them to observe standards of conduct appropriate to their calling."

All the canons of proper conduct which are formulated and enshrined in the statement have in fact been approved from time to time by the society in general meeting and have so been approved before publication.

Disciplinary matters are dealt with in the following way. There is a statutory committee (created as a committee of the society) which has jurisdiction over registered pharmacists and over corporate bodies which are authorised to sell poisons. The committee has five members, who are appointed by the council of the society, and a chairman who must have had practical legal experience and who is appointed by the Privy Council. Subject to certain conditions the committee may direct the removal from the register of the name of a registered pharmacist who has been guilty of such misconduct as in the opinion of the statutory committee renders him unfit to have his name on the register (see s. 8 of the Act of 1954). Under s. 9 the assent of the chairman of the committee is a necessary requisite to the giving of any such direction. There are provisions (see s. 10) for appeal to the High Court.

The limitation plan which is embodied in the motion, which was approved (by a large majority) at the special general meeting held on July 25, 1965, owes its origin to the report of a committee (set up by the society in 1955) on the general practice of pharmacy. In connexion with the services undertaken by pharmacists when they sell what have been called non-traditional goods it

(7) I.e., the Pharmacy Acts of 1852 and 1868.



A was the view of that committee that it was doubtful whether such services or activities could be regarded

“as consistent with the practice of pharmacy if carried on to a significant extent in an establishment which is not clearly departmentalised, that is to say, conducted with separate accommodation, stock and staff involving a pharmacist in personal supervision.”

B An exception was thought to be perhaps desirable in country districts.

“It may well be that in country districts it is in the public interest that goods which normally would not be regarded as suitable should be sold in pharmacies, but this need not affect the general rule.”

I need not set out the terms of the motion. It relates in the first place to new pharmacies. The requirement that they “should be situated only in premises which are physically distinct” is imprecise and vague; but whatever be the condition so to be imposed the essence of the requirement is that there must be confinement of sales within set limits unless there is the approval of the council. As to existing pharmacies there must be no extensions of the ranges of sales except as approved by the council. The acknowledged intention is to incorporate the terms of the motion in the statement on matters of professional conduct. The enquiry is at once raised as to what ethical concept there is which requires that a retail trader is to be forbidden for the future from varying the range of the articles that he sells. The further enquiry is prompted as to the source of any power in the society to lay down the rules which the motion embodies.

E The only object of the society set out in the charter of 1953 which seems relevant is contained in the words “To maintain the honour and safeguard and promote the interests of the members in their exercise of the profession of pharmacy”. All the time it is to be remembered that we are concerned with those who combine the professional activities of pharmacists with the commercial activities of retail traders and salesmen. It is a great many decades too late to suggest that the “honour” of pharmacists is tarnished if they concern themselves with activities other than pharmacy or other than those which are akin to or fairly closely akin to those of pharmacy. Where, then, is the power in a society which is concerned to safeguard and promote the interests of members “in the exercise of the profession of pharmacy” to prescribe and limit and control those affairs of members which do not relate to the profession of pharmacy but to those separate and additional activities which, as it has for a long time been accepted, can properly and respectably be undertaken?

I have no doubt that there could be some trading activities which it would be undesirable for pharmacists to undertake in conjunction with their professional activities as pharmacists. The motion now being considered has however no specific activities in contemplation. Being general in its application it needs a link, if it is to be justified, with the interests of pharmacists in their professional work. In connexion with and for the benefit of their professional work how can enforced restraint in their retail trading be incumbent? There were three suggestions. It was said that if there are trade activities they distract a pharmacist from his professional activities with the result that the latter are adversely affected. The appellants agree that this suggestion can no longer be sustained. I It was said that entry into the profession will be discouraged if trading activities are not curtailed. That suggestion is no longer pursued. The remaining suggestion was that the status of the profession will be diminished unless the proposed limitations are applied. Evidence was given by witnesses who felt that the status of pharmacy should be higher than it is, and who considered that the fact that there was extensive retail trading in extraneous goods diminished respect for the profession. While I can fully appreciate and respect the point of view of those who feel that retail trading has already reached, or perhaps passed, what they regard as the desirable limits and who fear that any extension of it might

be at the expense of the image of the profession, I do not consider that the evidence established that professional standards have been eroded by reason of the fact that members of the society have both carried on trade and carried on their profession. Nothing adversely affecting "the exercise of the profession of pharmacy" was shown by the evidence to be taking place, which could entitle the society to interfere with the freedom of members in the exercise of trading activities which they have for so long been entitled to undertake. Selling by members of non-traditional goods has been permissible. I do not think that it is within the powers or purposes of the society to control such selling activities as do not interfere with the proper performance of professional pharmaceutical duties.

I have no doubt that it would be within the competence of the society, as a body concerned for the honour and well being of those engaged in the profession of pharmacy, to lay down rules concerning non-professional (as well as professional) activities if such activities were harming or thwarting a proper adherence to professional standards and behaviour; but that would have to be proved. In agreement with the Court of Appeal (8) I do not think that it was proved in this case. It will normally be for a profession itself to decide in regard to its standards and its codes of behaviour, and the mere fact that certain rules are laid down which are severely restrictive will not warrant attack on them if in the interests of members and in the public interest such rules are reasonable. It may be that some professions in laying down their codes of proper and desirable conduct find it necessary to enjoin all non-professional activities. This has never been the position in regard to pharmacy. Professional activities and non-professional ones have existed and have grown side by side. Curbing of the latter could only be insisted on if the former were being jeopardised. In the absence of persuasive evidence that such was the case I do not consider that it is within the objects and the purposes of the society to impose the bans and the restrictions which the motion contains.

Prominent among the submissions of the appellants was the submission that in bringing his action the respondent was not raising an issue which was justiciable. It was said that statements on matters of professional conduct were merely "guide lines". It was said that they were binding only in honour, but were not sustained by any sanction and could not be enforced by the council of the society. Furthermore, it was said that if, as the result of non-compliance with any precept contained in the statement, a member found himself before the standing committee that body was not obliged to enforce the statement and could conclude that conduct which was at variance with it was not misconduct. In addition it was said that a member could appeal to the High Court from a decision of the Statutory Committee and that as this procedure was available any present intervention of the court was not permissible. For all these reasons it was contended that neither the statement nor the motion was justiciable.

These contentions appear to me to ignore the realities of the situation. It is the definite purpose of the society to incorporate the motion in the statement on matters of professional conduct. It follows that, if the motion becomes operative, it will be the view of the council that a failure to comply with the terms of it will be misconduct. The society will take such steps as they can to make members conform. The inspectors will report cases of non-compliance. If persuasion fails the society will take steps to bring a member before the statutory committee and will endeavour to persuade that body that the member had been guilty of such misconduct as rendered him unfit to have his name on the register. It is true that the committee could take the view that a member was in no way obliged to conform to the limitations prescribed by the motion, but I see no reason why a member should wait for such a decision. If the society have no right to impose restrictions or to lay it down that in their view non-compliance with such

(8) [1967] 2 All E.R. 558; [1967] Ch. at p. 722.

- A restrictions will be misconduct, I think that the respondent is entitled to come to court now and to seek the declaration and the injunction which he obtained. Why should he wait? Why should he have a period of uncertainty? Why should he not know how he is to order his affairs? Why should he be obliged to suffer the embarrassment of being charged with professional misconduct? In my view, he need not tarry. He is entitled to come to the courts and to ask for a
- B decision that the rule (for such it amounts to) of which he complains was not one which it was within the powers of the society to impose.

- There is, in my view, a further reason (or perhaps one which is inherent in the first) why the society is not entitled to impose the restrictions which the motion contains, and that is that the motion would impose an unjustified restraint on the trade of all members. That compliance with the terms of the motion would
- C involve a restraint of trade is clear beyond argument. The question that arises is, therefore, whether the restraint which the society would wish and would intend to enforce is unreasonable and unjustified. The fact that the society is incorporated by charter does not entitle it to impose on its members a restraint of trade that is unreasonable and unjustified. So I think that the enquiry becomes one whether the restraint is of that nature. The appellants contended, however, before the
- D judge that this issue was not before the court at all, and that they were under no obligation to justify the restraint as being reasonable in the interests of their members. This contention was, I think, advanced because the appellants were saying that the motion was binding only in honour and was not enforceable by the society and would be subject to the independent scrutiny of the statutory committee under its independent chairman. In line with this was the further
- E contention that there was no justiciable issue before the court. The result was that the appellants resolutely declined to plead any justifications of the restraint. If, however, the whole of the evidence is considered, it does not seem to me that it established that the restraint was reasonable. I think that the society would and should have regard to the interests of the public as well as to the interests of members. One feature of the public interest is that trade should not be restricted
- F without good reason. The society ought not therefore to impose restrictions on its members unless such restrictions are either necessary or desirable for the purpose of maintaining the honour of members or for the purpose of promoting the interests of members when in serving the public they are carrying on the profession of pharmacy. The respondent had to prove his case, but once he had shown that the requirement being imposed on him (and all other members) was
- G one that would operate as a restraint of trade and once he had shown that there was an issue which was justiciable then, irrespective of questions as to where the onus of proof lay, the question which the court had to decide was whether the undoubted restraint of trade could reasonably be imposed by the society. The law has always favoured freedom of trade and has discountenanced restraints on trade. Thus in the notable case of *Mitchel v. Reynolds* (9) it was said (10) that
- H "In all restraints of trade, where nothing more appears the law presumes them bad". The same approach was adopted in *Gunmakers, etc. (Master, etc.) v. Fell* (11). In that case it was said that to the general rule there are some exceptions: as if a restraint is only particular in respect to the time or place and if there is good consideration given to the person restrained and (12) "So likewise if the restraint appear to be of a manifest benefit to the public". In more recent state-
- I ment of what is after all a rule of public policy it has been emphasised that to support restraints of trade and interference with individual liberty, there must be "sufficient justification". The restriction must be reasonable:

"... reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and

(9) (1714), 1 P. Wms. 181.

(10) (1714), 1 P. Wms. at p. 197.

(11) (1742), Willes 384.

(12) (1742), Willes at p. 388.



so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public " A

(*Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co., Ltd.* (13)). On what basis, then, could it be said that the restraint was reasonable or desirable or necessary? The only basis (either in reference to the society and its members or in reference to the public benefit) that was advanced was founded on the three suggestions already noted. As they lacked adequate substance the result was that no sufficient justification existed for requiring or imposing the restraints. B

I would dismiss the appeal.

**LORD HODSON:** My Lords, the main questions for determination on this appeal are (i) whether a proposed rule is outside the scope of the society's objects as expressed in its charter of 1953, and (ii) does the proposed rule, coupled with the steps by which the society intend to carry it out, represent an unreasonable restraint of trade. C

The respondent is a registered pharmacist and one of the directors of Boots Pure Drug Co., Ltd. He has for many years been a member of the appellant society, the Pharmaceutical Society of Great Britain, of which the second appellant is the president. Both appellants were unsuccessful in the Court of Appeal (14) and now appeal to your lordships against a declaration made by PENNYCUICK, J. (15) which came about in this way. The society which controls the professional activities of pharmacists is based on royal charter, the present charter bearing date Dec. 31, 1953. Its members are such persons as are for the time being registered pharmacists. The objects of the society, as set out in the charter, are as follows: D

"To advance chemistry and pharmacy. To promote pharmaceutical education and the application of pharmaceutical knowledge. To maintain the honour and safeguard and promote the interests of the members in their exercise of the profession of pharmacy. To provide relief for distressed persons, being (1) members "

etc. E

The council of the society consists of twenty-one elected members and three persons appointed by the Privy Council. The council directs and manages the affairs of the society generally with certain exceptions, and reports annually to the general meeting of the society. Special general meetings are held at such times as are necessary and desirable. The council's function is, in pursuance of the objects of the society, to prescribe and issue for the guidance of their members rules which form a code of ethics under the heading, "Statement upon matters of professional conduct". These are not bye-laws and have no compulsive force. F

On July 25, 1965, the society called a special general meeting at which, on the motion of the president, a motion was carried in the following terms: G

"New pharmacies should be situated only in premises which are physically distinct, and should be devoted solely to: (i) professional services, as defined in para. 19 of the report of the committee on the general practice of pharmacy, (ii) within the limits recommended in the report non-professional services as defined in para. 19 of the report, and (iii) such other services as may be approved by the council; and the range of services in existing pharmacies, or in pharmacy departments of larger establishments, should not be extended beyond the present limits except as approved by the council." H

In explanation of the motion it should be stated that professional services are defined as the dispensing of medicines and the sale of pharmaceutical goods, that non-professional services relate to the sale of what are called traditional goods, such as toilet articles and photographic equipment, and that the other I

(13) [1891-94] All E.R. Rep. 1 at p. 18; [1894] A.C. 535 at p. 565.

(14) [1967] 2 All E.R. 558; [1967] Ch. at p. 722.

(15) [1966] 3 All E.R. 404; [1967] Ch. 708.

A services relate to non-traditional goods such as may be approved by the council.

The code of ethics, on its face, does not purport to be enforceable. In the first paragraph it is emphasised that the statement is not primarily a basis for applying compulsion, but a means of assisting pharmacists to discharge the moral obligation resting on them to observe standards of conduct appropriate to their calling.

B complied with by ninety per cent. of the members and the society intends to take steps to carry out the motion as the learned judge found by correspondence, inspection, and, in the last resort, by the initiation and prosecution of proceedings before the statutory committee. This committee provides the only effective means of compulsion. It is appointed pursuant to s. 7 of the Pharmacy Act, 1954. It consists of six members of whom the chairman is appointed by the Privy Council and the remainder by the council, and has power (subject to appeal to the High Court) to remove the name of a registered pharmaceutical chemist from the register if he is found guilty of such misconduct as in the opinion of the statutory committee renders him unfit to have his name on the register.

C There is no question but that a breach of the code of ethics may be treated by the statutory committee as such misconduct, for the committee naturally pays regard to what the profession itself regards as misconduct in forming its own judgment. The effect of the rule as contained in the motion would be that, save with the approval of the council, new pharmacies would have to be situated in physically distinct premises and their trading activities confined to pharmaceutical and traditional goods and existing pharmacies would not, without the same approval, be able to extend the present range of non-traditional goods.

D The declaration of the learned judge was as follows:

"This Court Doth Declare that it is not within the powers purposes or objects of The Pharmaceutical Society of Great Britain hereinafter called the society to enforce or carry out or attempt to enforce or carry out the provisions of the motion specified in the pleadings and set forth in the schedule hereto or any of the said provisions on the ground that the said provisions are in restraint of trade."

E The first point taken before your lordships was that there is here no justiciable matter at all. No sanction is contained in the statement on matters of professional conduct: this contains pious expressions of opinion only, and the fact that the council may refer to the statutory committee cases which they regard as objectionable founds no legal claim such as would be contained in any enforceable byelaw. It is pointed out that the word "should" not "must" is used in the motion. This is perhaps a distinction without a difference and in any event there is a real threat hanging over the heads of those affected by the proposed rule and such persons are entitled to know where they stand. Accordingly, the courts can grant a declaration as to the validity of the rule and an injunction if required.

F Since the decision of the Court of Appeal in *Dyson v. A.-G.* (16), it has always been accepted that there is jurisdiction to make a declaratory order whether any consequential relief is or could be claimed or not.

G I agree with all the judgments in this case that there is a justiciable issue to determine whether or not the rule contained in the proposed motion is within the scope of the charter, and that the respondent was faced with a real threat that, if the rule were allowed to stand, he might have to face charges of misconduct. That he is justified in coming to the courts now for a declaration I have no doubt. He has not to wait until proceedings are taken against him. A parallel situation arose in the Scottish appeal before your lordships' House in *Rossi v. Edinburgh Corpn.* (17), where the Scottish action of declarator was held to be appropriate.

Is the rule then within the powers of the society? The relevant object in the

(16) [1911] 1 K.B. 410.

(17) [1905] A.C. 21.

charter is: "To maintain the honour and safeguard and promote the interests of the members in their exercise of the profession of pharmacy". Although the doctrine of ultra vires does not apply strictly to societies incorporated by royal charter, as PETERSON, J., pointed out in the case of *Jenkin v. Pharmaceutical Society of Great Britain* (18), so as to make it open to attack by third parties in general, a member of the society is entitled to take legal proceedings for the purpose of preventing the society or its governing body from doing acts outside of the purposes authorised by the charter which may lead to its destruction by the forfeiture of its charter. The judge in this case was of opinion, apart from restraint of trade, that the rule would not be outside the authorised purposes in view of the special nature of the occupation of a pharmacist, whose professional and trading activities are normally carried out in the same building so that the two are very much bound up together. Hence he felt that the rule might be regarded as calculated to maintain the members' honour and safeguard their interests in the exercise of their profession. SACHS, L.J., expressed (19) considerable doubts on this matter, which I share, particularly since, as a matter of history, after the decision in *Jenkin's* case (20) matters relating to the trading interests of owners of pharmacies have been dealt with by the National Pharmaceutical Union while the society has concentrated on the professional aspect. Like him, however, I find it unnecessary to decide this as a separate issue. If the rule is bad as being in unreasonable restraint of trade it will in any event be outside the limits imposed on the society by its charter.

There is no doubt that the motion itself, coupled with the steps which the society propose to take in order to carry out the motion, does amount to a proposed restraint on the trade of members by bringing pressure on them in the ways indicated, and in my opinion this is no less true because the rule is in itself incapable of direct enforcement. The action of the society still remains an interference with individual liberty of action in trading and restraint of trade. Unless it is reasonable in relation to the objects of the society the restraint cannot be justified. This is true of a modern profession as it was in the case of the old guilds, cf., *Gunmakers, etc. (Master, etc.) v. Fell* (21). As DEVLIN, J., pointed out in *Hughes v. Architects' Registration Council of the United Kingdom* (22):

"There is the right of every man to earn his living in whatever way he chooses unless by the law or his own voluntary submission his way is taken from him . . ."

The appellants, however, never raised the issue of reasonableness and contented themselves with saying that there was nothing for the courts to enquire into, or at any rate nothing on which to found a declaration or an injunction, because the motion was unenforceable and all disciplinary jurisdiction was vested in the statutory committee. Once this objection was out of the way that is, as the judge found (23), and I agree with him, an end of the case.

Reasonableness was, however, raised in the Court of Appeal (24) and extensive argument has been directed to that matter before your lordships. Like my noble and learned friend, LORD REID, I do not wish to pursue what I said on the general question of restraint of trade in *Esso Petroleum Co., Ltd. v. Harper's Garage (Stourport), Ltd.* (25). I see the force of the point that, when there is restraint of trade the burden of proof of reasonableness being, as between the parties, on the restraining party, this may cast an unfair burden of establishing reasonableness in many instances where the doctrine will not be applied. Nevertheless, the

(18) [1921] 1 Ch. at p. 398.

(19) [1967] 2 All E.R. at p. 573; [1967] Ch. at p. 757.

(20) [1921] 1 Ch. 392.

(21) (1742), Willes at pp. 388, 389.

(22) [1957] 2 All E.R. 436 at p. 443, letter G; [1957] 2 Q.B. 550 at p. 563.

(23) [1966] 3 All E.R. at p. 411; [1967] Ch. at p. 720.

(24) [1967] 2 All E.R. 558; [1967] Ch. at p. 722.

(25) [1967] 1 All E.R. 699; [1968] A.C. 269.



- A authorities appear to be consistent in treating the words "restraint of trade" as general and wide in their import. I have in mind, as an example, the statement of LORD PARKER OF WADDINGTON in *A.-G. of Commonwealth of Australia v. Adelaide Steamship Co., Ltd.* (26), to which I referred in the *Esso* case (27). The issue which in practice, once restraint is found to exist, is litigated between the parties is not "Is this the kind of case to which the doctrine applies?" but "Is the restraint reasonable?" I do not find it possible to segregate any particular class of case so as to exclude it from the ambit of the doctrine although there are, no doubt, many cases where it is futile to raise it. I have in mind the field of contractual and other manifold activities which, in the absence of special features, have been treated as immune.

In view of the state of the pleadings the evidence was never directed to reasonableness as a separate matter, but your lordships have been referred to various passages which have some bearing on this aspect. I agree that in the light of that evidence the restraint here cannot be justified as reasonable either in the public interest or in the private interest of the parties.

I would dismiss the appeal.

- D LORD UPJOHN: My Lords, the issues in this case arise by reason of the fact that, though pharmacy is a profession, those pharmacists who carry on the general practice of pharmacy by way of engaging in retail sale (and they form about seventy-five per cent. of the twenty-nine thousand members of the appellant society, the Pharmaceutical Society of Great Britain) must also engage in trade to earn a living. So a pharmacist's life consists of two parts: first, carrying on the profession of a pharmacist by dispensing and supplying medicines, surgical appliances and so on, and, secondly carrying on a retail trade in what are called traditional goods, perfumes, cosmetics and the like, cameras and photographic materials. In recent years, to meet increasing competition, the range of goods sold by pharmacists have extended to non-traditional goods such as "handbags, beachwear, souvenirs, pottery, jewellery, books and wines and spirits". The council of the society felt that these extended trading activities were intrinsically undesirable, so after prolonged examination of the situation by a committee set up in 1955 who made a report, the following resolution was passed at a special general meeting of the society on July 25, 1965, in these terms:

- G "New pharmacies should be situated only in premises which are physically distinct and should be devoted solely to: (i) professional services as defined in para. 19 of the report of the committee on the general practice of pharmacy; (ii) within the limits recommended in the report non-professional services as defined in para. 19 of the report and (iii) such other services as may be approved by the council and the range of services in existing pharmacies or in pharmacy departments of larger establishments should not be extended beyond the present limits except as approved by the council."

- H Paragraph 19 is set out fully in the judgment of PENNYCUICK, J. (28) and I need not repeat it, for it is clear that the object of this motion was to restrict the purely trading activities of pharmacists so far as was practical in order to enhance the standing of the pharmaceutical profession and to elevate the status of its members. It was intended that the motion should be incorporated into a code of ethics published from time to time by the society under the title "Statement upon matters of professional conduct" with a sub-title "Issued by the council of [the society] for the guidance of pharmacists and corporate bodies carrying on business under the Pharmacy Acts".

The respondent, who is a registered member of the society and the retail director of Boots Pure Drug Co., Ltd. ("Boots"), objects to this resolution and has taken action asking for a declaration that the motion is invalid and for an

(26) [1911-13] All E.R. Rep. 1120 at p. 1122; [1913] A.C. 781 at p. 793.

(27) [1967] 1 All E.R. at p. 720; [1968] A.C. at p. 318.

(28) See [1966] 3 All E.R. at p. 406.

injunction to restrain the society from acting on it. Of course, and quite properly, A  
 he has taken this action on behalf of Boots. He has succeeded before PENNYCUICK,  
 J. (29), and the Court of Appeal (30). The issues before your lordships are three-  
 fold: 1. Are the issues between the parties justiciable at all? 2. If so, is the July  
 motion open to attack by a member of the society as being beyond the expressly  
 authorised powers of the society? 3. Does the doctrine of restraint of trade apply B  
 to a professional body and, if so, is the motion in unreasonable restraint of trade  
 and void?

On the first issue the society contend that (i) the code of ethics contains merely  
 recommendations binding in honour only on members (ii) the society cannot en-  
 force the code; that is a matter vested in an independent statutory committee  
 set up by the Pharmacy Act, 1954, re-enacting an earlier Act of 1933 (31). C  
 The main duties of this committee are to consider whether a pharmacist's name  
 should be removed from the register because he has been found guilty of some  
 relevant criminal offence or has been guilty of such misconduct as in the opinion  
 of the committee renders him unfit to have his name on the register. The chairman  
 is appointed by the Privy Council and must be one who has practical legal  
 experience, and he has under the regulations (32) made by statutory instrument  
 very considerable powers of his own motion to stop proceedings before the D  
 committee at an early stage in certain cases and he must himself assent to every  
 removal of a name from the register. The evidence showed that this statutory com-  
 mittee is in truth highly independent and that over the years a succession of  
 eminent chairmen had not hesitated, much to the disappointment of the council,  
 to exercise their powers to stop proceedings at an early stage. But all this means  
 no more than that, like any police force, the council are not judges in their own E  
 cause. The evidence also established that by every peaceful method available to  
 the council they endeavour in practice to enforce their code of ethics on their  
 members, and they have been very successful. Let me quote a question to and  
 answer of Mr. Adams, the secretary of the society for the last nineteen years.

"Q.—May I turn with you to the statement on matters of professional F  
 conduct generally. Once a matter has got into that statement, the council  
 in fact do all they can to secure that it is complied with by members. Is that  
 right? Never mind what it is; they must do everything that they can?.  
 A.—Yes; that would be a correct statement. Q.—And they have a very  
 large measure of success? A.—Indeed. Q.—Without resorting to the  
 statutory committee? A.—Yes. Q.—Would it be right to say that, when  
 a matter goes into the statement, ninety per cent. or more of pharmacists G  
 comply? A.—I should think so; yes . . . Q.—So that it was one hundred per  
 cent. success, except for Boots? A.—Yes."

To contend that a trader subject to such pressures to restrict his trading cannot  
 resort to law in an endeavour to prove, if he can, that such pressures ought not  
 lawfully to be brought to bear on him merely because they are said to be binding H  
 in honour only is quite untenable. The truth is that the council is trying by every  
 peaceful means in its power to enforce its views on its members and, if in fact some  
 of its views are unlawful, they cannot escape from the consequences that flow  
 from that by using such phrases as "binding in honour" or "guidance". They  
 must be judged by their acts, not by their words.

Then, it was said that in any event the action was premature. The objecting I  
 member must wait, apparently, until the council think fit to bring him before the  
 statutory committee, it may be years later, for it was said there was no immediate  
 threat to do so. As a matter of commonsense this is most unreasonable. Why  
 should a trader be put into the position where he may expend large sums on

(29) [1966] 3 All E.R. 404; [1967] Ch. 708.

(30) [1967] 2 All E.R. 558; [1967] Ch. at p. 722.

(31) The Pharmacy and Poisons Act, 1933.

(32) The Pharmaceutical Society (Statutory Committee) Order of Council, 1957 (S.I.  
 1957 No. 754).

- A expanding his trading activities in defiance of the code of ethics and then be compelled to wait until at some indefinite time in the future the council choose to bring him before the statutory committee for his alleged misconduct, and only then, possibly, he finds all his hard work and expenditure rendered useless. The law is full of examples to show that a person whose freedom of activity is challenged can in a proper case have the issue determined, so that he knows where he stands.

Thus, a trader who is said to require some licence to trade may come to the court and ask for a declaration to the contrary and not wait until he is prosecuted. *Rossi v. Edinburgh Corpn.* (33). This principle is not confined to trade. A person whose freedom of action is challenged can always come to the court to have his rights and position clarified subject always, of course, to the right of the court in exercise of its judicial discretion to refuse relief in the circumstances of the case. In the judicial exercise of this discretion the court may declare the rights of the parties and by way of ancillary relief grant injunctions, and so on. See three recent cases which illustrate this elementary proposition. *Boulting v. Association of Cinematograph, Television and Allied Technicians* (34); *Eastham v. Newcastle United Football Club, Ltd.* (35) and *Nagle v. Feilden* (36).

- D In addition to this, it is quite clear that, as a member of the society, the respondent is entitled to come to the court now and complain that the society are proposing to go outside the expressed terms of the charter and ask for an injunction to restrain them from doing so. See *Jenkin v. Pharmaceutical Society of Great Britain* (37). I shall return to this aspect of the matter when considering the second issue. The quia timet cases relied on by the society do not, with all respect to the argument, really touch on this point. In any event on the pleadings, it seems to me quite clear on the admissions contained in para. 8 of the defence that the society are now threatening and intending to carry out the July motion unless restrained by the court, and this alone justifies immediate action against them. So that the first issue, which was in fact one of the two principal planks in the arguments of the society, in my opinion fails.

- F The second issue depends not on any doctrine about restraint of trade nor is it a question of ultra vires, for the society, being the creation of a royal charter, are not bound by the doctrines of ultra vires in the same way as a corporation created by or pursuant to a statute. A chartered corporation is not, as a matter of vires, bound by its charter. At common law it has all the powers of an individual and can legally and lawfully extend its activities beyond the objects of its charter and indeed carry out activities prohibited by the charter. Nevertheless its members, and only its members, can complain for if the corporation goes outside its expressed objects or, worse still, performs acts prohibited by the terms of the charter, the Crown may by scire facias proceed to forfeit the charter. Any member can, therefore, apply to the court to prohibit the corporation from risking such forfeiture by continuing such activities.

- H My lords, all this is explained in the lucid judgment of PETERSON, J., in the *Jenkin* case (38) in which the society was a party. That correctly states the law. I cannot improve on the way in which PETERSON, J., expressed it. So the respondent is entitled to an injunction if he can show that the July motion goes outside the expressed objects of the charter. On the facts this point did not appeal to the learned trial judge (39) nor to LORD DENNING, M.R. (40), but SACHS, L.J., (40) felt serious doubts about it. I think that his doubts are fully justified.

(33) [1905] A.C. 21.

(34) [1963] 1 All E.R. 716; [1963] 2 Q.B. 606.

(35) [1963] 3 All E.R. 139; [1964] Ch. 413.

(36) [1966] 1 All E.R. 689; [1966] 2 Q.B. 633.

(37) [1921] 1 Ch. 392.

(38) [1921] 1 Ch. at pp. 398-400.

(39) [1966] 3 All E.R. 404; [1967] Ch. 708.

(40) [1967] 2 All E.R. 558; [1967] Ch. at p. 722.



Historically the matter stands thus. The original charter of 1843 was granted to the society A

“for the purpose of advancing chemistry and pharmacy and promoting a uniform system of education of those who should practise the same and also for the protection of those who carry on the business of chemists and druggists.”

Here was the minute embryo of the formation of a profession. As knowledge of drugs developed the calling of a pharmacist increased in stature especially having regard to the many statutory provisions which entrusted the sale or mixing of drugs to pharmacists, but the charter plainly also affected the calling of a pharmacist/druggist/chemist. When, however, the society tried to go so far as to regulate members' hours of business and the prices to be charged (among other matters) PETERSON, J. (in *Jenkin's case*) (41) held that, for the reasons which I have already mentioned, a member was entitled to object and claim that such activities went outside the expressed objects of the society. He held that they did, and granted declarations accordingly. Thereupon the society hived off their trading activities to the National Pharmaceutical Union. B

The professional side of the society, however, continued to grow and by 1933 received statutory recognition as a profession, for in the Pharmacy and Poisons Act, 1933, there was set up for the first time the statutory committee to regulate the conduct of members. In 1953 the society received a supplemental charter which, save for incorporation, entirely superseded the earlier charter and provided for far more limited objects contained in para. 4 of the charter. The only relevant object admittedly is: “To maintain the honour and safeguard and promote the interests of the members in their exercise of the profession of pharmacy.” So, *prima facie*, the society will exceed the purely professional objects of the charter if they try to regulate the trading side of the occupation of a pharmacist, but this consideration alone cannot determine the matter. In the interest of and for the advancement of the profession of pharmacy it may be legitimate to control, regulate and restrict the members' trading activities; but clearly the society must establish this. They tried to establish it on three grounds— C

1. It would be more difficult to attract new entrants to the profession if the trading activities are to be extended beyond traditional goods. D

2. Increased trading activities would distract the pharmacist from his professional work. E

Both points were abandoned during the hearing in this House. F

3. Increased trading would lower the status of the professional pharmacist. G

So little was the evidence on this point that PENNYCUTICK, J., in his extremely careful judgment (42), did not mention it. LORD DENNING, M.R., in his judgment (43) explained why, and I entirely agree. So the society entirely fail to justify the interference by the July motion with the purely trading activities of the members, to maintain the honour and safeguard and promote their interests in the exercise of the profession of pharmacy. On this ground alone the respondent, as a member of the society, is entitled to hold the declaration and injunction he has obtained. H

I can deal with the third issue, that of restraint of trade, fairly briefly. The basis of the argument of the society was that the well-known principles based on the dislike of the common law of restraints of trade and their consequent invalidity, unless in particular circumstances such restraint could be justified, had no application to professional activities. I think it right to state that counsel for the society before your lordships stated that PENNYCUTICK, J., was in error when he stated (44) in the course of his judgment that he did not understand counsel for I

(41) [1921] 1 Ch. 392.

(42) [1966] 3 All E.R. 404; [1967] Ch. 708.

(43) [1967] 2 All E.R. at p. 568; [1967] Ch. at p. 748.

(44) [1966] 3 All E.R. at p. 411; [1967] Ch. at p. 720.

A the society so to contend. I am entirely unable to accept the argument that professional bodies are outside the general doctrine of restraint of trade.

True, no case has so far applied the doctrine to professional bodies in the case of involuntary restraints. I will explain why in a moment; but an examination of the great case of *Mitchel v. Reynolds* (45) in 1711, where LORD MACCLESFIELD delivered the judgment of the court, shows that the dislike of the common law for all restraints was general and applied equally to restraints voluntary and involuntary, to grants and charters by the Crown, to bye-laws and of course to contractual restraints, unless in particular circumstances they could be justified. Those particular circumstances have been examined even in your lordships' House many times, but I need not detain your lordships today, for all of them, unlike this case, have been examples of restraints not affecting a profession save in cases of voluntary restraint.

The great principle laid down by LORD MACCLESFIELD (45) in a judgment too long and comprehensive to set out here, was conveniently analysed and summarised by WILLES, C.J., in the *Gunmakers, etc. (Master, etc.) v. Fell* (46). The relevant passages are set out in the judgment of DANCKWERTS, L.J. (47) in the court below and I shall not repeat them, for on the facts of this case the observations of WILLES, C.J. (46) require no analysis. These judgments establish that there is no exception in favour of a profession from the general rule that the doctrine of restraint of trade applies quite generally.

The reason why this doctrine as affecting involuntary restraints has not been applied to a profession in any reported case is, to my mind, clear. It is not because it is exempt from this doctrine at all. It is because in applying the doctrine to a profession there is this additional relevant circumstance to be considered. A profession is a vocation of the highest standing; it calls on its members to serve (no doubt for reward) the public by offering to them highly technical and always confidential advice and services, which require a different standard of conduct from the tradesman. Its members stand in a different relationship altogether from the man doing ordinary business. So much so that in many cases they are presumed to exert an undue influence on the client. No close definition can be given for bodies are always, rightly, breaking into the professional area and the pharmaceutical profession forms a very welcome example of it.

The professional code, however, must be different by the nature of its calling and the reliance placed on it by the public from those carrying on trade and commerce. Those seeking the advice of a professional man are entitled to expect of him the highest standards of ethical conduct. This means that the professional man must submit to some restraints of trade such, to take elementary examples, as a prohibition against advertising and a refusal, by undercutting or otherwise, to snatch work from another practitioner (but of course there is no harm in letting the work come to you). Such restraints (of which I have only given two elementary examples) are necessary to establish, sustain and promote the profession and particularly its ethical standards. The restraints on professional men are justifiable in law for they are necessary not only in the interests of the profession but also in the interests of the public, who trust to the peculiarly high standing and integrity of a profession to serve it well. What happened at the trial, however, was that counsel for the society stood on the submission that the doctrine of restraint of trade did not arise, and he refused categorically, as I PENNYCUICK, J., pointed out in his judgment (48), to plead that the restraint imposed by the July motion was reasonable, in the interests of the profession and of the public.

In the Court of Appeal (49) this was treated as a pleading point. I do not

(45) (1714), 1 P. Wms. 181.

(46) (1742), Willes at pp. 388, 389.

(47) [1967] 2 All E.R. at p. 569; [1967] Ch. at p. 750.

(48) [1966] 3 All E.R. at p. 411; [1967] Ch. at p. 720.

(49) [1967] 2 All E.R. 558; [1967] Ch. at p. 722.

agree with this. If counsel for the society refuse to apply for leave to amend (which obviously would have been granted to them) for their own good reasons (to quote the learned judge again (50)) and elect to treat the issue as not before the court their clients must stand by that decision which was plainly a decision of substance and on principle after careful consideration, quite unconnected with questions of costs. It was not in my opinion a pleading point at all. I think that PENNYCUICK, J., having held (50), as I think, quite correctly, that the July motion was in restraint of trade and as the society refused to set up any test of reasonableness, that concluded the action. The Court of Appeal (51), however, having treated the matter as a pleading point, went into the question of reasonableness in the interests of the profession. They came to the conclusion that the July motion was not reasonable, and I agree with them, for the only facts they had to consider were identical with those which I have already considered on the second issue in this opinion, so I need say no more about that.

For these reasons I would dismiss this appeal.

**LORD WILBERFORCE:** My Lords, the rules of conduct which are embodied in the motion passed at the Royal Albert Hall on July 25, 1965, affect and limit both the type of goods which may be sold in new pharmacies and also that which may continue to be sold in existing pharmacies. No existing or intending pharmacists, or "company chemist" can organise his business unless he knows whether and how far he or it is bound by these limitations. To suggest, as the Pharmaceutical Society of Great Britain do, that his proper course is to defy the motion, defend himself before the disciplinary committee, of the society and possibly then appeal to the High Court, is, in my opinion, an untenable argument. He has the right, immediately, to challenge the validity of the rule in the courts and to seek such a declaration as will make his position clear. That is what the respondent has done and I agree with both courts below (52) that his action was correct. Equally unmaintainable, in my judgment, is the argument that no invalidating declaration can be made because the rule is merely hortatory and has no binding effect. It is true that the obligation is shrouded in the word "should" rather than "may" but, as so often happens in the field of restrictive action, this masks the reality. That is that the new rule, if allowed to be valid, will be included in the code of ethics of the society, and that breaches of it may be (and by admission in the pleadings are intended to be) the subject of enforcement proceedings taken by the council. The disciplinary body of the society is a committee constituted by statute (Pharmacy Act, 1954) with a legal chairman: there is an appeal to the High Court. The committee forms its own opinion as to what amounts to professional misconduct, but it would be influenced by the opinion of the council, and even more, by the terms of a resolution passed by the members in general meeting. If it finds a charge proved it has power to strike the offending pharmacist off the register. The existence of this enforcement machinery, and the threat to use it in order to implement the motion, provide ample justification for anticipatory proceedings such as are now brought, and I cannot find any relevance in the independence of the statutory committee, or in the right of appeal from its findings. A pharmacist has a clear legal right not to be put in jeopardy of his livelihood under an invalid rule. Laying aside these procedural objections, the real question is whether the motion is invalid. It may be so on either or both of two grounds, because it is not authorised by the society's constitution, or because it is an unreasonable restraint of trade. The latter ground may itself be a sub-head of "ultra vires", but I propose to consider the two grounds separately.

The society's original charter was granted on Feb. 18, 1843. It was expressed to be for the protection of those who carry on the business of chemists and

(50) [1966] 3 All E.R. at p. 411; [1967] Ch. at p. 720.

(51) [1967] 2 All E.R. 558; [1967] Ch. at p. 722.

(52) [1966] 3 All E.R. 404; [1967] 2 All E.R. 558; [1967] Ch. 708.



A druggists, but references to education and qualifications show that even at this date the occupation, as well as being in the nature of a trade, had professional characteristics. This original charter was confirmed by Act of Parliament (Pharmacy Act, 1852, s. 1). In 1920 an action was brought in the High Court in order to test the extent of the society's powers, particularly in relation to the trading activities of its members, and resulted in the decision, and declaration, that the society had no power to regulate hours of business, or wages and conditions of employment, or prices, or even to insure members of the society (*Jenkin v. Pharmaceutical Society of Great Britain* (53)). This led to the formation of the National Pharmaceutical Union to deal with members' trading interests: among its objects are "the imposition of restrictive conditions on the conduct of the business of a chemist and druggist".

C The supplemental charter under which the society now operates was granted on Dec. 31, 1953, the original charter being revoked except in so far as it incorporates the society. The objects are defined in cl. 4 as follows:

D "To advance chemistry and pharmacy: To promote pharmaceutical education and the application of pharmaceutical knowledge: To maintain the honour and safeguard and promote the interests of the members in their exercise of the profession of pharmacy; To provide relief for distressed members, etc."

It will be seen that under this charter the society are recognised as a body of professional men, no reference appearing to the trading activities. Further the Act of 1852 which supported the original charter has been repealed and not replaced by any similar legislation supporting the present charter.

E The question, then, is whether it is within the powers of the society, as stated in cl. 4, to impose such restrictions on the trading activities of members as are contained in the motion. The words which must justify this, if any can do so, are to "safeguard and promote the interests of the members in their exercise of the professions of pharmacy".

F I have no doubt that this charter, as other similar grants or corporate status and privileges to members of a profession, ought to be construed so as to give to the members a wide degree of autonomy. Particularly is this so in relation to standards of professional conduct. When, as to this matter, rules are laid down, and submitted by proper procedure, to democratic approval, and approved by a majority, the court will normally allow them to take effect. It will not permit the minority to renew a contest which it has lost in the domestic forum; but, as in the case of other law-making bodies, there are legal boundaries which must not be passed and the court has power to see that any exercise of the law-making, or rule-making, power falls fairly within the area of permitted activity. If its relevance to the permitted objects is minimal and if it seems to be directed, in the main, at other objects, or other targets, it should be disallowed as outside the power: and, in considering whether it is directed at the permitted object, rather than outside it, it is permissible to examine its working and impact. A conclusion that, without reason, it strikes one part of the target, and that a small one, but arbitrarily misses another, may support an argument that it is not really or essentially aimed where, according to the constitution, it should be aimed, but elsewhere.

I In relation to the subject-matter of the motion, it is necessary to give full recognition to two considerations. First, as LORD DENNING, M.R., pointed out (54), some regulation of trading activities may be relevant to the members' professional interests: an obvious example would be regulations as to hygiene. So the mere fact that trading interests are affected is not enough to establish invalidity. Secondly, since at the relevant date in 1965, the pattern of pharmacists' trading was itself irregular, some degree of irregularity must be permissible

(53) [1921] 1 Ch. 392.

(54) [1967] 2 All E.R. at p. 566; [1967] Ch. at p. 746.

in any attempt to control them. With all allowance for these matters, however, I have come to the conclusion that the regulations contained in the motion have too slender a connexion or link with the relevant object (i.e. the members' professional interests) to be a justified exercise of the society's rule-making powers. A

The regulations, in the first place, fall clearly within the field hived off after 1921 to the National Pharmaceutical Union: they are directly within the words I have quoted "the imposition of restrictive conditions on the conduct of the business of a chemist or druggist". As SACHS, L.J., put it (55), they seek "to put the defendant society in the position to exercise those powers... over trading interests which it deliberately abjured after the *Jenkin Case* decision..." (56). The licensing power given to the council is in its nature so fully within the field of trade regulation as to make any relevance to professional activity, at best, remote. In more detail, the society's evidence at the trial signally failed to establish any significant connexion with members' professional interests. It was suggested at one time that the regulations were necessary to prevent pharmacists from being distracted from their proper duties, or were necessary if the right sort of entrants to the profession were to be encouraged; but the evidence did not make good either of these and they were not pursued in this House. The only link that was left was that they were necessary to maintain or enhance the status of pharmacists as professional men. I agree with the Court of Appeal (57) that this was altogether too tenuous. It is true that a number of witnesses referred to the question of status, and one may be prepared to respect their opinion that status—professional status—is important enough, that it is important to them. None of the witnesses, however, was able successfully to relate the particular regulation to this objective. It is here that the haphazard and arbitrary character of the rule becomes important: it has these qualities, in my opinion, to a degree which far exceeds what is imposed by the irregularity of the subject-matter, thus demonstrating its relevance to the regulation of the members' trade, its irrelevance to the promotion of professional interests. I would therefore reject the motion on the simple ground that it is ultra vires. B C D E F

The second ground of invalidity is, in my opinion, as it was in that of all the learned judges below, even clearer. In the first place, the motion is plainly, on its face, in restraint of trade—no other description is possible. It must be remembered, in case conclusions are sought to be drawn from this case which may affect other professions, that this is a trading profession. Both historically and economically this has been and is of its nature. The restrictions are aimed at and affect its trading side; the restraint is of a trade actually and legitimately carried on. It is of no materiality that members are not contractually bound to observe the rules. To make a distinction between a case such as the present and a case such as *McEllistrim v. Ballymacelligott Co-operative Agricultural and Dairy Society, Ltd.* (58) (where the rule had this effect) would be something of a mockery. The "doctrine" of restraint of trade has never been limited to contractual arrangements: LORD MACNAGHTEN expressed it in the words (59) "all interference with individual liberty of action in trading, and all restraints of trade... are contrary to public policy", putting in modern terms what had been said by LORD MACCLESFIELD in *Mitchel v. Reynolds* (60) where he applied the "doctrine" to grants or charters from the Crown, customs and bye-laws. I

(55) [1967] 2 All E.R. at p. 572; [1967] Ch. at pp. 755, 756.

(56) [1921] 1 Ch. 392.

(57) [1967] 2 All E.R. 558; [1967] Ch. at p. 722.

(58) [1919] A.C. 548.

(59) In *Nordenfjelt v. Maxim Nordenfjelt Guns and Ammunition Co., Ltd.*, [1891-94] All E.R. Rep. at p. 18; [1894] A.C. at p. 565.

(60) (1714), 1 P. Wms. 181.

- A practical working of the restraint, irrespective of its legal form (see *Esso Petroleum Co. Ltd. v. Harper's Garage (Stourport), Ltd.* (61) and cf. WHITE, C.J., in *U.S. v. Standard Oil Co.* (62). There is, moreover, ample authority that the "doctrine" applies outside the contractual field, viz. to charters (*City of London Case* (63), ordinances of the nature of bye-laws (*Ipswich Tailors' Case* (64), made under a charter (*Gummakers etc. (Master, etc.) v. Fell* (65), rules of friendly societies (*Swaine v. Wilson* (66)). It is not at this point of the argument that any difficulty arises. Where there is difficulty is at the next stage, when it has to be decided whether the restraint can be upheld, and this is because of the manner in which this issue has been presented to the court. The appellants did not, as they might have done, and as those who impose restraints normally do, seek to justify the restraints as reasonable: their defence contained no plea to this effect, and at the trial, when the judge indicated that he would allow any necessary amendment and indeed invited the appellants to make it, they resolutely declined to do so. In these circumstances it would be no mere technicality to say that no case having been made for upholding the restraints, their invalidity inevitably follows. PENNYCUICK, J., dealt with the action on this basis (67) and, in my opinion, he was perfectly correct in so doing.
- D If one is to go further and as the Court of Appeal (68) did, to give the appellants the benefit of a position which they did not take up, one is faced at once with the difficulty that no issue has been stated in relation to which to judge the evidence. It would be for the appellants to define the manner in which the restraints are reasonable; to show, for example, that they are reasonable in the interests of the society, or of their members, or of both, and to particularise the interests. This they have not done, and I do not think that it is for the court to set up the necessary legal structure which the appellants have declined to set up. The most that can be done, and I do not find it entirely satisfactory, is to take, as the Court of Appeal did (68), the factual contentions apparently put forward and to examine their validity. This can be shortly done, for there emerge, in the field of what may broadly be called the interests of the society or their members, the three points which have already been discussed in relation to the question of ultra vires—the arguments as to distraction, entry into the profession and status and, for substantially the same reasons which it would be superfluous to restate, these arguments fail in the present context. If, moreover, one proceeds as did SACHS, L.J., (69) to weigh the considerations of public interest—the second limb of LORD MACNAGHTEN'S formula (70)—I think that equally the restraints
- G do not survive the test. I would so hold on the simple ground, which I think is the relevant ground in this connexion, that there is nothing here to displace the normal proposition that the public has in the absence of countervailing considerations an interest in men being able to trade freely in the goods which they judge the public wants and that these restraints clearly, severely and arbitrarily restrict this freedom. More special arguments to the effect that the
- H restraints might cause a reduction in the number of pharmacies I would regard as less secure. Before I could accept them I should require persuasion first that this type of consideration may properly be taken into account in relation to the common law doctrine of restraint of trade (as contrasted with proceedings in the Restrictive Practices Court) and, secondly, that a reduction in the number

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(61) [1967] 1 All E.R. at pp. 707, 715; [1968] A.C. at pp. 298, 309.

(62) (1911), 222 U.S. 1.

(63) (1610), 8 Co. Rep. 121b.

(64) (1614), 11 Co. Rep. 53a.

(65) (1742), Willes 384.

(66) (1889), 24 Q.B.D. 252.

(67) [1966] 3 All E.R. at p. 411; [1967] Ch. at p. 720.

(68) [1967] 2 All E.R. 558; [1967] Ch. at p. 722.

(69) [1967] 2 All E.R. at p. 574; [1967] Ch. at p. 758.

(70) [1891-94] All E.R. Rep. at p. 18; [1894] A.C. at p. 565.



of pharmacies, if it were to result, is contrary to the public interest. To demonstrate this would require a far more extensive enquiry than has been attempted here and it is certainly not something which can be assumed.

I do not elaborate further on the arguments raised in this appeal because I so entirely agree with the manner in which the Court of Appeal (71) dealt with this case.

I would dismiss the appeal.

*Appeal dismissed.*

Solicitors: *Lamartine, Yates & Lacey* (for the appellants); *Seaton Taylor & Co.* (for the respondent).

[Reported by S. A. HATTEEA, ESQ., Barrister-at-Law.]

## BROWN AND ANOTHER v. THOMPSON.

[COURT OF APPEAL, CIVIL DIVISION (Willmer, Winn and Edmund Davies, L.JJ.), December 7, 8, 1967.]

*Damages—Assessment—Appeal—Principle on which appellate court will intervene—No intervention unless assessment based on error in principle or assessment so clearly erroneous that it should be altered.*

*Negligence—Contributory negligence—Appeal—Apportionment of liability—Principle on which appellate court will intervene—Apportionment by trial judge not interfered with save for error in principle or where clearly erroneous—Law Reform (Contributory Negligence) Act, 1945 (8 & 9 Geo. 6 c. 28), s. 1 (1).*

In apportioning liability under the Law Reform (Contributory Negligence) Act, 1945, s. 1 (1) the emphasis is on fault and not solely on the causative potency of the acts of either party; where a trial judge has apportioned liability accordingly, his apportionment should not be interfered with on appeal, save in exceptional cases (as where there is some error in principle) or the apportionment is clearly erroneous), and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial judge (see p. 709, letter G, p. 710, letter C, p. 712, letter D, and p. 713, letters D and H, post).

A like principle governs the intervention of an appellate court on appeal on quantum of damages (see p. 712, letter E, and p. 713, letter F, post).

[As to the basis of assessment of liability in cases where there is contributory negligence, see 11 HALSBURY'S LAWS (3rd Edn.) 317, para. 513; and for cases on damages where there is contributory negligence, see 36 DIGEST (Repl.) 184-186, 983-997.]

As to appeals on the assessment of damages, see 11 HALSBURY'S LAWS (3rd Edn.) 312, para. 508; and for cases on the subject, see 17 DIGEST (Repl.) 193, 194, 913-918.]

Cases referred to:

*British Fame (Owners) v. MacGregor (Owners), The MacGregor*, [1943] 1 All E.R. 33; [1943] A.C. 197; 112 L.J.P. 6; 160 L.T. 193; 42 Digest (Repl.) 913, 7085.

*Ceramic (S.S.) Owners v. S.S. Testbank (Owners)*, [1942] 1 All E.R. 281; sub nom. *The Testbank*, [1942] P. 75; 111 L.J.P. 49; 167 L.T. 97; 42 Digest (Repl.) 913, 7084.

*Davies v. Swan Motor Co. (Swansea), Ltd.*, [1949] 1 All E.R. 620; [1949] 2 K.B. 291; 36 Digest (Repl.) 171, 921.

*Ingram v. United Automobile Service, Ltd.*, [1943] 2 All E.R. 71; [1943] K.B. 612; 112 L.J.K.B. 447; 169 L.T. 72; 45 Digest (Repl.) 285, 77.

(71) [1967] 2 All E.R. 558; [1967] Ch. at p. 722.

- A *Karama, The*, [1921] P. 76; 90 L.J.P. 81; 124 L.T. 653; *on appeal*, sub nom. *S.S. Haughland v. S.S. Karama*, [1922] 1 A.C. 68; 42 Digest (Repl.) 912, 7082.
- Miraflores, The and The Abadesa*, [1967] 1 All E.R. 672; [1967] 1 A.C. 826; [1967] 2 W.L.R. 806; Digest (Repl.) Supp.
- B *Quintas v. National Smelting Co., Ltd.*, [1961] 1 All E.R. 630; [1961] 1 W.L.R. 401; Digest (Cont. Vol. A) 585, 201c.
- Rees v. The Admiralty*, [1960] 2 Lloyd's Rep. 261.
- Stapley v. Gypsum Mines, Ltd.*, [1953] 2 All E.R. 478; [1953] A.C. 633; [1953] 3 W.L.R. 279; Digest (Cont. Vol. A) 1147, 157.
- Umtali, The*, (1938), 160 L.T. 114; 42 Digest (Repl.) 887, 6758.

### Appeal.

- C Mr. and Mrs. William Brown, the plaintiffs, were injured when the car in which they were travelling struck a stationary lorry which was wholly unlighted at the rear and which had no reflectors. The accident occurred at 2.45 or 3.00 a.m. on Feb. 18, 1963, on a stretch of road which ran along the fringes of Epping Forest. At the time there was a thin coating of snow on the road, but snow was not falling heavily. Mr. Brown was driving the car with dipped headlights.
- D The last street lamp was some 280 feet before the place of the accident. Mr. Brown had seen something looming up in front of him just before the accident occurred, and his car had begun to turn out from the nearside kerb before it struck the back of the lorry. The plaintiffs brought an action for damages against the owner of the lorry, and the trial judge (WALLER, J.) on Apr. 20, 1967, awarded to Mrs. Brown, who was injured, £2,500 general damages. The trial judge apportioned twenty per cent. of the responsibility for the accident to Mr. Brown. The defendant appealed against the apportionment of damages awarded to Mrs. Brown, contending that fifty per cent. of the responsibility for the accident should have been apportioned to Mr. Brown. The trial judge's findings of fact were not disputed by the defendant.
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- F *J. M. Wright* for the defendant.  
*John Davies, Q.C.*, for the plaintiffs.

- WINN, L.J., who delivered the first judgment at the invitation of WILLMER, L.J., stated the facts and reviewed the evidence and the findings of the trial judge, and continued: When it is necessary for a court to ascribe liability in proportions to more than one person, it is well established that regard must be
- G had not only to the causative potency of the acts or omissions of each of the parties, but to their relative blameworthiness. In *The Miraflores and The Abadesa* (1), LORD PEARCE said:

- H "... the investigation is concerned with 'fault' which includes blameworthiness as well as causation; and no true apportionment can be reached unless both those factors are borne in mind."

- I He then gave a very interesting and helpful illustration from the Factories Act type of claim. I do not propose to read it again; I read it during the course of the argument in this appeal. I say no more than that it is worthy of close study by all practitioners concerned in matters of this kind. It is worthy of note, I think, that that being a case where three ships had been involved in a collision, LORD PEARCE said that what was essential was to compare the fault of each with the fault of the other two; the emphasis is on fault, not solely on causation of damage.

There is no doubt whatever that the act of driving into the back of a stationary vehicle, the act of driving in such a manner that for one reason or another the driver in this case failed to turn out (since there was no real need for him to stop in order to avoid this lorry) was in a high degree potentially causative of the

collision and of the injuries suffered by Mr. Brown and his wife. Equally, of course, it was potently causative of the collision that the lorry should have been left there in the position I have described with no lights on it. This goes very much further than saying that if either of the vehicles had not been there, there would have been no collision. Each of them potently contributed to the causation of this accident; but when one looks at the question of blameworthiness, then for the reasons which I have only sketched, it seems to me quite plain that the fault of the appellant, Mr. Thompson, was very much greater than the fault of Mr. Brown, and that Mr. Brown's fault, having regard to the element of blameworthiness, was relatively really quite small.

It is said by counsel for the appellant that, whereas it may be difficult and not in accordance with the practice of this court to change a complete acquittal by a judge of one party of any negligence at all into a finding against that party of some degree, however minor, of negligence, on the other hand, where there has been as here, a condemnation, albeit a mild condemnation, of the appellant, Mr. Thompson, as being partly responsible for this collision, counsel submits that the court is entirely unfettered and should feel itself free to substitute its own opinion for that of the trial judge on the question of the attribution of blame. If there is any widespread belief to that effect at the Bar, it should be entirely discarded. It can lead only to much wasteful use of an appellate court's time. It is quite contrary to the well established practice of this court. Perhaps at the risk of being tedious in giving this reminder, the locus classicus of course, is *British Fame (Owners) v. MacGregor (Owners)* (2). It was an Admiralty decision, which went to the House of Lords, and the speech to which I desire to direct attention, so that it may be borne in mind, is that of LORD WRIGHT. He refers to *S.S. Ceramic (Owners) v. S.S. Testbank (Owners)* (3) on which it is not necessary for me to dwell, and proceeds to say this (4):

"With the greatest respect to the Court of Appeal, and without in any way expressing any conclusion on the actual decision at which they there arrived, I venture to think that their statement of principle is not quite in accord with the authorities, so far as laid down up to the present. *The Umtali* (5), which was a decision of this House, was not cited to the Court of Appeal, but there was cited *The Karamea* (6), in which LORD STERNDALE, M.R., a great authority on these matters, dealing with this question of apportionment, says (7): "...I think it would need a very strong case indeed to induce the court to interfere with [the judge's] discretion as to the proportions of blame. We have power to do it, but I do not suppose that we should ever think of doing it". WARRINGTON, L.J., is reported as saying (8): 'It may well be and probably is the case that if the court arrives at the same conclusion both on the facts and in law it would not interfere merely because the learned judge in his discretion has given proportions which this court thinks it would not have given'. SCRUTTON, L.J., says (9): '...if the Court of Appeal agrees with the findings of fact and law of the learned judge below, and the only difference is that it attaches more importance to a particular fact than he did, it would require an extremely strong case to alter the proportions of blame which the learned judge below has attributed to the ships...'. "

"It seems to me that these observations of three very eminent judges are quite in accord with what was said in *The Umtali* (5) and with what VISCOUNT SIMON, L.C., has just said. I do not say, any more than they did,

(2) [1943] 1 All E.R. 33; [1943] A.C. 197.

(3) [1942] 1 All E.R. 281; [1942] P. 75.

(4) [1943] 1 All E.R. at p. 35; [1943] A.C. at p. 200.

(5) (1936), 160 L.T. 114.

(6) [1921] P. 76.

(7) [1921] P. at p. 78.

(8) [1921] P. at pp. 83, 84.

(9) [1921] P. at p. 89.



A that under proper conditions, such as those indicated by the three members of the Court of Appeal in *The Karama* (10), the judge's apportionment might not be interfered with by an appellate court; but I do repeat that it would require a very strong case to justify any such review of or interference with this matter of apportionment where the same view is taken of the law and facts. It is a question of the degree of fault, depending on a  
 B trained and expert judgment considering all the circumstances, and is different in essence from a mere finding of fact in the ordinary sense. It is a question not of principle or of positive findings of fact or law, but of proportion, of balance and relative emphasis, and of weighing different considerations; it involves an individual choice or discretion, as to which there may well be differences of opinion by different minds."

C I do not think that I need read further from that speech of LORD WRIGHT'S.

The question was considered by the Court of Appeal in the same year in *Ingram v. United Automobile Service, Ltd.* (11). This was a case, not of distribution of liability between the plaintiff and defendants, since, of course, the Law Reform (Contributory Negligence) Act, 1945, was not yet in force, but of distribution between two tortfeasors. MACKINNON, L.J., there expressly  
 D said (12):

"For my part, I cannot see why there should be any difference between the case of the apportionment of liability as between the owners of two ships in a collision at sea and that between two tortfeasors in a road collision. In the present case I am of opinion that the conclusion that both defendants were liable should stand, and, therefore, applying the rule laid down by  
 E [VISCOUNT SIMON, L.C.], I hold that we ought not to interfere with the apportionment of blame made by the judge."

DU PARCQ, L.J., referred to *The MacGregor* (13) and said (14):

"It would seem to follow . . . that this court should not interfere with the apportionment of liability made by the judge at the trial unless there is some error of law or of fact in his judgment. I come to that conclusion particularly in view of the observations of LORD WRIGHT in that case. In the present case the matter is perhaps one of academic interest because I should not have been prepared to differ from the judge in the apportionment that he has made, although, if I had tried the case, I should not necessarily have apportioned the damages in exactly the same way. This court has never taken the  
 G view that it should alter an apportionment unless there was something seriously wrong with it."

The matter has received further consideration. One would have thought that such authoritative consideration as it has received would have given the *quietus* once and for all to the type of argument that this court had heard on behalf of the appellant in the present case. In *Quintas v. National Smelting Co., Ltd.* (15),  
 H SELLERS, L.J., said that he agreed with the judgment then about to be delivered by WILLMER, L.J., "... that an appellate court will not lightly interfere with an apportionment made by the trial judge..." In that case WILLMER, L.J., gave a judgment in which he fully and very carefully considered the whole problem, and in the course of it he said (16):

"The problem of apportioning blame where there has been fault on both sides is one that has been familiar in the Admiralty jurisdiction for fifty years. It has long been held to be a matter primarily for the discretion of  
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(10) [1921] P. 76.

(11) [1943] 2 All E.R. 71; [1943] K.B. 612.

(12) [1943] 1 K.B. at p. 614; [1943] 2 All E.R. at p. 73.

(13) [1943] 1 All E.R. 33; [1943] A.C. 197.

(14) [1943] 1 K.B. at pp. 614, 615; [1943] 2 All E.R. at p. 73.

(15) [1961] 1 All E.R. 630 at p. 636.

(16) [1961] 1 All E.R. at p. 643.

the trial judge, who finds the facts and who has the advantage of seeing the participants at first hand and assessing the degrees of their responsibility. It is well settled that, in the absence of any error of principle, an appellate tribunal will interfere with the trial judge's apportionment only in exceptional cases, and then as a rule only where it can be seen that the trial judge has failed to give effect to some material fact or has failed to take into account some material consideration."

WILLMER, L.J., referred to *The MacGregor* (17); he referred to another Admiralty decision, *Rees v. The Admiralty* (18) and then expressed the conclusion relevant for the purpose of that particular appeal.

Directing myself by those very authoritative pronouncements, and having taken note of other cases which are usefully noted in BINGHAM'S DIGEST OF MOTOR CLAIMS CASES (5th Edn.), which entirely bears out the principle in various different sets of circumstances, I feel quite satisfied that I do not find any cause in the instant case for altering the apportionments made by the trial judge. I deliberately do not say that, had I been trying this case myself, my apportionment would have been twenty per cent. I am not concerned with that. I find no reason which moves my mind at all to consider that the trial judge's apportionment was wholly erroneous. Even if I had thought there was reasons to disagree with his apportionment, I would have thought it impossible, for the reasons indicated in the judgments to which I have referred, to interfere with the judge's apportionment. That deals with the issue of liability.

So far as damages are concerned, it is a somewhat comparable matter whether this court thinks that the judge's award of damages was wholly erroneous. He awarded the sum of £2,500 general damages. I do not accept counsel for the appellant's submission that that award was wholly excessive. Clearly in different cases of this general type different judges would arrive at various figures. I have always myself found that the text which I prefer to follow in order to direct my own mind is to set down item by item what seem to me to be the heads of damage to which a judge, fixing the amount to be awarded, should properly have regard, and having set out those under headings then to jot down a figure against each of them, without noticing how the total builds up as the column gets longer. Only then, when satisfied that one has given what one thought was the right figure for each item, would one look at the total at all. It is interesting to observe that, so approaching this matter, the figure that I reached is £50 more than the amount that the judge awarded. Quite obviously to my mind, therefore, it cannot be said that his award was wholly excessive.

On both points, therefore, distribution of blameworthiness and damages, in my judgment this appeal should be dismissed.

EDMUND DAVIES, L.J.: I agree, and I had it in mind to add nothing to what WINN, L.J., has said; but his reference to *Quintas v. National Smelting Co., Ltd.* (19) prompts me to add on the matter of apportionment some very short observations. For my part I am content simply to say that I am not satisfied that the trial judge arrived at a wrong apportionment, having regard to the two elements of causative potency and blameworthiness which I believe were first adverted to as the relevant factors by DENNING, L.J., in *Davies v. Swan Motor Co. (Swansca), Ltd.* (20). I base my refusal to disturb the apportionment solely on the fact that I do not think it right to interfere with what the judge held in relation to either or both of those factors. As to *Quintas v. National Smelting Co., Ltd.* (19), SELLERS, L.J., however, in accepting the enunciation of

(17) [1943] 1 All E.R. 33; [1943] A.C. 197.

(18) [1960] 2 Lloyd's Rep. 261.

(19) [1961] 1 All E.R. 630.

(20) [1949] 1 All E.R. 620 at p. 632; [1949] 2 K.B. 291 at p. 326.

A principle which WILLMER, L.J., pronounced (in, be it noted, his *dissenting* judgment), had this to say (21):

B "...the question arises whether it is just and equitable to deprive the plaintiff of so much. The difference between one-quarter and one-half to blame is over £2,000, and I do not think we are obliged to hold that a plaintiff to whom such a sum would be very substantial should be deprived of an effective appeal on apportionment if this court thought the apportionment to be wrong. In *Stapley v. Gypsum Mines, Ltd.* (22) the House of Lords altered the apportionment and since then this court has from time to time also done so on similar grounds to those on which it would alter an assessment of damages."

C Whether it is material to consider the *amount* of damages involved in arriving at a conclusion whether this court should interfere with the apportionment decided on by the lower court is a question which I would desire to reserve for further consideration if or when such a submission is made. It has rightly not been made in this case. I entirely agree with WINN, L.J., that it is quite impossible to say that it has been demonstrated by the appellant (as it must be before he can succeed) that the existing apportionment is so clearly wrong that this court should alter it.

E As to the assessment of Mrs. Brown's damages, just as in the case of apportionment, counsel for the appellant did not submit that the judge had misdirected himself in any way. Just as in the former case he said that the judge's findings of fact should have led him to hold that Mr. Brown was at least fifty per cent. to blame, so in relation to the assessment of damages counsel for the appellant has submitted that, despite the absence of any misdirection by the judge, his assessment of Mrs. Brown's general damages was so clearly erroneous that it cannot be allowed to stand. Not £2,500, he said, should be awarded to Mrs. Brown, but a sum on the region of £1,500. I do not desire to add a single word to those expressions of view which have already come from WINN, L.J., in relation to such damages. It might be that I would have awarded a little less, but even if that had been my tendency, the margin between the sum in fact awarded and that which I might have awarded had I been the trial judge is so narrow that it would be quite wrong to say that any interference by this court is called for.

G Accordingly, in respect of both the grounds advanced by the appellant here, it seems to me that he must fail, and I therefore concur in holding that this appeal must be dismissed.

H WILLMER, L.J.: I also agree that this appeal must be dismissed, and the only thing that I desire to add for myself is an expression of my concurrence with the observations which have fallen from WINN, L.J., with regard to the reluctance of this court to interfere on a mere matter of apportionment where no error of principle is alleged and no misapprehension of the facts on the part of the trial judge is suggested.

*Appeal dismissed.*

Solicitors: *Stevensons* (for the appellant); *Jas. H. Fellowes & Son* (for the respondent).

[*Reported by F. A. AMIES, ESQ., Barrister-at-Law.*]

(21) [1961] 1 All E.R. at p. 636.

(22) [1953] 2 All E.R. 478; [1953] A.C. 638.



## WISDOM v. CHAMBERLAIN (Inspector of Taxes).

[CHANCERY DIVISION (Goff, J.), March 8, 11, 1968.]

*Income Tax—Casual profit on hedge against devaluation—Purchase of silver bullion—Profit on re-sale—Finding that other considerations influenced purchase unsupported by evidence—Whether adventure in the nature of trade—Income Tax Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 10), Sch. D, Case I.*

Being concerned in 1961 with the possibility of a devaluation of the pound and the effect which that might have on the taxpayer's assets of between £150,000 and £200,000, the taxpayer's adviser decided to take steps to find a hedge against devaluation, i.e., an investment which on devaluation would retain its value in the United States and could easily be sold. He decided on an investment in silver bullion, the price of which had not varied by more than three per cent. in the previous five years and was unlikely to suffer a sudden fall or rise. Owing to temporary market disruptions, he was unable to purchase more than £100,000 worth of silver at that time, but in March, 1962, he made a fresh arrangement with the bullion brokers under which the £100,000 worth of silver bullion was sold at a loss of over £3,000 (taking into account the high interest charge on the loan by which the purchase was financed), and £200,000 of fresh bullion was bought on special terms. In the autumn of 1962 the pound recovered, the price of silver jumped, and the taxpayer was able to sell the £200,000 of silver bullion at a profit of over £48,000 excluding liability for interest charges on the loan financing the project. The taxpayer was assessed to tax on the profit realised, and on appeal the commissioners found as follows: (i) the taxpayer's original intention was to purchase the silver as a hedge against devaluation, but (ii) at the time of the second transaction other considerations influenced the purchase, the fear of devaluation having subsided; (iii) the commodity was useless, left unallotted in the hands of the brokers, was not an income producing investment or a long-term investment, was financed by loans at a high rate of interest, and no organisation was needed to deal in it as that was provided by the brokers; and (iv) whether there was a single transaction or two, by the nature of the subject matter there was an adventure in the nature of trade, and, therefore, the profit was assessable under Case I of Sch. D to the Income Tax Act, 1952. On appeal,

**Held:** the taxpayer's profit on the transaction was not assessable to income tax because—

(i) on the facts there was no evidence to support the commissioners' findings that the fear of devaluation had subsided at the time of the second transaction (which must mean fear in the mind of the taxpayer's adviser, not of others) and that other considerations influenced that purchase (see p. 718, letters C and E, post); and

(ii) in view of that, and having regard to the findings that the taxpayer's adviser satisfied himself that the price of silver had not moved materially for over five years, with no substantial likelihood of a sudden fall or rise, and as to the taxpayer's original intention, it followed as a matter of law that the transaction was not an adventure in the nature of trade, but was a security to protect the taxpayer against devaluation on which the actual profit was fortuitous (see p. 720, letters G to I, post).

Appeal allowed.

[As to casual and isolated transactions in the nature of trade assessable to income tax, see 20 HALSBURY'S LAWS (3rd Edn.) 119, 120, para. 213; and for cases on the subject, see 28 DIGEST (Repl.) 20-38, 78-173.]

## A Cases referred to:

*Californian Copper Syndicate (Limited and Reduced) v. Harris (Surveyor of Taxes)*, (1904), 5 Tax Cas. 159; 1904 6 F. (Ct. of Sess.) 894; 28 Digest (Repl.) 38, \*29.

*Edwards (Inspector of Taxes) v. Bairstow*, [1955] 3 All E.R. 48; [1956] A.C. 14; [1955] 3 W.L.R. 410; 36 Tax Cas. 207; 28 Digest (Repl.) 396, 1753.

B *Inland Revenue Comrs. v. Fraser*, (1942), 24 Tax Cas. 498; 1942 S.C. 493; 28 Digest (Repl.) 46, \*131.

*Jones v. Leeming*, [1930] All E.R. Rep. 584; [1930] A.C. 415; 99 L.J.K.B. 318; 143 L.T. 50; 15 Tax Cas. 333; *affg.* sub nom. *Leeming v. Jones*, [1930] 1 K.B. 279; 99 L.J.K.B. 17; 141 L.T. 472; 28 Digest (Repl.) 22, 87.

## C Case Stated.

The taxpayer appealed to the Commissioners for the General Purposes of the Income Tax for St. Martins-in-the-Fields, Westminster, against an assessment made on him under Case 1 of Sch. D to the Income Tax Act, 1952 for 1962-63 in the sum of £49,000 in respect of "profits of trade, etc., of sales and dealer in silver". The question for determination was whether the taxpayer had carried on a trade or an adventure in the nature of trade. The material parts of the

## D Case Stated are set out in the judgment (cf., p. 716, letter C, to p. 717, letter D, post). The taxpayer contended\* before the commissioners as follows: (a) that the profit which was assessed to income tax was the result of an isolated casual transaction; (b) that the profit was not a trading profit but an accretion to capital; (c) that all the circumstances, including the nature and substance of the transaction, had to be considered: (d) that the statement by Mr. R. L. Major dated Sept. 30,

## E 1964, showed the financial position of the United Kingdom from March, 1961, onwards, and the possibility of devaluation; (e) that the nature of the commodity which was the subject of the taxpayer's transaction, i.e., silver, did not lend itself to commercial speculation by a private individual; (f) that the price of bar silver had not varied except by very small amounts over the last six years, and although the inspector of taxes had produced extracts from The Times dated Oct. 31, 1961,

## F forecasting a rise in the price of silver over the next twelve months (which extracts Mr. Halpern had not read) the price of silver in fact hardly moved between Oct. 31, 1961, and Nov. 29, 1961; (g) that silver was not a commodity which the taxpayer would have bought had he intended to make a quick profit; (h) that the object of the transaction was to obtain protection against devaluation, and was not to make a profit but to minimise possible loss; (i) that the possible fall in the price of silver was provided for, and the profit was not certain; (j) that

## G Mocatta and Goldsmid, Ltd., the brokers with whom the taxpayer dealt, protected themselves against a fall of more than 4d. so that even they did not think that it was obviously bound to be profitable, and (k) that the two transactions involved were really only one transaction implementing the original intention to acquire £200,000 worth of silver as a hedge against devaluation.

## H The Crown contended before the commissioners as follows:—(i) that the taxpayer had carried on a trade or an adventure in the nature of a trade and made profits therefrom which were assessable under Case I of Sch. D to the Income Tax Act, 1952; and (ii) that the amount of the assessment should be determined accordingly. The inspector of taxes made the following submissions before the commissioners in support of these last contentions:—(a) that the

## I interval between the purchase and the sale was short; (b) that the asset was not acquired for cash, but was financed by loans; (c) that the nature of the asset was something which could not be used, it gave no pride of possession such as a work of art, and did not create an income but was purchased with the intention of re-selling at a profit; (d) that it was clear that it was not intended that the silver should be held for a long period as the interest would have been far too heavy a burden and there was no income to offset that; (e) that where profits

\* The facts of the case are set out at p. 716, letter C, to p. 717, letter D, post.

or gains were made from an investment which was made for the purpose of gain, even if it was speculation, it was an adventure in the nature of trade; (f) that from the extracts from *The Times* newspaper which were produced it was clear that it had been publicly stated on Oct. 31, 1961, that there must be a rise in the price of silver within the next twelve months and that there was at that time speculation in silver; and (g) that before the date of the second purchase of silver, at the beginning of April, 1962, the fear of devaluation had passed.

The commissioners found\* that there was an adventure in the nature of trade the profits of which were assessable under Case I of Sch. D to the Income Tax Act, 1952, and dismissed the appeal. The taxpayer appealed by way of Case Stated to the High Court.

*H. Major Allen, Q.C., and B. Pinson for the taxpayer.*

*The Solicitor-General (Sir Arthur Irvine, Q.C.) and J. R. Phillips for the Crown.*

**GOFF, J.:** This is a case in which Mr. Halpern, acting for the appellant taxpayer, Mr. Norman Wisdom, was concerned, in the middle of 1961, with the possibility of a devaluation of the pound and the effect which that might have on his client's assets, which were found by the General Commissioners of Income Tax for St. Martin-in-the-Fields, Westminster, to be of a value between £150,000 and £200,000. The taxpayer had a very substantial professional income in addition to anything which might be yielded by way of income on his investments. Mr. Halpern therefore decided, as is found by the commissioners, that, in looking after the taxpayer's affairs, he ought to take steps to find a hedge against devaluation; i.e., to find an investment which, on devaluation, would retain its value in the United States and could easily be sold.

Having considered the matter and taken advice, he lit on the idea of a purchase of or investment in silver bullion. The commissioners found as a fact that he had checked that, over the five years prior to the autumn of 1961, the price of silver had not varied by more than three per cent., and that there was then no substantial likelihood of a sudden fall or rise. In those circumstances, in November 1961, having been introduced to Mocatta & Goldsmid, Ltd., who were bullion brokers, Mr. Halpern made an appointment to see them on the afternoon of Nov. 29, 1961.

Despite the fact that silver bullion had remained virtually unchanged in price over some five or six years, there was just at that moment, and before he could keep the appointment, a sharp rise in the price; but the commissioners have found that that was an unexpected rise resulting from certain action taken by the United States Treasury. Mr. Halpern wished to purchase £200,000 worth of silver, but due to the disruption of the market occasioned by that sudden rise in price Mr. Mocatta was unwilling to sell more than £100,000 worth, and consequently that was all that Mr. Halpern purchased for his client on that occasion. The terms of the purchase are set out, and I need not go into them in detail, but it was financed largely by borrowed money at a high rate of interest. That feature is not as significant as it might otherwise be by reason of the income tax and surtax position of the taxpayer, which made the payment of a high rate of interest less costly to him than it would be to many other persons.

The Case Stated further finds that Mr. Halpern persisted in his attempts to purchase £200,000 worth of silver, and as early as January, 1962, he saw Mr. Mocatta again for that purpose. Negotiations continued into March, and indeed early April, and eventually Mr. Halpern got his £200,000 worth of bullion, but Mr. Mocatta required that the old bargain should be closed by repurchase and a new transaction undertaken. Accordingly, the first lot of bullion was sold on Mar. 30, 1962, with a resulting loss of over £3,000, and a new bargain was made on Apr. 4, 1962, for £200,000 worth of silver. Mr. Mocatta undertook to repurchase the silver at that price increased by £10,000 if called on to do so at any time prior to Oct. 12, 1962, but there was a proviso, protecting Mr. Mocatta against any disastrous fall, that if the price fell by more than 4d. an ounce before Oct. 12,

\* The findings of the commissioners are set out at p. 717, letters F and G, post.



A 1962, the taxpayer might be called on to exercise his option, and if he did not then it would lapse. Again, the transaction was financed by loans at a high rate of interest.

B There was in fact a great improvement in the monetary position, and in the autumn of 1962 the pound recovered and the price of silver jumped, with the result that the taxpayer or Mr. Halpern on his behalf, was able to sell the £200,000 worth of silver at a very substantial profit; viz., £48,000 not taking into account the taxpayer's liability to pay interest, it having been a term of the transaction that he should pay a year's interest in any event. It was also found by the commissioners that extracts from *The Times*, exhibited to the Case Stated, were produced during the cross-examination of Mr. Halpern.

C "Two extracts dated Oct. 31, 1961, forecast a rise in silver prices and a domestic speculative demand following activity of the United States Treasury."

D That is how it is put in the findings, although the extracts do not read precisely like that. So far as domestic speculative demand is concerned, all it says is: "A . . . speculative demand for silver was met at unchanged prices . . . for forward delivery." The paragraph of the Case Stated, which I was reading, continues:

"A third extract dated Mar. 23, 1962, was about the short-term improvement in the Sterling crisis since the credit squeeze of July, 1961. The fourth extract, dated Oct. 20, 1962, announced the new all time peak in silver prices. Mr. Halpern said he had not read any of these extracts."

E It does not in terms say that the commissioners accepted that, but I think that is the obvious meaning of that finding; and, indeed, the Solicitor General did not dispute that view of the matter.

That is all that is stated in the facts proved or admitted, but in para. 9 one finds the commissioners' findings, which of course do or may include their inferences from the primary facts. I will read para. 9, which is as follows:

F "We the commissioners found that: (a) The [taxpayer's] original intention was to purchase the silver as a hedge against the devaluation of sterling. (b) At the time of the second transaction other considerations influenced the purchase, the fear of devaluation having subsided. (c) The commodity was useless, left unallotted in the hands of Mocatta, was not an income producing investment, was not a long-term investment, and was financed by loans at a high rate of interest, and no organisation was needed to deal in the commodity as this was provided by Mocatta. (d) Whether there was a single transaction or two, by the nature of the subject-matter there was an adventure in the nature of trade. (e) The transaction (or transactions) was (or were) in the nature of trade and therefore assessable under Case I of Sch. D."

H The taxpayer appeals against that conclusion, and I am bound by the findings of fact but not by inferences from those findings. I am entitled to go behind the decision if it was wrong in law, which it may be if the conclusion was one to which the commissioners could not, on the facts found, have reasonably come. The relevant principle is stated by LORD RADCLIFFE in *Edwards (Inspector of Taxes) v. Bairstow* (1). LORD RADCLIFFE said:

I "As I see it, the reason why the courts do not interfere with commissioners' findings or determinations when they really do involve nothing but questions of fact is not any supposed advantage in the commissioners of greater experience in matters of business, or any other matters. The reason is simply that, by the system that has been set up, the commissioners are the first tribunal to try an appeal and, in the interests of the efficient administration of justice, their decisions can only be upset on appeal if they have been positively wrong in law. The court is not a second opinion, where there is

reasonable ground for the first. But there is no reason to make a mystery about the subjects that commissioners deal with or to invite the courts to impose any exceptional restraints upon themselves because they are dealing with cases that arise out of facts found by commissioners. Their duty is no more than to examine those facts with a decent respect for the tribunal appealed from, and, if they think that the only reasonable conclusion on the facts found is inconsistent with the determination come to, to say so without more ado."

Counsel for the taxpayer has criticised the commissioners' finding which I have read because, he says, there was no evidence to support sub-para. (b), and that what follows stemmed from the finding in that sub-para. (b). That finding was: "At the time of the second transaction other considerations influenced the purchase, the fear of devaluation having subsided." It seems to me, with all respect, that, on the findings of fact, there was no warrant for that inference. It may be that the fear of devaluation had subsided in many minds, but the relevant consideration is whether it had subsided in the mind of Mr. Halpern, and there is no evidence that it had. The finding of fact was that Mr. Halpern had not read the relevant extracts in *The Times*, which were put to him in cross-examination. The Solicitor-General invited me to say that the commissioners did infer or could have inferred that Mr. Halpern, who was applying his mind to the question of the value of the pound and was in close touch with Mr. Mocatta, would have appreciated the changed climate indicated by the relevant extracts from *The Times*. If that had been the basis, however, on which the commissioners were proceeding, one would certainly have expected to find some finding to that effect, and there is none.

I also find no warrant for the first part of the sub-paragraph, that "At the time of the second transaction other considerations influenced the purchase". It seems to me that the only possible inference from the facts found—that Mr. Halpern always intended to buy £200,000 worth of bullion, that he was unable to do so owing to an unexpected rise in the market price, that he persisted in his attempts to purchase the £200,000 worth and that in January, 1962, he again saw Mr. Mocatta for that purpose—is that the second transaction was not influenced by other considerations. The fact that there were two transactions was purely fortuitous owing to the unexpected rise in the price of silver.

That, in my judgment, however, is not the end of the matter, because in their findings the commissioners have pointed out in sub-para. (c) that:

"The commodity was useless, left unallotted in the hands of Mocatta, was not an income producing investment, was not a long-term investment, and was financed by loans at a high rate of interest."

Then they say:

"Whether there was a single transaction or two, by the nature of the subject-matter there was an adventure in the nature of trade."

So they are there saying that they draw the inference from the nature of the subject-matter that there was an adventure in the nature of trade, and that, if there were nothing more in the case, would be an inference which they were entitled to draw. The question is not whether I would draw it, but whether there were reasonable grounds on which the commissioners could draw it.

In *Inland Revenue Comrs. v. Fraser* (2), there are some pertinent observations by the Lord President (LORD NORMAND). As counsel for the taxpayer has pointed out, it is right to observe that, on the findings of fact, that case is plainly distinguishable, because it was found as a fact that the whisky which was the subject-matter of that case (3)

"was purchased with the sole object of resale if possible at a profit, and a profit as undermentioned was in fact made."

(2) (1942), 24 Tax Cas. 498.

(3) (1942), 24 Tax Cas. at p. 498.

A It was found, further (4):

“The purchase and sale of whisky in circumstances similar to that under consideration was a common type of transaction in the neighbourhood.”

LORD NORMAND made some observations as follows (5):

B “But what is a good deal more important is the nature of the transaction with reference to the commodity dealt in. The individual who enters into a purchase of an article or commodity may have in view the resale of it at a profit, and yet it may be that that is not the only purpose for which he purchased the article or the commodity, nor the only purpose to which he might turn it if favourable opportunity of sale does not occur. In some of the cases the purchase of a picture has been given as an illustration. An amateur may  
C purchase a picture with a view to its resale at a profit, and yet he may recognise at the time or afterwards that the possession of the picture will give him aesthetic enjoyment if he is unable ultimately, or at his chosen time, to realise it at a profit. A man may purchase stocks and shares with a view to selling them at an early date at a profit, but, if he does so, he is purchasing something which is itself an investment, a potential source of  
D revenue to him while he holds it. A man may purchase land with a view to realising it at a profit, but it also may yield him an income while he continues to hold it. If he continues to hold it, there may be also a certain pride of possession. But the purchaser of a large quantity of a commodity like whisky, greatly in excess of what could be used by himself, his family and friends, a commodity which yields no pride of possession, which cannot be turned  
E to account except by a process of realisation, I can scarcely consider to be other than an adventurer in a transaction in the nature of a trade; and I can find no single fact among those stated by the commissioners which in any way traverses that view. In my opinion the fact that the transaction was not in the way of the business (whatever it was) of the respondent in no way alters the character which almost necessarily belongs to a transaction  
F like this. Most important of all, the actual dealings of the respondent with the whisky were exactly of the kind that take place in ordinary trade.”

Counsel for the taxpayer also relied on the case of an option in *Jones v. Leeming* (6), which he points out was a case in which the nature of the property was again one which was non-income producing and one from which no aesthetic enjoyment could be derived; nor, I would have thought, a pride of possession. The  
G commissioners there found that the transaction in question was not a concern in the nature of trade, but LORD HANWORTH, M.R., pointed out (7) that they themselves would have been disposed to take a different view. He said (7):

H “Now ROWLATT, J., and I think this court, might perhaps have taken the course of saying that having regard to what he had called attention to in this case, the particular facts, ‘of organising the speculation, of maturing the property’, and the diligence in discovering a second property to add to the first, ‘and the disposing of the property’, there ought to be and there must be a finding that it was an adventure in the nature of trade; but ROWLATT, J., refrained from so doing and I think he was right, for however strongly  
I one may feel as to the facts, the facts are for the commissioners. It would make an inroad upon their sphere if one were to say in a case such as the present that there could only be one conclusion.”

Prima facie, therefore, it would seem that the findings in sub-paras. (c) and (d) were warranted by the evidence, but all these cases depend on their facts and it is necessary to consider in this particular case whether that is a possible conclusion having regard to the express finding that the taxpayer's original intention was

(4) [1942], 24 Tax Cas. at p. 499.

(5) [1942], 24 Tax Cas. at p. 502.

(6) [1930] All E.R. Rep. 584; 15 Tax Cas. 333.

(7) [1930] 1 K.B. 279 at p. 292; 15 Tax Cas. at p. 346.



to purchase the silver as a hedge against the devaluation of sterling and the fact, as I have held, that there was no evidence to support the second finding, that other considerations influenced the purchase. The Solicitor-General has submitted that, in any event, the intention being, as would appear from the high rate interest, that the silver should be re-sold at no long distant period, coupled with the fact that the intention was in substance and effect to make a profit on the re-sale, by having an asset which would retain its value in the United States of America and therefore would show a gain in value to offset the loss by the fall in the value of sterling, it was in itself an adventure in the nature of trade; and in my view the crux of this case, in the end, turns on that. It is submitted by counsel for the taxpayer that, on the facts as found and on the conclusion in sub-para. (a), this was nothing more than insurance. It is submitted by the Solicitor-General that it is at least a reasonable inference—and that is enough—that it was a transaction in the nature of trade.

In *Californian Copper Syndicate (Limited and Reduced) v. Harris (Surveyor of Taxes)* (8), the Lord Justice Clerk said (8):

“It is quite a well settled principle in dealing with questions of assessment of income tax, that where the owner of an ordinary investment chooses to realise it, and obtains a greater price for it than he originally acquired it at, the enhanced price is not profit in the sense of Sch. D of the Income Tax Act, 1842, assessable to income tax. But it is equally well established that enhanced values obtained from realisation or conversion of securities may be so assessable, where what is done is not merely a realisation or change of investment, but an act done in what is truly the carrying on, or carrying out, of a business. The simplest case is that of a person or association of persons buying and selling lands or securities speculatively, in order to make gain, dealing in such investments as a business, and thereby seeking to make profits. There are many companies which in their very inception are formed for such a purpose, and in these cases it is not doubtful that, where they make a gain by a realisation, the gain they make is liable to be assessed for income tax. What is the line which separates the two classes of cases may be difficult to define, and each case must be considered according to its facts; the question to be determined being—Is the sum of gain that has been made a mere enhancement of value by realising a security, or is it a gain made in an operation of business in carrying out a scheme for profit-making?”

I think, on the peculiar facts of this case, that one ought to postulate the question: is the sum of gain that has been made a mere enhancement of value by realising a security, or by realising something acquired as an insurance against devaluation, or is it a gain made in an operation of business in carrying out a scheme for profit-making? I have to remember in this case the very important finding that Mr. Halpern had satisfied himself that what he was purchasing was something the price of which had not materially moved for over five years, and the express finding that there was then no substantial likelihood of a sudden fall or rise.

Having regard to that finding of fact and to the conclusion which the commissioners came to as to the taxpayer's original intention, and to the fact that in my judgment there was no evidence to support any finding that his intention changed, it seems to me as a matter of law to follow that this was not an adventure in the nature of trade but was what Mr. Halpern meant it to be, a security to protect his client against devaluation, and that the actual profit which he realised was fortuitous. In my judgment, therefore, the appeal succeeds.

*Appeal allowed.*

Solicitors: *Burton & Ramsden*, (for the taxpayer); *Solicitor of Inland Revenue*.

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

A

## SEARS v. SMITHS FOOD GROUP, LTD.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Ashworth and Blain, JJ.)  
March 21, 1968.]

B

*Weights and measures—Pre-packed goods—Short weight—Testing—Time and place of testing—Single articles brought in by purchaser for testing—No other articles tested—Similar goods available elsewhere in locality—Whether other articles of same kind available for testing within the meaning of Weights and Measures Act 1963 (c. 31) s. 26 (7).*

C

A purchaser bought two packets of potato crisps at 10 a.m. from a mobile shop at Trowbridge. He took them unopened at about 3.15 p.m. to the local inspector of weights and measures who weighed them. Each packet was marked "net weight 1 oz. and 4 drams". One packet weighed only fourteen drams. The other weighed 1 oz. 7½ drams and seven grains. No other packets or articles were tested. An information was preferred in the circumstances against the respondents, who supplied the packets to the sellers. No circumstances founding a defence under para. (iii) of s. 26 (7)\* of the Weights and Measures Act 1963 were put forward. On appeal against the dismissal of the information on the ground that a defence under s. 26 (7) was established, viz., that other articles of the same kind had been available for testing at the same time and place, viz., at Trowbridge, and a reasonable number of them had not also been tested,

D

E

**Held:** (i) in the circumstances of the present case testing the packets, for the purposes of s. 26 (7) of the Act of 1963, began when they were brought to the inspector, at which time and place no other articles were "available" (viz., physically present or adjacent) for testing; and the respondents were not entitled to maintain a defence under s. 26 (7) on the ground that though other articles were not available to the inspector at the time and place when his test began, such other articles were available from retailers or elsewhere in the locality (see p. 724, letter H, and p. 725, letters D, E, F and G, post).

F

(ii) the defences under para. (ii) and para. (iii) of s. 26 (7) were open to the respondents, but on the facts, the proceedings being in respect of a single article, the deficiency was not inconsiderable and para. (ii) was thus inapplicable; no circumstances having been advanced to establish a defence under para. (iii), the case would be remitted to the justices with a direction to convict (see p. 725, letters B and H, post).

G

Per CURIAM: when an inspector himself decides to make a test and selects articles for testing, e.g., at a shop, his test starts at that time, and it is to that time that, for the purposes of s. 26 (7), the question whether articles of the same kind are available refers; if such other articles are available then a defence under s. 26 (7) arises if a reasonable number are not tested (see p. 724, letters B and D, and p. 725, letter F, post).

H

Appeal allowed.

[As to the statutory defences relating to prepacked articles and bread, see 39 HALSBURY'S LAWS (3rd Edn.) 811, para. 1229; and for cases relating to the sale of bread, see 25 DIGEST (Repl.) 134, 517, \*139.

I

For s. 26 (7) of the Weights and Measures Act 1963, see 43 HALSBURY'S STATUTES (2nd Edn.) 1407.]

Case referred to:

*Cave v. Dudley Co-operative Society, Ltd.*, [1934] All E.R. Rep. 534; 103 L.J.K.B. 569; 151 L.T. 448; 98 J.P. 265; 25 Digest (Repl.) 134, 517.

### Case Stated.

This was a case stated by the justices for the county of Wilts., acting in and for the petty sessional division of Trowbridge, in respect of their adjudication as

\* Section 26 (7), so far as material, is set out at p. 723, letter F, post.

a magistrates' court sitting at Trowbridge on Sept. 28, 1967. On Aug. 18, 1967, an information was preferred by the appellant, Cyril Joseph Edward Sears, against the respondents, Smiths Food Group, Ltd., charging that the Co-operative Wholesale Society, Ltd., of Manchester on May 22, 1967, at Trowbridge was the person by whom certain goods, namely potato crisps, were sold by retail to Mr. Ronald George Peters, the buyer, at a time while they were prepacked in a container marked with a statement in writing with respect to their quantity, namely net weight one ounce four drams, the quantity of the said goods being found on the day of purchase to be less than that stated, namely fourteen drams gross weight, contrary to s. 24 (3) of the Weights and Measures Act 1963. The information was preferred against the respondents since Wiltshire county council, being the authority concerned, were reasonably satisfied under s. 27 (4)\* of the Act of 1963 that the offence was due to the act or default of the respondents and that the Co-operative Wholesale Society, Ltd., could establish a defence under s. 27 (1) of that Act. The facts are summarised below at letter I, to p. 723, letter B, post.

It was contended by the respondents before the justices that they were entitled to the benefit of the defence afforded by s. 26 (7) of the Act of 1963, and that in that subsection the expression "the time" meant the day on which the packets of crisps were tested and the words "the place" meant Trowbridge; accordingly it was contended that the inspector should have tested any packets of crisps which were available for testing on that day in the travelling shop from which the packet in question was purchased, and also any packets which were available for testing at the Co-operative Wholesale Society's depot at Trowbridge. It was contended before the justices by the appellant that in s. 26 (7) the phrase "the time" meant the time when the packet of crisps was submitted to the inspector for testing, and that "the place" meant the department at County Hall, Trowbridge, where the articles were tested; the appellant further submitted that on the occasion when the packets were tested there were only two packets available for testing and the weights of both packets had been given in evidence.

The justices were of opinion that, in s. 26 (7) of the Act of 1963, the words "the time" meant the day on which the packets of crisps were tested, that the words "the place" meant Trowbridge and that, as a narrower interpretation was put on the words by the appellant, he had failed to comply with the provisions of the section. They accordingly dismissed the information. The question for the opinion of the High Court was whether the justices came to a correct decision in point of law in dismissing the information. The cases noted below† were cited during the argument in addition to the one referred to in the judgment of ASHWORTH, J.

*Alan Fletcher* for the appellant.

*Frank Whitworth, Q.C.*, and *R. J. Ellis* for the respondents.

ASHWORTH, J., delivered the first judgment at the invitation of LORD PARKER, C.J.: In August, 1967, an information was preferred by the appellant against the respondents alleging, in effect, that some pre-packed potato crisps were under-weight. The respondents were brought into the proceedings under and in accordance with s. 27 of the Weights and Measures Act 1963. To simplify the position, it is fair to say that as a result of sub-s. (5) of that section, the position of the respondents is equated with that of the actual retailers, who were the local co-operative society.

The facts were that at about 10 a.m. on May 22, 1967, a witness named Peters bought two 6d. packets of Smiths potato crisps from a travelling shop belonging to the Co-operative Wholesale Society. Later in the day Mr. Peters noticed that one packet contained considerably less crisps than the other, and appeared

\* See s. 27 (4) of the Weights and Measures Act 1963.

† *Brett v. Monarch Investment Building Society*, [1894] 1 Q.B. 367; *Roberts v. Dorman Long & Co., Ltd.*, [1953] 2 All E.R. 428.



A to be light in weight. At about 3.15 p.m. on May 22 he took it to the weights and measures department at County Hall in Trowbridge, where the two unopened packets of crisps were weighed by an inspector. Each packet was marked with the words "Net weight one ounce and four drams", but it turned out that one of the two packets when weighed was fourteen drams only; the gross weight of the other was one ounce seven and a half drams and seven grains.

B Evidence was called before the justices explaining how the local co-operative society had taken delivery of some cartons supplied by the respondents, and the issue in the court below all turned on the question whether the respondents could successfully rely on the first of the safeguards and defences provided by s. 26 of the Act of 1963. It is to be noted that s. 26 (7) is the revised and extended form of s. 12 (1) of the Sale of Foods (Weights and Measures) Act, 1926. It is a revised form because there is no doubt that the current sub-s. (7) confers on persons charged with these offences a much larger possibility of obtaining acquittal than was the case with s. 12 (1).

C I do not think it necessary to read s. 12 (1), or indeed to cite from the case which was brought to the notice of the justices and to the notice of this court, *Cave v. Dudley Co-operative Society, Ltd.* (1). The question canvassed in that case, so far as it is material to this case, was the meaning of the word "occasion". D It is necessary to consider in some detail the terms of s. 26 (7) of the Act of 1963. Before doing so, I would say this by way of preface, that this subsection embraces in its first part a defence, so to speak, on its own. It is an absolute defence, and if the facts bring it into operation, then, as the subsection says, the person charged shall not be convicted. The second part of the subsection really only E comes into operation in respect of cases where the first part has not provided a defence and, also in cases where the first part never would provide a defence. To make the facts clearer, let me read, so far as is material, the terms of s. 26 (7):

"If proceedings for an offence under this Part of this Act . . . in respect of any deficiency . . . in the quantity—(a) of any goods made up for sale . . . in or on a container marked with an indication of quantity . . . are brought F with respect to any article, and it is proved that, at the time and place at which that article was tested, other articles of the same kind . . . were available for testing, the person charged shall not be convicted of such an offence with respect to that article unless a reasonable number of those other articles was also tested . . ."

G I have left out the immaterial words.

H Before attempting an analysis of the words, may I venture to put forward what I would suggest is the plain intention of Parliament by this enactment, and indicate the type of situation with which it was dealing. It is in my view a case where an inspector may come on a retailer or dealer in articles such as bread or packets of potato crisps and he has, either by way of information or suspicion or instinct, the notion that it may be wise to make a test in case one or other of the articles is underweight. It contemplates a situation where he decides to test, and Parliament has said, as I see it, that it would not be right for him in such circumstances to pick on one article and, if he were fortunate enough for his purpose to find a defective article, to launch proceedings on that article alone. Parliament has said that in such circumstances it is his duty, if there are other articles of the same kind available for testing, to test a reasonable number of I those other articles. Parliament has gone further by providing expressly that unless he takes that course, then the person charged shall not be convicted. That, in my view, is the purpose of the section and the situation which Parliament had in mind when it was enacted. My impression is borne out, as I think, by some information which was supplied to the court by counsel for the appellant, to the effect that broadly speaking proceedings under the Act of 1963 in these circumstances are generally brought as the result of action by an inspector.

Secondly, that such action or intervention generally occurs when he is in a position to carry out the requisite test, either at the premises or at the side of the van, or whatever the method of retailing may be. The result being that the inspector is in a position, so long as he is mindful of this section, to carry out what is essential if he is to bring a prosecution successfully, namely to test a reasonable number of other articles of the same kind. A

In my judgment, when the inspector decides to test and supports his testing by taking hold of a loaf of bread or a packet of crisps, or whatever the article may be, then that, for the purposes of this subsection, is the time and place at which that article is tested, albeit in some instances the testing may not be completed, for example, until some analysis has taken place some days later; but in the normal case the test will start then, that will be its time and place, and it will be completed then. It would follow from that, that the inspector, by intervening in that way and having started his test, is under the obligation to do, if the facts permit it, what the section refers to; namely, take the same action in regard to other articles of the same kind which—and these are important words—are available for testing. That phrase “available for testing” in my judgment is a composite phrase which fits into the picture that I have endeavoured to describe. It may be that the number will vary, but if there are other articles of the same kind to which he can apply the same method as he is adopting with regard to the selected article, then it seems to me that the section comes into force, and he must comply with what is there specified if a conviction is to result. B C D

Counsel for the respondents, has submitted to this court that the approach to this case by the prosecution before the justices involved altogether too narrow an understanding of the meaning and effect of the section. Maybe on one view it did, because, as already has been stated, the purchase was made at 10 a.m., and the test was not made until 3.15 p.m. What is said by counsel is that at that time testing was carried out, and at that time and place there were other articles of the same kind available for testing, inasmuch as the inspector might, by enquiry or visit, have obtained from some mobile van or indeed from the co-operative society's depot, articles of the same kind. On this approach he says that the word “available” does not mean physically adjacent to the inspector when he is carrying out his test; but it means, as he put it, that one can get it —“available means something which he could reasonably have got hold of”. E F Following that through in the argument, counsel said it would be deplorable if the person charged with an offence of this sort, who had in his depot or his mobile van other articles of the same kind, was deprived of his defence because the testing happened to be carried out by the inspector in the town hall or county hall at Trowbridge. G

I see all the force of that, but I trust it will be apparent from what I have said already, that I do not take the view that testing qua time and place is limited to the actual physical testing that was carried out in the room in the case where the inspector himself has selected articles. When he selects articles he starts his test at once, but when articles are brought in by a lay purchaser, clearly there has been no testing until he starts his operation. It may be that, in the case of an individual purchaser who wants to secure the intervention of an inspector and takes one article to him, the respondents or retailers do not have the advantage of the first part of s. 26 (7). It was pressed on the court by counsel for the respondents, in argument, that this was a construction of the Act of 1963 which would work harshly on retailers, but I do not take that view at all. It seems to me that one contemplates two quite separate situations in this additional defence. One situation is the one I have described first, of the inspector going to a shop or to a mobile van and seeing a number of articles, when he is required to make a test. The other situation is one where individual articles may be brought in by a purchaser or may be when there are in fact no other available articles to test. This approach to the matter is reinforced by looking at the second part of s. 26 (7) which provides what shall happen in the same two different sets of H I

A circumstances. Under para. (i), where there has been a testing of several articles, the justices are to have regard to the average. That is not conclusive, as this court held a month ago (2). There may be, even in an average, something so out of line with the statutory or appropriate requirement that the general average, so to speak, will not save them, but that is the course which the justices have to take when there has been a test of several articles. On the contrary in para. (ii), B what the justices have to do is to look at that single article, consider the facts, and ask themselves whether the deficiency or excess is inconsiderable, and if it is inconsiderable, they are to disregard it. Those two approaches are quite different; applicable to both comes para. (iii), that they are generally to have regard to all the circumstances of the case.

C In my judgment it would be quite wrong to say that persons in the position of the respondents are being unfairly treated because proceedings are brought in respect of a single article which has been brought in by a purchaser, and the inspector has not taken the course of enquiring from the retailers whether they have any other articles of the same kind which he might test.

D To come back to the first part of s. 26 (7) the important words to my mind for this case are the words "at the time and place at which that article was tested" coupled with the words "available for testing". Those two phrases give the key to the situation which Parliament was dealing with, and in my judgment the justices fell into error by saying in this case that the time meant the day on which the packets of crisps were tested; and that the place meant Trowbridge, and that as a narrower interpretation was put on the words by the E appellant, he failed to comply with the provisions of that section. It is only fair to counsel for the respondents, if I may say so, to say that he did not seek to support the justices' decision on the grounds on which they decided the case. He relied, and relied with persuasiveness if I may say so, on what he called the proper construction of the word "available". For the reasons that I have endeavoured to state, I am unable myself to accept his argument, and subject to anything further that may be considered, I would allow this appeal.

F **BLAIN, J.:** I agree.

**LORD PARKER, C.J.:** I agree. I confess that I have not found this an easy case, but on the whole I have come to the same conclusion as my lords. If one poses to oneself the question whether the respondents had proved that articles in the depot were available for testing at the time and place at which G the particular article was tested, it seems to me that the answer is "No". As an ordinary matter of language "available" there means physically present or physically adjacent, and for that reason I think that the justices came to a wrong conclusion.

H I would only add this, that I for my part have had doubt whether this case ought not to be remitted to the justices to consider the matter further, because even though the defence raised did not succeed, the respondents would be entitled to rely on para. (ii) and (iii) of s. 26 (7) of the Weights and Measures Act 1963. However, it seems that para. (ii) could not avail them in that no-one could say that the deficiency here was inconsiderable. Further, counsel for the respondents on their behalf, has not put forward any circumstances of the case under para. (iii) which would entitle the justices to acquit. Accordingly I I agree that this case should go back to the justices with a direction to convict.

*Appeal allowed.*

Solicitors: *Collyer-Bristow & Co.*, agents for *R. P. Harries*, Trowbridge (for the appellant); *Warren, Murton & Co.* (for the respondents).

[*Reported by N. P. METCALFE, ESQ., Barrister-at-Law.*]



## THE ABADESA.

## FURNESS-HOULDER ARGENTINE LINES, LTD. v. OWNERS OF STEAM TANKER MIRAFLORES AND OTHERS.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Kerminski, J.), March 25, 26, April 4, 1968.]

*Shipping—Limitation of Liability—Conversion rate—Rate prevailing at the date of decree—Devaluation of pound sterling after date of collision but before decree of limitation made—Rate for conversion of gold francs mentioned in s. 1 of the Act of 1958 varied after devaluation—Whether new conversion rate applicable—Interest on amount fixed as limit of liability—What rate of interest applicable—Merchant Shipping (Liability of Shipowners and Others) Act, 1958 (6 & 7 Eliz. 2 c. 62), s. 1 (3)—Merchant Shipping (Limitation of Liability) (Sterling Equivalents) Order 1967 (S.I. 1967 No. 1725), art. 2. On Feb. 25, 1963, the Abadesa and the Miraflores were in collision in the river Scheldt as a result of which a third vessel, the George Livanos, ran aground and was damaged. Apportionment of responsibility for the damage was finally established in February, 1967\*. On Feb. 8, 1966, the plaintiffs owners of the Abadesa, commenced limitation proceedings by writ. On Nov. 18, 1967, the pound sterling was devalued. On Nov. 24, 1967 the Merchant Shipping (Limitation of Liability) (Sterling Equivalents) Order 1967 came into force, substituting a new conversion rate for the former conversion rate established by the Merchant Shipping (Limitation of Liability) (Sterling Equivalents) Order, 1958. On Feb. 21, 1968, the Admiralty registrar made a limitation decree. In this he applied the new conversion rate, thus producing a limit of £333,855 14s. 5d.; but the old conversion rate would have produced a limit of £286,161 8s. 2d. He awarded interest at four per cent. per annum from Feb. 25, 1963, to the date of payment into court, which was Mar. 25, 1968. On appeal and cross-appeal,*

**Held:** (i) having regard to art. 3 (b) of the International Convention†, which article was embodied in s. 1 of the Merchant Shipping (Liability of Shipowners and Others) Act, 1958, the conversion rate applicable was the rate prevailing on Feb. 21, 1968, the time when the decree of limitation was made; the conversion rate applicable was that established by the order of 1967 and the amount to which liability was limited was £333,855 14s. 5d. (see p. 729, letters H and I, and p. 730, letter B, post).

Dictum of BRANDON, J., in the *Annie Hay* ([1968] 1 All E.R. at pp. 663, 664) applied.

Dicta in the *Celia* (Owners) v. *Volturno* (Owners), ([1921] All E.R. Rep. at pp. 117, 119) not applied.

(ii) having regard to the high rates of interest prevailing over the last ten years, interest would be awarded at the rate of 5½ per cent. per annum instead of four per cent. per annum (see p. 730, letter H, post).

Dicta in *The Theems* ([1938] P. at p. 201) and in *Commonwealth of Australia v. Asiatic Steam Navigation Co., Ltd., The River Loddon* ([1965] 1 Lloyd's Rep. at p. 507) considered.

Appeal dismissed: cross-appeals allowed.

[As to interest in limitation actions, see 35 HALSBURY'S LAWS (3rd Edn.) 779, 780, para. 1199; and for cases on the subject, see 42 DIGEST (Repl.) 1063, 1064, 8811-8818.

\* See *The Miraflores and The Abadesa*, [1967] 1 All E.R. 672.

† Article 3 (1), so far as material, provides: "The amounts to which the owner of a ship may limit his liability under art. 1 shall be . . . (b) where the occurrence has only given rise to personal claims an aggregate amount of 3,100 francs for each ton of ship's tonnage . . ."

- A For the Merchant Shipping Act, 1894, s. 503, see 23 HALSBURY'S STATUTES (2nd Edn.) 656.

For the Merchant Shipping (Liability of Shipowners and Others) Act, 1958, s. 1, see 38 HALSBURY'S STATUTES (2nd Edn.) 1092.]

Cases referred to:

- B *Annie Hay, The, Coldwell-Horsfall v. West Country Yacht Charters, Ltd.*, [1968] 1 All E.R. 657; [1968] 2 W.L.R. 353.
- Cail v. Papayanni, The Amalia*, (1863), 1 Moo. P.C.C.N.S. 471; Brown & Lush, 151; 32 L.J.P.M. & A. 191; 8 L.T. 805; 15 E.R. 778; *on appeal*, 1 Moo. C.C.N.S. 479; 42 Digest (Repl.) 1063, 8810.
- C *Celia (Owners) v. Volturmo (Owners)*, [1921] All E.R. Rep. 110; [1921] 2 A.C. 544; 90 L.J.P. 385; 126 L.T. 1; 15 Asp. M.L.C. 374; *affmg.* sub nom. *The Volturmo*, [1920] P. 447; 17 Digest (Repl.) 173, 685.
- Commonwealth of Australia v. Asiatic Steam Navigation Co., Ltd., The River Loddon*, [1955] 1 Lloyd's Rep. 503.
- De Maurier (Jewels), Ltd. v. Bastion Insurance Co., Ltd. and Coronet Insurance Co., Ltd.*, [1967] 2 Lloyd's Rep. 550.
- D *Miraflores, The, and The Abadesa*, [1967] 1 All E.R. 672; [1967] 1 A.C. 826; [1967] 2 W.L.R. 806; Digest (Repl.) Supp.
- Northumbria, The*, (1869), L.R. 3 A. & E. 6; 39 L.J. Adm. 3; 21 L.T. 681; *subsequent proceedings*, L.R. 3 A. & E. 24; 42 Digest (Repl.) 1063, 8811.
- Straker v. Hartland*, (1864), 2 Hem. & M. 570; 34 L.J.Ch. 122; 11 L.T. 622; 71 E.R. 584; 42 Digest (Repl.) 1064, 8813.
- E *Theems, The*, [1938] P. 197; 107 L.J.P. 139; 159 L.T. 392; 19 Asp. M.L.C. 206; 61 Lloyd L.R. 178; 42 Digest (Repl.) 1064, 8818.

### Appeal.

This was a summons by the plaintiff, Furness-Houlder Argentine Lines, Ltd., the owners of the motor tanker, The Abadesa, by way of appeal against the decision of the Admiralty registrar dated Feb. 21, 1967, whereby he held that the liability of the plaintiffs to damages should not exceed the limit of £333,855 14s. 5d. with interest at four per cent. from Feb. 25, 1963, to the date of payment into court. The limitation claim arose from a collision in the River Scheldt on Feb. 25, 1963, between The Abadesa and the first defendants' steam tanker, The Miraflores, with the subsequent grounding of the second defendants' steam tanker, The George Livanos; the final appeal on the question of responsibility for damage was reported sub nom. *The Miraflores and The Abadesa* ([1967] 1 All E.R. 672).

G The defendants, including the third defendants, the owners of cargo lately laden aboard The Miraflores, cross-appealed against the rate of interest of four per cent. allowed by the Admiralty registrar; the first defendants contended for six per cent. and the other two defendants for seven per cent.

The authorities and cases noted below\* were cited during the argument in addition to those referred to in the judgment.

- H R. A. MacCrindle, Q.C., and James Rochford for the plaintiffs, Furness-Houlder Argentine Lines, Ltd., the owners of The Abadesa.

J. Franklin Willmer, Q.C., and J. C. Tylor for the first defendants, the owners of The Miraflores.

- I B. C. Sheen, Q.C., and A. P. Clarke for the second defendants, the owners of The George Livanos and the owners of cargo lately laden aboard her.

N. A. Phillips for the third defendants, the owners of cargo lately laden aboard The Miraflores.

\* 4 BRITISH SHIPPING LAWS (MARSDEN), "Collisions at Sea", para. 1286; 11 BRITISH SHIPPING LAWS (6th Edn.) (1963, TEMPERLEY), paras. 860, 1750; SCRUTTON ON CHARTERPARTIES (17th Edn.), p. 379. THE SUPREME COURT PRACTICE 1967, Vol. 1, pp. 320, 1036; CRAIGS ON STATUTE LAW (6th Edn.), pp. 388, 397, 399; *J. D'Almeida Araujo Lda. v. Sir Frederick Becker & Co., Ltd.*, [1953] 2 All E.R. 288; [1953] 2 Q.B. 329; *Salomon v. Comrs. of Customs and Excise*, [1966] 3 All E.R. 871; [1967] 2 Q.B. 116; *Boys v. Chaplin*, [1968] 1 All E.R. 283.

Apr. 4. **KARMINSKI, J.**, read the following judgment: This is an appeal from a decree of limitation made by Mr. Registrar **McGUFFIE**, the Admiralty registrar, on Feb. 21, 1968. By that decree the registrar limited the liability of *The Abadesa*, the plaintiffs in the limitation proceedings, to £333,855 14s. 5d. with interest at four per cent. from Feb. 25, 1963, to the date of the payment into court. The latter date was Mar. 25, 1968. The plaintiffs now appeal against both parts of the order. It is complained that the correct order for limitation should have been £286,161 8s. 2d. and that the registrar was in fault in applying the wrong conversion figure of sterling into gold francs. All three defendants have entered cross-appeals on the ground that the rate of interest, namely four per cent, was too low. One defendant says that the rate of interest should have been not less than six per cent.; the other two defendants claim that seven per cent. was the right interest. B C

The history of this litigation is a long one. On Feb. 25, 1963, *The Abadesa* and *The Miraflores* collided in the River Scheldt. As a result of that collision, a third ship, *The George Livanos*, ran aground and was damaged. Protracted litigation followed. Finally the apportionment of fault was decided by the House of Lords; see the *Miraflores and the Abadesa* (1). It is not necessary for me to refer further to that litigation for the purpose of deciding the questions raised in the present appeal. The limitation proceedings were commenced by writ dated Feb. 8, 1966, in which the owners of *The Abadesa* are plaintiffs. On Nov. 18, 1967, the pound sterling was devalued. This was followed on Nov. 22, 1967, by the Merchant Shipping (Limitation of Liability) (Sterling Equivalents) Order 1967 (2). The effect of this order, which came into operation on Nov. 24, substituted a figure of £27 12s. 9½d. for an earlier figure made under the Merchant Shipping (Limitation of Liability) (Sterling Equivalents) Order, 1958 (3), namely £23 13s. 9¾d. The 1967 conversion figure has produced the sum decreed by the registrar, namely £333,855 14s. 5d. The 1958 figure would have produced the sum of £286,161 8s. 2d. The plaintiffs submit that the Admiralty registrar was wrong in applying the 1967 conversion rate and should have taken the 1958 rate. D E F

On behalf of the plaintiffs, counsel's argument was based on the submission that the registrar should have taken the 1958 rate of conversion, as this was the rate in force at the time of the collision in February, 1963, and was still in force when the limitation writ was issued in February, 1966. Therefore it was wrong to take into account the rate of conversion which came into existence substantially after the latter of these two dates. Limitation of liability is a creature of statute, and counsel relied on the provisions of s. 503 of the Merchant Shipping Act, 1894, as amended by the Merchant Shipping (Liability of Shipowners and Others) Act, 1958. Section 1 of the latter Act substituted a new measure of liability based on tonnage, in this case one thousand gold francs. It was provided by the section that the Minister of Transport (now the Board of Trade) might from time to time by statutory instrument specify the amount which should be taken as the equivalent of one thousand gold francs. By the order of 1958 the rate was fixed at £23 13s. 9¾d. G H

Counsel for the plaintiffs made the point that the rights of parties cannot fluctuate during the litigation, and emphasised that the rate of exchange must be taken as the one in force at the date of the breach, whether the breach was one of contract or was a breach of duty. In support of his argument he relied on *Celia (Owners) v. Volturmo (Owners)* (4). That case arose from a collision between an English and an Italian ship, and the question was as to the rate of exchange I

(1) [1967] 1 All E.R. 672; [1967] 1 A.C. 826.

(2) S.I. 1967 No. 1725.

(3) S.I. 1958 No. 1287.

(4) [1921] All E.R. Rep. 110; [1921] 2 A.C. 544.



A applicable to a claim calculated in Italian lire for detention while a ship was under repair. During the period of detention the lire had been substantially devalued in terms of sterling. It was held by the majority of their lordships that the proper date for ascertaining the rate of exchange was the date on which the detention occurred. LORD SUMNER pointed out at the end of his opinion (5) that fluctuations in foreign exchanges must introduce a speculative element, and to avoid this the law must apply the same principles as if the exchanges had remained stable. He added that waiting to convert the currency until the date of judgment only adds the uncertainty of the exchange to the uncertainty of the law's delays. LORD WRENBURY (6) summed the position up by saying that the answer to the measure of damage is to award such sum as represents the market value at the date of the tort of the goods of which the plaintiff was tortiously deprived. That is the test which counsel for the plaintiff says is the correct one to apply in the present case.

Counsel for the plaintiffs further argued that the Merchant Shipping (Liability of Shipowners and Others) Act, 1958 was not retrospective in its effect, and could not so be unless clear words to that effect were used, or unless at least the words used in the Act of 1958 made it clear that it was intended to cover events which had taken place before the Act of 1958 became law. In support of that argument, he relied on a long line of authority, summarised in MAXWELL ON INTERPRETATION OF STATUTES (11th Edn.) (1962) at pp. 204-5. He also relied on (7) the Interpretation Act, 1889, s. 38 (2) (b) and (c).

In answer to that argument, counsel for the first defendants submitted that the common law position in either contract or tort was irrelevant in considering the effect of a limitation decree, such decree being the creation of statute law. The effect of limitation is of course to limit, or reduce, the rights of the victim of the wrongdoer. The history of limitation in Admiralty actions is a long one, extending over two and a half centuries. In *Cail v. Papayanni, The Amalia* (8), DR. LUSHINGTON discussed the history of limitation and described its origin as political. By this word I think that DR. LUSHINGTON meant that limitation was a doctrine designed to assist international commerce, and not political in the common modern use of that word. DR. LUSHINGTON emphasised that limiting liability was unknown to the common law of England.

Counsel for the first defendants, whose argument was adopted by counsel for the second defendants and her cargo owners, and by counsel for the third defendants, the cargo owners of the *Miraflores*, stressed that the Act of 1958 was indeed international in the sense that it was designed to give legislative effect to the International Convention relating to the Liability of Owners of Sea-going Ships, signed at Brussels on Oct. 10, 1957 (Cmnd. 353). Counsel for the plaintiffs complained that s. 1 (4) of the Act of 1958 was difficult to construe, though he conceded that it must mean something. Counsel for the first defendants argued that once it was accepted that the Act of 1958 was designed to give effect to the Brussels convention, its meaning was clear and that s. 1 as a whole gave the court power to assess the limit of liability in sterling at the rate in gold francs in force at the time when the party seeking limitation comes before the court, in this case on Feb. 21, 1968, when the decree of limitation was made.

In support of this argument, counsel for the first defendants relied on *The Annie Hay* (9) to show that as Parliament was seeking in the Act of 1958 to implement the convention of 1957, this court could look at the convention itself. Counsel for the plaintiffs did not object to this course, and I, therefore, looked at the convention. In the result I accept counsel for the first defendants' argument that art. 3 (b) of the convention is embodied in s. 1 of the Act of 1958.

(5) [1921] All E.R. Rep. at p. 117; [1921] 2 A.C. at p. 558.

(6) [1921] All E.R. Rep. at p. 119; [1921] 2 A.C. at p. 563.

(7) See 24 HALSBURY'S STATUTES (2nd Edn.) 229.

(8) (1863), Brown & Lush. 151 at p. 152.

(9) [1968] 1 All E.R. 657 at pp. 662-664.

Counsel for the plaintiffs argued that the orders of both 1958 and 1967 were both prospective and not retrospective; but in my view the correct method of dealing with both instruments is to regard them as procedural and not as legislative, viz., that is each order is directed at stating only the rate of conversion into gold francs at the time that the order was made. In my view the order of 1967 meant that as from Nov. 22, 1967, the court had to convert into sterling at the rate there stated. The Admiralty registrar applied accordingly this rate at the time he made the decree of limitation, namely on Feb. 21, 1968. In my view he was right in so doing, and on this point the plaintiffs' appeal must fail.

I must now deal with the point raised in the cross-appeals, namely the appropriate rate of interest. Counsel for the first and second defendants argued that a rate of four per cent. cannot be right in a period of over ten years of dear money, since the object of interest was to compensate the victim of tort or of breach of contract for the loss of interest between the wrongful act and the payment of the damages for it: see *The Northumbria* (10), where SIR ROBERT PHILLIMORE agreed with the observations of SIR HENRY PAGE WOOD, V.-C., in *Straker v. Hartland* (11) that justice required that a debt which was due, but the payment of which was delayed, should carry interest.

On the other side counsel for the plaintiffs relied on the practice of allowing interest at four per cent. which had endured for many years in limitation suits, and especially on the judgment of BUCKNILL, J., in *The Theems* (12). In Australia, where interest rates have tended to be higher, the same four per cent. rate has likewise been a standard rate in limitation suits, see *Commonwealth of Australia v. Asiatic Steam Navigation Co., Ltd., The River Loddon* (13). On the other hand interest given in judgments of the commercial court seems to have been more generous, in recent years and lately has reached seven per cent.: see *De Maurier (Jewels), Ltd. v. Bastion Insurance Co., Ltd. and Coronet Insurance Co., Ltd.* (14). In *The Theems* (15), BUCKNILL, J., pointed out that the rate of interest in limitation actions had remained at four per cent. for over a hundred years and held it still to be the proper rate in 1938. In *The River Loddon* (16), TAYLOR, J., in the High Court of Australia in 1955 felt himself unable to depart from the four per cent. English rate on the ground that it would be unwise to follow the fluctuations of monetary conditions from time to time, and that uniformity of practice should be followed in order to provide a fair return over a long period.

Neither of these decisions is binding on me, though both of them are of high persuasive authority. I am very mindful that some degree of stability of interest rates is most desirable, if only to avoid both the uncertainties and the expense of frequent calculations. On the other hand it seems to me that it is equally desirable to find a figure which is more consistent with interest rates over the last ten years, which has been for the most part a period of high interest rates. While I am reluctant to change a rate which has been steady for nearly 150 years, it seems to me that a change is now necessary, and I am going to be bold enough to make it. In the hope that the rate which I have chosen will last for some time, though not necessarily for a century and a half, I have chosen the rate of  $5\frac{1}{2}$  per cent., and allow the cross-appeals on interest accordingly.

*Appeal dismissed. Cross appeals allowed. Leave to appeal granted.*

Solicitors: *Middleton, Lewis & Co.* (for the plaintiffs); *Thomas Cooper & Co.* (for the first defendants); *Ince & Co.* (for the second defendants); *Richards, Butler & Co.* (for the third defendants).

[Reported by N. P. METCALFE, ESQ., Barrister-at-Law.]

(10) (1869), L.R. 3 A. & E. 6 at p. 11.

(12) [1938] P. 197.

(14) [1967] 2 Lloyd's Rep. 550.

(11) (1864), 34 L.J.Ch. 122 at p. 123.

(13) [1953] 1 Lloyd's Rep. 503 at p. 506.

(15) [1938] P. at p. 201.

(16) [1955] 1 Lloyd's Rep. at p. 507.

A

## THE MECCA.

UNITED ARAB MARITIME COMPANY v. BLUE STAR LINE, LTD.  
AND OTHERS.

B

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Brandon, J.), April 8, 9, 10, 24, 1968.]

C

*Shipping—Limitation of liability—Conversion rate—Rate prevailing at the date of decree—Devaluation of pound sterling after date of collision but before decree of limitation made—Rate for conversion of gold francs mentioned in s. 1 of the Act of 1958 varied after devaluation—Whether new conversion rate applicable—Interest on amount fixed as limit of liability—What rate of interest applicable—Merchant Shipping (Liability of Shipowners and Others) Act, 1958 (6 & 7 Eliz. 2 c. 62), s. 1 (3), (4)—Merchant Shipping (Limitation of Liability) (Sterling Equivalents) Order 1967 (S.I. 1967 No. 1725), art. 2.*

D

When, for the purposes of s. 1 of the Merchant Shipping (Liability of Shipowners and Others) Act, 1958, the court has to ascertain the sterling equivalent of the gold franc limit of liability, the conversion rate applicable is that provided by the order made under s. 1 (3) that is in force when the ascertainment has to be made, except that, if payment into court of not less than the amount of the limit has been made in respect of the limited liability, the conversion rate applicable is that provided by the order in force at the date of payment in (see p. 734, letter F, post).

E

The plaintiffs incurred liability for loss of or damage to property by reason of the collision of their ship, the Mecca, in May, 1965, with B., Ltd.'s ship, The Fremantle Star. The plaintiffs sought limitation of their liability. On Feb. 20, 1968, the Admiralty registrar decreed that the amount of the limit of the plaintiffs' liability should be ascertained at the equivalent of the one thousand gold francs per ton for which s. 1 (1) (b) of the Merchant Shipping (Liability of Shipowners and Others) Act, 1958, provided, and that this equivalent should be ascertained by applying the conversion rate specified in art. 2\* of the Merchant Shipping (Limitation of Liability) (Sterling Equivalents) Order 1967. The registrar fixed the rate of interest payable by the plaintiffs on the amount of their limited liability at four per centum. No payment into court had been made. On appeal by the plaintiffs on the ground that the registrar should have applied the conversion rate applicable under the corresponding Order of 1958†, art. 2, being the rate applicable when the collision took place in 1965, and on cross appeals by B., Ltd., and by owners of cargo of The Fremantle Star seeking a higher rate of interest than four per cent.

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**Held:** (i) the effect of s. 1 (1), (3), of the Act of 1958, having regard particularly to sub-s. (4) of s. 1, being as stated at letter C, above, the sterling equivalent for the purposes of limitation of the plaintiffs' liability should be ascertained in accordance with the order of 1967, that being the order in force at the time of ascertainment of the limitation of liability and no payment into court having been made (see p. 734, letter E, and p. 736, letter C, post).

I

*The Abadesa* (ante, p. 726) applied.

(ii) the period in respect of which interest was to be awarded was from 1965 to 1968, for which a higher rate of interest than four per cent. would be appropriate; in accordance with the rate of interest awarded in *The*

\* Article 2 provides: "£85 13s. 7½d., and £27 12s. 9½d., are hereby specified as the accounts which for the purposes of the aforesaid s. 1 [of the Merchant Shipping (Liability of Shipowners and Others) Act, 1958] are to be taken as equivalent to three thousand one hundred and one thousand gold francs respectively".

† I.e., S.I. 1958 No. 1287.



*Abadesa*, supra, interest would be awarded in the present case at 5½ per cent. per annum (see p. 738, letter D, post). A

*The Abadesa* (ante, p. 726) applied.

*The Theems* ([1938] P. 197) not followed.

Appeal dismissed; cross-appeals allowed.

[As to interest in limitation actions, see 35 HALSBURY'S LAWS (3rd Edn.), 779, 780, para. 1199; and for cases on the subject, see 42 DIGEST (Repl.) 1063, 1064, 8811-8818. B

For the Law Reform (Miscellaneous Provisions) Act, 1934, s. 3 (1), see 18 HALSBURY'S STATUTES (2nd Edn.) 525.

For the Merchant Shipping (Liability of Shipowners and Others) Act, 1958, s. 1, see 38 HALSBURY'S STATUTES (2nd Edn.) 1092.] C

Cases referred to:

*Abadesa, The, Furness-Houlder Argentine Lines, Ltd. v. The Miraflores (Owners)*, ante, p. 726.

*Amalia, The*, (1864), 34 L.J.P.M. & A. 21; 42 Digest (Repl.) 1064, 8812.

*Celia (Owners) v. Volturmo (Owners)*, [1921] All E.R. Rep. 110; [1921] 2 A.C. 544; 90 L.J.P. 385; 126 L.T. 1; 15 Asp. M.L.C. 374; 17 Digest (Repl.) 173, 685. D

*Commonwealth of Australia v. Asiatic Steam Navigation Co., Ltd., The River Loddon*, [1955] 1 Lloyd's Rep. 503.

*de Maurier (Jewels), Ltd. v. Bastion Insurance Co., Ltd. and Coronet Insurance Co., Ltd.*, [1967] 2 Lloyd's Rep. 550.

*Kong Magnus, The*, [1891] P. 223; 65 L.T. 231; 7 Asp. M.L.C. 64; 42 Digest (Repl.) 951, 7423. E

*Northumbria, The*, (1869), L.R. 3 A. & E. 6; 39 L.J. Adm. 3; 21 L.T. 681; subsequent proceedings, L.R. 3 A. & E. 24; 42 Digest (Repl.) 1063, 8811.

*Post Office v. Estuary Radio, Ltd.*, [1967] 3 All E.R. 663 at p. 679; [1967] 1 W.L.R. 1396; [1967] 2 Lloyd's Rep. 299; Digest (Repl.) Supp.

*Salomon v. Comrs. of Customs and Excise*, [1966] 3 All E.R. 871; [1967] 2 Q.B. 116; [1966] 3 W.L.R. 1223; Digest (Cont. Vol. B) 621, 77a. F

*Theems, The*, [1938] P. 197; 107 L.J.P. 139; 159 L.T. 392; 19 Asp. M.L.C. 206; 61 Lloyd L.R. Rep. 178; 42 Digest (Repl.) 1064, 8818.

### Appeal and cross-appeals.

This was an appeal by the plaintiffs, the United Arab Maritime Company, owners of the steamship *The Mecca*, against a decree made by the Admiralty registrar (K. C. McGUFFIE, Esq.) on Feb. 20, 1968, fixing their liability for damages at £215,620 5s. 2d. The *Mecca* had been involved in a collision in May, 1965, with *The Fremantle Star* owned by Blue Star Line, Ltd. As a result of the collision in the Gulf of Suez, both vessels were damaged, together with cargo owned by other defendants, laden on *The Fremantle Star*. It was agreed that *The Mecca* was eighty per cent., and *The Fremantle Star* twenty per cent., to blame for the collision. Accordingly, Blue Star Line, Ltd., were entitled to recover eighty per cent. of their damage, to be proved or agreed, less twenty per cent. of the plaintiffs' damage, which was agreed at £100,000 and that the two groups of cargo owners laden on *The Fremantle Star* were to recover eighty per cent. of their damage to be proved or agreed. It was also agreed that all such rights of recovery were subject to the plaintiffs' right to limit their liability under the Merchant Shipping Acts. The plaintiffs' claimed that in limiting their liability the conversion rate provided by the Merchant Shipping (Limitation of Liability) (Sterling Equivalents) Order, 1958, should have been applied; if it had been applied they would have been liable only for a lesser sum, viz., £184,816 18s. 7d. The higher amount, decreed by the Admiralty registrar, was the limit ascertained by applying the Merchant Shipping (Limitation of Liability) (Sterling Equivalents) Order 1967. The defendant owners of *The Fremantle Star*, Blue Star Line, Ltd. and defendant cargo owners cross-appealed against so much of the Admiralty G H I

- A registrar's decree as fixed the rate of interest payable by the plaintiffs or the amount of their liability at four per cent.

The authorities noted below\* were cited in argument in addition to the cases referred to in the judgment.

*R. A. MacCrindle, Q.C., and James Rochford* for the plaintiffs, the United Arab Maritime Company, the owners of the steamship *The Mecca*.

- B *S. O. Olson* for the defendant owners of *The Fremantle Star*, Blue Star Line, Ltd.

*J. S. Hobhouse* for the defendants, owners of cargo ex *The Fremantle Star*.

*Cur. adv. vult.*

- Apr. 24. **BRANDON, J.**, read the following judgment: The court has before it three matters arising out of a claim by the plaintiffs, the United Arab Maritime Company, to limit their liability for damages in respect of a collision between their ship *The Mecca* and Blue Star Line, Ltd.'s ship *The Fremantle Star* which took place in the Gulf of Suez in May, 1965. The first matter is an appeal by the plaintiffs from so much of a decree made by the registrar on Feb. 20, 1968, as fixed the limit of their liability at £215,620 5s. 2d. The plaintiffs say that the limit should be less, namely, £184,816 18s. 7d. [His LORDSHIP stated the nature of the second matter, which was an alternative claim, and continued:] The third matter consists of cross-appeals by two defendants, namely, cargo owners and Blue Star Line, Ltd., against so much of the registrar's decree as fixed the rate of interest payable by the plaintiffs on the amount of their limited liability at four per cent. The defendants say that the rate should be higher, namely, 5½ per cent., or six per cent.

- E I shall deal first with the plaintiffs' appeal on the amount of their limit, which raises an interesting and important point on the interpretation of the Merchant Shipping (Liability of Shipowners and Others) Act, 1958. Section 1 (1) of the Act of 1958 prescribes two limits of liability, both related to gold. For loss of life or personal injury, the limit is the equivalent (by which is meant the sterling equivalent) of 3,100 gold francs per ton; for loss of or damage to property, or infringement of rights, the limit is the equivalent of one thousand gold francs per ton. Section 1 (3) provides that the Board of Trade (formerly Minister of Transport) may from time to time specify by order the amounts to be taken as the equivalents of those two sums in gold francs. Under that provision two orders have been made, one in 1958 (1) and the other in 1967 (2). The second order was made very soon after the recent devaluation of the pound and in consequence of it. It came into force on Nov. 24, 1967, and superseded the first order which had remained in force from Aug. 1, 1958, until then.

- G The question raised by the appeal is this. The plaintiffs having incurred liability for loss of or damage to property by reason of the collision to which I have referred, should the limit of their liability be ascertained by applying the equivalent of one thousand gold francs specified in the order of 1958, or that specified in the order of 1967? The registrar, dealing with the matter on the hearing of a summons for a decree of limitation which came before him on Feb. 20, 1968, held that the equivalent in the order of 1967 should be applied. The plaintiffs appeal. As appears from the figures mentioned, the amount involved in the appeal, apart from interest, is about £30,800. The registrar had already decided the same point in the same way in a previous case (*The Abadesa* (3)) on Feb. 21, 1968. His decision in that case has, since his decision in

\* 15 HALSBURY'S LAWS (3rd Edn.) 208; BRITISH SHIPPING LAWS, Vol. 8 (1963 Edn.), pp. 1058-1060; CRAIES'S STATUTE LAW (6th Edn., 1963), p. 387; DICEY AND MORRIS' CONFLICT OF LAWS (8th Edn.), p. 889, r. 154; WILLIAMS & BRUCE'S ADMIRALTY PRACTICE (1962 Edn.), p. 349.

(1) The Merchant Shipping (Limitation of Liability) (Sterling Equivalents) Order, 1958 (S.I. 1958 No. 1827).

(2) The Merchant Shipping (Limitation of Liability) (Sterling Equivalents) Order 1967 (S.I. 1967 No. 1725).

(3) Ante, p. 726.

the present case, been upheld on appeal by KARMINSKI, J., in a reserved judgment delivered on Apr. 5, 1968. I have the advantage, therefore, which the registrar did not, of the guidance afforded by that judgment. While the decision of KARMINSKI, J., is not binding on me, it is of strong persuasive authority, and I should certainly follow it unless I were convinced that it was wrong. In fact, having heard full and careful argument on both sides of the question, I find myself, if I may respectfully say so, in entire agreement with that decision.

My reasons are as follows. Section 1 of the Act of 1958 has to be read as a whole. It is clear from sub-s. (1) and sub-s. (3) that the limit of liability in any particular case is to be ascertained by applying the equivalents specified in an order made by the Board of Trade (formerly Minister of Transport). There may be cases, however, of which the present is an example, where there is one order in force at the date when the liability to damages arises, and another order, specifying different equivalents and superseding the earlier order, in force at the date when the limit of liability falls to be ascertained. There may even be cases where there is more than one change of specified equivalents between those two dates. Subsection (1) and sub-s. (3) do not by themselves indicate, in cases where there are two or more orders to which reference might be made, which order in force at which date is to be applied. It appears to me, however, that sub-s. (4) does, by necessary inference, give just that indication. Subsection (4) provides that, where there has been a payment into court in respect of a limited liability, subsequent variation of the equivalents specified by order under sub-s. (3) shall *not* affect the ascertainment of the limit, unless the amount paid in was less than the limit as ascertained in accordance with the order in force at the date of payment in. While this provision is framed negatively, it has, by necessary inference, an affirmative corollary. That is that, where there has been no payment in, or where there has been a payment in but its amount was less than the limit ascertained in accordance with the order in force at the date when the payment in was made, the ascertainment of the limit *will* be affected by subsequent variation of the equivalents specified by order under sub-s. (3). The effect of that provision can, in my view, be put in this way. When the court comes to ascertain the limit in any particular case, it should apply the equivalents specified either (i) by such order as is in force at the date when the ascertainment is made, or (ii) if at an earlier date an adequate payment into court in respect of the limited liability was made, by such order as was in force at that earlier date. By adequate payment, I mean a payment of an amount not less than the limit as ascertained in accordance with the order in force at the date when the payment was made. In the present case there was no payment into court in respect of the limited liability. It follows that the limit must be ascertained in accordance with the order of 1967, which was in force on Feb. 20, 1968, when the limit fell to be ascertained.

Counsel for the plaintiffs attacked this interpretation of the Act of 1958 on two main grounds. First, because it conflicted with the general principle that, where damages are measured in a currency other than sterling, the appropriate date for conversion into sterling is the date when the damage occurred: see *Celia (Owners) v. Volturmo (Owners)* (4). Second, because it gave a retrospective effect to orders made under sub-s. (3), and in particular to the Order of 1967 in this case.

With regard to the first objection, while I recognise the general common law principle relied on, it seems to me impossible, in view of sub-s. (4), to construe the Act of 1958 as doing other than departing from that principle. With regard to the second objection, it seems to me that the argument begs the question. What I mean is this. If on the true construction of the Act of 1958, the limit of liability for damage occurring on a certain date is to be ascertained by reference to a state of affairs, namely the relationship of sterling to gold francs as specified



A from time to time by order under sub-s. (3), in existence at one or other of two later dates, then it is not really correct to describe the order which does such specifying as having retrospective effect.

Counsel for the plaintiffs argued that it was difficult to give any effect to sub-s. (4) because, under existing practice, there never would be a payment into court which could have the result contemplated. The subsection was, therefore, B unworkable and it would be wrong to construe the rest of the section in a manner contrary to established principles simply because of this one unworkable subsection. I accept that there are difficulties in seeing what kind of payment into court is contemplated by sub-s. (4). There appear to be three main possibilities: first, a payment into court by way of security; second, a payment into court by a defendant in a damage action under R.S.C., Ord. 22, r. 1; third, a payment C into court by a plaintiff in a limitation action. With regard to the first possibility, while it is possible to give security in an action in rem by paying into court, it is not, and has not for many years been the practice to do so. With regard to the second possibility, while there is nothing to prevent a defendant paying into court in respect of a limited liability under R.S.C., Ord. 22, r. 1, it is seldom done because of the difficulty that other claims, besides that of the D plaintiff in the action, are usually payable out of the same limit. Moreover, if in such a case R.S.C., Ord. 22, r. 7 were strictly observed, the court, although it might need to know of the payment in and its amount in order to apply sub-s. (4), would be denied that knowledge. With regard to the third possibility, the practice in limitation actions is and has been for many years for no payment into court to be made until after the decree ascertaining the limit has been E made.

Despite these difficulties, I do not think that it can be said that it is impossible to find any practical application for sub-s. (4). In particular it may well be that, as the effect of the Act of 1958 comes to be fully appreciated, the practice in limitation actions will change and plaintiffs will seek to pay into court as early as possible and certainly before decree. I am told by the registry that a payment F in before decree in a limitation action was in fact made, for the first time in the last thirty years at any rate, in 1967. In these circumstances I cannot treat sub-s. (4) as being so obscure or unworkable as to justify disregarding the clear inferences to be drawn from it.

The view which I have formed of the meaning of s. 1 seems to me to be supported by certain other provisions of the Act of 1958, namely, s. 5 (4) (b) and s. 6 G (2) (a). Section 5 deals with release of ships or other property arrested in respect of a limited liability. Section 6 deals with restriction on enforcement of judgments or decrees after security in respect of a limited liability has been given. In either case, under the procedure prescribed, a question may arise whether the amount of the security given was not less than the amount of the limit concerned. In either case it is expressly provided that that question, if it arises, is to be H decided as at the time when the security was given. It seems to be a necessary inference from this that, for other purposes, the amount of the limit will, or may at least, have to be ascertained as at a later date, when the equivalents may have been varied by a subsequent order made under s. 1 (3). The view which I have formed of the meaning of s. 1 seems to me to be supported also by the terms of the I international convention to which it is agreed that the Act of 1958 was intended to give domestic effect. That is the International Convention relating to the Limitation of the Liability of Owners of Sea-going Ships (5), dated Brussels Oct. 10, 1957. I am not satisfied that s. 1 of the Act of 1958 is obscure or ambiguous so as to make it necessary to seek assistance in its interpretation from the Convention. On the footing, however, that there is such obscurity or ambiguity, the court is clearly entitled to seek such assistance: see *Salomon v. Comrs. of Customs and Excise* (6) and *Post Office v. Estuary Radio, Ltd.* (7).

(5) *Cmnd.* 353.

(6) [1966] 3 All E.R. 871; [1967] 2 Q.B. 116.

(7) [1967] 3 All E.R. 663.

Under art. 3 (6) of the Convention the date on which conversion of gold francs into domestic currency is to be made is A

“the date on which the shipowner shall have constituted the limitation fund, made the payment or given a guarantee which under [the domestic law] is equivalent to such payment.”

That provision is wholly inconsistent with the construction of s. 1 of the Act of 1958 contended for by the plaintiffs, which would require the conversion to be made as at the date when the damage occurred. Moreover, although it may be questioned whether sub-s. (4) gives complete effect to art. 3 (6) of the Convention, it seems to me that it represents a clear attempt, at least partially successful, to do so. B

For these reasons I am of opinion, as was KARMINSKI, J., that the registrar has correctly decided the question of law raised by the appeal. It follows that the plaintiffs' appeal fails and must be dismissed. [HIS LORDSHIP then dealt with the plaintiffs' alternative claim, as amended, based on the agreement of settlement between the parties as to the quantum of liability, and concluded that that too failed and would be dismissed. HIS LORDSHIP continued:] It remains for me to deal with the cross-appeals of the two groups of cargo owners and Blue Star Line, Ltd. Both these parties applied for leave to cross-appeal out of time on the question of the rate of interest payable by the plaintiffs on the amount of their limited liability. The cargo owners had served a notice of appeal; Blue Star Line, Ltd. had not. I gave both leave to appeal out of time, and directed that, so long as Blue Star Line, Ltd. wished to do no more than adopt the argument put forward for the cargo owners, they need not serve a separate notice of appeal. C D E

The point raised by the cross-appeals is also of considerable importance. The registrar, in accordance with long-established practice in limitation actions, ordered the plaintiffs to pay interest on the amount of their limited liability at four per cent. from the date of the collision until the date of payment into court. The defendants whom I have mentioned appeal against that order, contending that the rate should be higher, say  $5\frac{1}{2}$  per cent. or six per cent. The amount involved in the cross-appeals is rather over £9,000 if  $5\frac{1}{2}$  per cent. is taken, and about £12,000 if six per cent. is taken. This question also came before KARMINSKI, J., in the appeal from the registrar in *The Abadesa* (8), to which I referred earlier. In that case he took the view that the four per cent. rate was out of date, and substituted what he regarded as a more realistic rate of  $5\frac{1}{2}$  per cent. He indicated that he thought that the latter rate was one which might, for a period at least, be regarded as of general application in limitation actions. On this point, as on that raised by the plaintiffs' appeal, the decision of KARMINSKI, J., is not binding on me; but again I treat it as of strong persuasive authority, and should follow it, in principal at any rate, unless I were convinced that it was wrong. I say in principle at any rate because the question of rate of interest is not, to my mind, a question of law alone, to be decided in the same way in all cases. It is a question, in part at least, also of discretion, to be exercised in relation to the facts of each particular case. By that I mean that it is necessary in any particular case to consider the period in respect of which interest is due, and to arrive at a rate which is appropriate having regard to commercial lending and borrowing rates during that period. Limitation actions, like other actions, may differ in this respect. I agree entirely, if I may again respectfully say so, with the principle on which KARMINSKI, J., proceeded. That is to say that I agree with him that the four per cent. rate is out of date and that a more realistic rate should be substituted. I also agree with him that the fact that four per cent. has been awarded for over one hundred years does not prevent the court from now awarding a higher rate in order to do justice in the circumstances prevailing today. F G H I

- A The way in which I look at the matter is this. If the plaintiffs' liability were unlimited (as it would be, for instance, if they could not prove that the collision occurred without their actual fault or privity) the Admiralty court would in the ordinary way award interest on the damage claims. It would do so either on the special Admiralty principle explained in *The Kong Magnus* (9) or under s. 3 (1) of the Law Reform (Miscellaneous Provisions) Act, 1934. If the claims
- B were brought in the Queen's Bench Division the court would award interest under the latter section. While the rate of interest would be discretionary, the practice in Admiralty cases has been to award five per cent., and in commercial cases in recent years five per cent. or six per cent. In one very recent case the Commercial judge awarded seven per cent.: see *de Maurier (Jewels) Limited v. Bastion Insurance Co., Ltd. and Coronet Insurance Co., Ltd.* (10). If these are
- C the rates at which interest would be awarded on unlimited damages, I can see no good reason for awarding interest at lower rates simply because the damages are limited. In so thinking, it seems to me that I am approaching the matter on the same lines as DR. LUSHINGTON did in *The Amalia* (11).

- The main difficulty in the way of awarding more than four per cent. arises from *The Theems* (12) which was reluctantly followed by the High Court of
- D Australia in *The River Loddon, Commonwealth of Australia v. Asiatic Steam Navigation Co., Ltd.* (13). In *The Theems* (14) BUCKNILL, J., recognised that the usual rate of interest awarded on damage claims in Admiralty was, and had been for some years, five per cent., but held that four per cent. was the proper rate in a limitation action.

- His reasoning, as I understand it, was as follows. The interest awarded in
- E damage actions in Admiralty was awarded, not strictly as interest on damages, but as part of the damages themselves. In limitation actions, on the other hand, interest could not be awarded as part of the damages, for so to award it would conflict with the statute limiting the amount of the damages; it was awarded instead on the ground that the wrongdoer had had the use of the money since the casualty and must pay to the injured party the sum which he had in theory made out of the money. On that basis the proper rate to award was four per cent., because that was the rate payable on a judgment debt. With respect to the judgment of BUCKNILL, J., I find myself unable to agree with this reasoning. In the first place, I think that the supposed distinction between interest on damages and interest as part of damages is unreal. In substance, if not in form, it comes to the same thing. In my view the purpose, and the sole purpose,
- F of awarding interest, whether in a damage action or a limitation action, and, if it be in a damage action, whether in the Probate, Divorce and Admiralty Division or in the Queen's Bench Division, is to compensate for the fact that the damages are paid late: see *The Amalia* (11), and *The Northumbria* (15), in which *The Amalia* (11) is cited with approval. The fact that damages are paid late may be looked at in two ways, by considering either that the wrongdoer has had
- G the money, or that the injured party has been without it. These are, however,
- H only two sides of the same coin.

- In the second place, I do not consider that the right guide to the proper rate of interest to be awarded to compensate for late payment is the rate of four per cent. payable on judgment debts. That rate was prescribed by the Judgments Act, 1838, and has never been altered. In that connexion it is interesting to
- I note that the equivalent rate in Australia is five per cent. (see *The River Loddon* (13)). If a guide were required, I should have thought a better guide, because

(9) [1891] P. 223; 7 Asp. M.L.C. 64.

(10) [1967] 2 Lloyd's Rep. 550.

(11) (1864), 34 L.J.P.M. & A. 21.

(12) [1938] P. 197; 19 Asp. M.L.C. 206.

(13) [1955] 1 Lloyd's Rep. 503.

(14) [1938] P. at pp. 199-201; 19 Asp. M.L.C. at pp. 207, 208.

(15) (1869), L.R. 3 A. & E. 6 at p. 13.



it is varied from time to time to take account of prevailing interest rates, is the rate which is prescribed as accruing on moneys paid into court. This was until recently five per cent., and is now six per cent.; see the Supreme Court Funds Rules, 1927, r. 78 (1), as amended by the Supreme Court Funds (Amendment) Rules 1965 and 1968 (16).

Agreeing therefore in principle with the decision of KARMINSKI, J., it remains for me to consider what is the appropriate rate to award, as a realistic rate, in the present case. In *The Abadesa* (17), KARMINSKI, J., was concerned with the period 1963 to 1968. After considering lending and borrowing rates during that period, he awarded interest at  $5\frac{1}{2}$  per cent. If I were approaching the matter afresh I should myself feel that the choice lay between five per cent. as the lower limit and six per cent. as the upper limit. It follows that I agree with  $5\frac{1}{2}$  per cent. as a fair figure in that case. In the present case I am concerned with the period 1965 to 1968. I think that there is material on which the court could find that commercial interest rates were on the average higher during 1965 to 1968 than during 1963 to 1968. Any such difference is, however, marginal, and I do not think that it should lead me to award a higher rate than KARMINSKI, J., did in the *Abadesa* (17). As KARMINSKI, J., said in his judgment, some degree of stability of interest rates is most desirable, and I am anxious not to rock the newly stabilised boat unnecessarily. In my view a fair rate of interest to award in this case, as in *The Abadesa* (17) is  $5\frac{1}{2}$  per cent., and I so award. The cross-appeals therefore succeed and the part of the decree relating to rate of interest will be varied accordingly.

Solicitors: *Middleton, Lewis & Co.* (for the plaintiffs); *Hill, Dickinson & Co.* (for the defendants, Blue Star Line, Ltd.); *Clyde & Co.* and *Waltons, Bright & Co.* (for the defendant owners of cargo).

[Reported by N. P. METCALFE, Esq., Barrister-at-Law.]

## LIEW SAI WAH v. PUBLIC PROSECUTOR.

[PRIVY COUNCIL (Viscount Dilhorne, Lord Hodson and Lord Upjohn). February 12, April 29, 1968.]

*Privy Council—Malaysia—Criminal law—Appeal—New ground for upholding conviction—Presentation of a different case involved—Leave to advance new ground refused—Criminal Procedure Code, s. 155.*

*Privy Council—Malaysia—Internal security—Possession of ammunition—Hand grenade bodies—Whether parts of hand grenades were ammunition within Internal Security Act, 1960 (No. 18 of 1960), s. 2, s. 57 (1).*

The appellant had in his possession in a security area in Singapore six hand grenade bodies. They were not drill or dummy grenades, but they lacked levers, safety pins, detonators and base plugs. There was no evidence that they were in fact filled with explosive, but there was evidence that such grenade bodies would normally have been filled with an explosive and, if they were used with other explosives, they would explode and cause damage. The appellant was convicted of being in possession of ammunition, to wit, six hand grenades, without lawful excuse and without lawful authority contrary to s. 57 (1)\* of the Internal Security Act, 1960. "Ammunition" was defined in s. 2† of the Act of 1960 as including "grenades, bombs and other like missiles... and any ammunition containing or designed to

(16) See THE SUPREME COURT PRACTICE 1967, Vol. 2, p. 302, para. 1325, and THIRD CUMULATIVE SUPPLEMENT thereto.

(17) Ante, p. 726.

\* Section 57 (1) is set out at p. 739, letter I, to p. 740, letter A, post.

† Section 2, so far as material, is set out at p. 740, letter B, post.

A contain or adapted to contain any noxious liquid, gas or other thing". On appeal it was sought also to uphold the appellant's conviction on a new ground that the hand grenade bodies, if not ammunition, were explosives within s. 2.

B **Held:** (i) the definition of "ammunition" did not cover components of hand grenades, as distinct from complete hand grenades, and thus the offence charged had not been established (see p. 740, letter G, and p. 742, letter G, post).

Dictum of LORD SIMONDS in *London and North Eastern Ry. Co. v. Berriman* ([1946] 1 All E.R. at p. 270) applied.

C (ii) the new ground sought to be advanced involved the presentation of a very different case from that which the appellant had had to meet at his trial, and leave to raise the new ground would be refused (see p. 742, letters D and F, post).

*Lee A Ba v. Public Prosecutor* ([1968] 1 All E.R. at p. 428) distinguished.

[As to the construction of penal enactments, see 36 HALSBURY'S LAWS (3rd Edn.) 415, para. 631.

D As to raising new points on appeals before the Judicial Committee, see 9 HALSBURY'S LAWS (3rd Edn.) 392, para. 920.

As to appeals in criminal cases, see *ibid.*, pp. 395, 396, para. 927; and for cases as to raising new points on appeal, see 16 DIGEST (Repl.) 174-177, 588-627.]

Cases referred to:

E *London and North Eastern Ry. Co. v. Berriman*, [1946] 1 All E.R. 255; [1946] A.C. 278; 115 L.J.K.B. 124; 174 L.T. 151; 38 Digest (Repl.) 297, 298, 69.

*Public Prosecutor v. Koi (and associated appeals)*, [1968] 1 All E.R. 419, 428; [1968] 2 W.L.R. 715.

### Appeal.

F This was an appeal by the appellant Liew Sai Wah against the judgment of the Federal Court of Malaysia (appellate jurisdiction), TAN AH TAH, F.J., BUTT-ROSE and WINSLOW, J.J.), dated June 24, 1966, dismissing his appeal against his conviction by the High Court at Singapore (CHOOR SINGH, J., sitting without a jury) under an order dated Nov. 18, 1965, of the offence of having in his possession in a security area at Singapore, on Mar. 21, 1965, ammunition to wit, six hand grenades without lawful authority contrary to s. 57 (1) (b) of the Internal Security Act, 1960. The articles of which the appellant was in possession were in fact hand grenade bodies. Special leave was granted by the Judicial Committee on a question of construction, whether hand grenade bodies were ammunition within the meaning of s. 2 of the Internal Security Act, 1960. The facts are set out in the opinion of VISCOUNT DILHORNE.

H *T. O. Kellock, Q.C.*, and *I. C. Baillieu* for the appellant.  
*J. G. Le Quesne, Q.C.*, and *S. N. McKinnon* for the Public Prosecutor.

I **VISCOUNT DILHORNE:** On Mar. 21, 1965, the appellant got off a train at Singapore station carrying a B.O.A.C. travelling bag. He was stopped by the police and in the bag were found six hand grenade bodies. He was arrested and charged and on Nov. 18, 1965, convicted in the High Court at Singapore of having had in his possession in a security area on Mar. 21, 1965, "ammunition, to wit six hand grenades, without lawful excuse and without lawful authority". He was sentenced to death under the provisions of s. 57 (1) of the Internal Security Act, 1960, which is as follows:

"Any person who without lawful excuse, the onus of proving which shall be on such person, in any security area carries or has in his possession or under his control—

"(a) any fire-arm without lawful authority therefor; or

“(b) any ammunition or explosive without lawful authority therefor, shall be guilty of an offence against this Part and shall be punished with death.” A

Section 2 of the Act defines “ammunition” in the following terms:

“‘ammunition’ means ammunition for any fire-arm as hereafter defined and includes grenades, bombs and other like missiles whether capable of use with such a fire-arm or not and any ammunition containing or designed to contain or adapted to contain any noxious liquid, gas or other thing:” B

At the trial before CHOOR SINGH, J., who sat without a jury, expert evidence was given by Sergt. Clifton then attached to the ammunition inspectorate. He gave evidence to the effect that the grenade bodies found in the possession of the accused were bodies of British 36 M grenades; that grenades, unless they were drill or dummy grenades, had their explosive in them and that the bodies found in the appellant's possession were not the bodies of drill or dummy grenades. He said that they were not complete grenades as they lacked levers, safety pins, detonators and base plugs. He had not opened the grenade bodies but said that grenades of this type were normally filled with an explosive called Baratol. No evidence was given at the trial proving that the grenade bodies were filled with an explosive. He said that if the bodies found in the appellant's possession were used with other explosives, they could still explode and cause damage. This assumes, of course, that they were filled with explosive. It is clear from his evidence that, lacking detonators and other parts, these grenade bodies would not have exploded when thrown and when the safety pin was taken out and the lever released in the way that complete grenades of this type do. C

At the trial counsel for the appellant submitted that grenade bodies did not come within the definition of ammunition in the Act of 1960 and that he had, consequently, no case to answer. CHOOR SINGH, J., ruled against him. He said: D

“The word ‘ammunition’ which appears in the fourth line of the definition, in my opinion includes grenades. Therefore a grenade containing or designed to contain any noxious thing comes within the definition of ammunition. In this case the evidence shows that the six grenade bodies found in the accused's bag were designed to contain Baratol which is a noxious thing. The grenade bodies are therefore ammunition within the meaning of the Internal Security Act, 1960.” E

While it is clear that the definition in the Act of 1960 of the word “ammunition” includes grenades and that a grenade designed to contain or adapted to contain any noxious liquid, gas or other thing is covered by it, even if empty of that noxious liquid gas or other thing—there is nothing in the definition to indicate that it was intended to cover not only grenades but parts of grenades such as grenade bodies. F

The appellant appealed to the Federal Court of Malaysia. Dealing with the submission that grenade bodies did not constitute ammunition as defined, that court said: G

“On this aspect of the case it is necessary to consider Sergt. Clifton's evidence which was that these six hand grenades were British 36 M grenades but they had no levers, safety pins or detonators attached to them. They were grenade bodies which are fitted with a high and powerful explosive called Baratol and they all had Indonesian markings. If levers, safety pins and detonators were attached to them they could be used. All grenades have their explosives inside them unless they are drill or dummy ones which these were not. If these six grenade bodies were used together with other explosives they would still explode and cause damage although they were without their component parts. In the light of this evidence we are of the opinion that the six grenade bodies come within the definition of ‘ammunition’ referred to above.” H

I



- A The Federal Court did not comment on the opinion expressed by CHOOR SINGH, J., but from this passage it appears that they based their conclusion on the ground that the grenade bodies if used together with other explosives would still explode and cause damage. As has been said, no evidence was given at the trial that these bodies were filled with explosive. Sergt. Clifton said that it was possible to remove Baratol from a grenade and that he had not opened these
- B bodies. If they did contain explosive and would have exploded if used with other explosives, it does not follow that they came within the definition. Whether or not they did so, does not depend on whether they would explode if so used. The definition makes it clear that an empty grenade would be covered by it.

The Internal Security Act, 1960, is a penal Act, and must be construed strictly. In 36 HALSBURY'S LAWS OF ENGLAND (3rd Edn.), p. 415, para. 631 the following

- C appears:
- "It is a general rule that penal enactments are to be construed strictly, and not extended beyond their clear meaning. At the present day, this general rule means no more than that if, after the ordinary rules of construction have first been applied as they must be, there remains any doubt or ambiguity, the person against whom the penalty is sought to be enforced is entitled to the benefit of the doubt."
- D

As LORD SIMONDS said in *London and North-Eastern Ry. Co. v. Berriman* (1):

"A man is not to be put in peril upon an ambiguity, however much or little the Act appeals to the predilection of the court."

- E The definition of "explosive" in s. 2 of the Internal Security Act, 1960, includes:

"(d) any material for making an explosive and any apparatus, machine, implement or material used or intended to be used or adapted for causing or aiding in causing, any explosion in or with any explosive, and any part of any such apparatus, machine or implement."

- F The definition of "fire-arm" in the same section includes "any component part of any such weapon as aforesaid".

If it had been intended that the definition of ammunition should include any component part of a grenade, that could easily have been stated. The omission to do so is not only significant when compared with the definition of "explosive" and "fire-arm". In 1958 the Corrosive and Explosive Substances and Offensive Weapons Ordinance (2) was made. In that Ordinance, "explosive substance" (3) was defined to include any bomb or grenade "and any such bomb, grenade..."

- G In their lordships' opinion the definition in s. 2 of ammunition is not wide enough to cover and does not cover grenade bodies alone. Counsel for the Public Prosecutor contended that, as the latter part of the definition covered grenades which were not filled but were designed or adapted to contain any noxious thing, the definition went further than applying to a complete grenade only. While recognising that the definition applies to grenades which are not filled, it does not follow from that that it applies to the component parts of a grenade.
- H

- I At the hearing before the Judicial Committee, counsel for the Public Prosecutor sought leave to advance an additional ground in support of his case, namely

(1) [1946] 1 All E.R. 255 at p. 270, letter G; [1946] A.C. 278 at p. 313.

(2) No. 43 of 1958.

(3) Section 2 provides: "'Explosive substance' shall be deemed to include any materials for making any explosive substance and any bomb, grenade, apparatus, machine, implement or material used or intended to be used or adapted for causing or aiding in causing any explosion in or with any explosive substance and any part of such bomb, grenade, apparatus, machine or implement."

that "if the six grenade bodies were not 'ammunition' as defined by s. 2 of the Act of 1960, they were 'explosives' as defined by the said section, and the appellant was not misled by the error in their description". He sought to contend that the grenade bodies came within that part of the definition of "explosive" quoted previously and he also referred to the case of *Lee A Ba v. Public Prosecutor* (4) where the appellant was convicted under the Internal Security Act, 1960, of having in his possession "ammunition to wit, two hand grenade detonators". In that case their lordships accepted the submission that detonators were explosives according to the definition and not ammunition. It would not have been necessary to consider whether grenade detonators came within the definition of "explosive" if the definition of "ammunition" could have been interpreted as applying to parts of a grenade. Their lordships were of the opinion that the error in nomenclature was of no significance. Section 156 of the Criminal Procedure Code applicable in that case is in similar terms to s. 155 quoted below (5). In that case it was not contended that the accused was misled, and their lordships held that the error in stating the offence was immaterial and that there was no substance in the defence based on the misdescription of detonators as "ammunition". In that case it was not suggested that s. 57 (1) (b) of the Internal Security Act, 1960, creates not one but two offences, one relating to the possession of ammunition and the other to the possession of explosive.

In their lordships' opinion the ground now sought to be advanced as a reason for the dismissal of the appeal, and sought to be advanced for the first time at the hearing before the Judicial Committee involves the presentation of a very different case to that which the accused had to meet at his trial and to that argued before the Federal Court. In the *Lee A Ba* case (6) the accused knew that he was charged with the possession of detonators. In this case the appellant was charged with the possession of six grenades when what was found in his possession was six grenade bodies. Detonators are expressly included in the definition of "explosive". Grenade bodies and the component parts of grenades are not mentioned in any definition in s. 2. If it had been alleged against him at his trial that despite the reference to grenades in the definition of ammunition, both grenades and their component parts were covered by that part of the definition of "explosive" quoted above, it may be—their lordships express no opinion on the matter—that the appellant would have had some answer to the charge. Their lordships refused leave to advance this ground as they did not think it right in all the circumstances that such a ground should be allowed to be advanced for the first time at the hearing before them.

For the reasons stated their lordships have allowed the appeal.

*Appeal allowed.*

Solicitors: *Gaster & Turner* (for the appellant); *Charles Russell & Co.* (for the Public Prosecutor).

[Reported by S. A. HATTEEA, Esq., Barrister-at-Law.]

(4) See *Public Prosecutor v. Koi* (and associated appeals), [1968] 1 All E.R. 419 at p. 428.

(5) Section 155 of the Criminal Procedure Code (c. 132), as re-enacted in 1955, provides: "No error in stating either the offence or the particulars required to be stated in the charge and no omission to state the offence or those particulars shall be regarded at any stage of the case as material unless the accused was in fact misled by such error or omission".

(6) [1968] 1 All E.R. 419.

A

## POPLE v. EVANS.

[CHANCERY DIVISION (Ungoed-Thomas, J.), November 14, 16, 17, December 6, 1967.]

B

*Res Judicata*—Dismissal of action for want of prosecution—Whether estoppel by record can be founded merely on such dismissal.

*Res Judicata*—Undisclosed principal—Contract for purchase of land entered into by C. acting as agent for principal whose identity and existence were unknown to vendor—Action by C. for specific performance—C. adjudicated bankrupt—Trustee in bankruptcy elected not to proceed with action—Undisclosed principal brought fresh action—Whether defendant could maintain *res judicata* based on the dismissal of C.'s action.

C

In an action by C. for specific performance of a contract for the sale of freehold land to him by the defendant, the latter pleaded that she was induced to enter into the contract by duress, and she counterclaimed for a declaration that the contract had been rendered void. In the purchase C. was acting as the undisclosed agent of the plaintiff, of whose existence the defendant did not know. C. having been adjudicated bankrupt, the official receiver informed the defendant, some months later, that C. had been acting as agent for the plaintiff in property transactions. Subsequently C.'s trustee in bankruptcy elected not to proceed with the action, which accordingly was dismissed. The plaintiff sued the defendant on the alleged contract, and the defendant applied to strike out the statement of claim as *res judicata*, relying on the order dismissing C.'s action.

E

**Held:** the plaintiff's claim was not barred as *res judicata* for the following reasons—

(i) where one of two parties to a contract was an agent for an undisclosed principal, any trust relationship as between the principal and the agent could not be recognised as between the other party to the contract and the principal (or the agent), with the consequence that in the present case the defendant could not maintain her plea of *res judicata* nor rely on the dismissal of the first action as a defence to the plaintiff's action (see p. 746, letter G, and p. 749, letter D, post).

F

Dicta of LORD ATKIN in *Allen v. F. O'Hearn & Co.* ([1936] 3 All E.R. at pp. 830, 831) followed.

G

(ii) estoppel by *res judicata* could not be maintained merely by reason of the dismissal of an action for want of prosecution, for the estoppel by *res judicata* was intended to be limited to the decision of issues on their merits as, e.g., when orders were made on trial or on admission or by way of compromise (see p. 752, letters G and I, post).

H

*Byrne v. Frere* ((1828), 2 Moll. 157) and *Magnus v. National Bank of Scotland, Ltd.* ((1888), 58 L.T. 617) followed.

*Kok Hoong v. Leong Cheong Kweng Mines, Ltd.* ([1964] 1 All E.R. 300) and dicta of LORD MAUGHAM, L.C., in *New Brunswick Ry. Co. v. British & French Trust Corp., Ltd.* ([1938] 4 All E.R. at p. 754) considered.

I

[As to basing *res judicata* on an order to dismiss for want of prosecution, see 15 HALSBURY'S LAWS (3rd Edn.) 210, para. 393 text and note (i); as to estoppel and *res judicata* where there is trust relationship, see *ibid.*, p. 200, para. 378 text and notes (b)-(f); and for cases on the subject, see 21 DIGEST (Repl.) 205-208, 67-86, 230, 231, 242-247, 263, 264, 418, 419.]

Cases referred to:

*Allen v. F. O'Hearn & Co.*, [1936] 3 All E.R. 828; [1937] A.C. 213; 106 L.J.P.C. 14; 156 L.T. 149; 44 Digest (Repl.) 415, 216.

*Byrne v. Frere*, (1828), 2 Moll. 157; 1 Digest (Repl.) 98, \*336.



- Harmer v. Armstrong*, [1933] All E.R. Rep. 778; [1934] 1 Ch. 65; 103 L.J.Ch. 1; **A**  
149 L.T. 579; 50 Digest (Repl.) 456, 1522.
- Howlett v. Tarte*, (1861), 10 C.B.N.S. 813; 31 L.J.C.P. 146; 142 E.R. 673;  
21 Digest (Repl.) 209, 100.
- Hoystead v. Taxation Comr.*, [1925] All E.R. Rep. 56; [1926] A.C. 155; 95  
L.J.P.C. 79; 134 L.T. 354; 21 Digest (Repl.) 249, 330.
- Kendall v. Hamilton*, [1874-80] All E.R. Rep. 932; (1879), 4 App. Cas. 504; **B**  
48 L.J.Q.B. 705; 41 L.T. 418; 1 Digest (Repl.) 668, 2351.
- Kok Hoong v. Leong Cheong Kweng Mines, Ltd.*, [1964] 1 All E.R. 300; [1964]  
A.C. 993; [1964] 2 W.L.R. 150; Digest (Cont. Vol. B) 248, 101a.
- Magnus v. National Bank of Scotland, Ltd.*, (1888), 58 L.T. 617; 57 L.J.Ch. 902;  
21 Digest (Repl.) 206, 75.
- Mercantile Investment and General Trust Co. v. River Plate Trust Loan and* **C**  
*Agency Co.*, [1894] 1 Ch. 578; 63 L.J.Ch. 366; 70 L.T. 131; 11 Digest  
(Repl.) 523, 1367.
- New Brunswick Ry. Co. v. British & French Trust Corp., Ltd.*, [1938] 4 All E.R.  
747; [1939] A.C. 1; 108 L.J.K.B. 115; 160 L.T. 137; 21 Digest (Repl.)  
231, 247.
- Priestly v. Fernie*, (1865), 3 H. & C. 977; 34 L.J.Ex. 172; 13 L.T. 208; **D**  
Digest (Repl.) 672, 2368.
- Selig v. Lion*, [1891] 1 Q.B. 513; 60 L.J.Q.B. 403; 64 L.T. 796; 5 Digest  
(Repl.) 1085, 8741.
- Warder v. Saunders*, (1882), 10 Q.B.D. 114; 47 L.T. 475; 5 Digest (Repl.)  
1084, 8735.
- Winkfield, The*, [1900-03] All E.R. Rep. 346; [1902] P. 42; 71 L.J.P. 21; **E**  
85 L.T. 668; 1 Digest (Repl.) 164, 518.
- Wright v. Swindon, Marlborough and Andover Ry. Co.*, (1876), 4 Ch.D. 164;  
46 L.J.Ch. 199; 5 Digest (Repl.) 1084, 8736.

### Motion.

By her notice of motion dated Oct. 23, 1967, Helen Margaret Evans, the  
defendant in an action commenced by writ issued on July 26, 1967, the **F**  
plaintiff, Marguerite Lilian Mary Pople, applied to the court asking that the  
plaintiff's statement of claim be struck out pursuant to R.S.C., Ord. 18, r. 19,  
and the inherent jurisdiction of the court on the grounds that (a) the statement  
of claim disclosed no reasonable cause of action in that the plaintiff was privy  
to proceedings on the same subject matter wherein a final order had been  
made in the defendant's favour; and (b) the statement of claim was an abuse **G**  
of the process of the court in that it averred matters previously conceded in  
such proceedings and was stale and oppressive. The facts are set out in the  
judgment.

The cases noted below\* were cited during the argument in addition to those  
referred to in the judgment.

*C. A. Brodie* for the plaintiff. **H**

*J. H. G. Sunnucks* for the defendant.

*Cur. adv. vult.*

Dec. 6. **UNGOED-THOMAS, J.**, read the following judgment: This  
is the defendant's application to strike out the statement of claim. The applica-  
tion is made under R.S.C., Ord. 18, r. 19, and the inherent jurisdiction of the **I**  
court, and as presented before me it is made exclusively on the ground of res  
judicata.

\* *Sadler v. Leigh*, (1815), 4 Camp. 195; *Short v. Spackman*, (1831), 2 B. & Ad. 962;  
*Huffer v. Allen*, (1866), L.R. 2 Exch. 15; *Re South Essex Estuary Co., Ex p. Chorley*,  
(1870), L.R. 11 Eq. 157; *James v. Smith*, [1891] 1 Ch. 384; *Jones v. Turney*, [1913]  
W.N. 72; *Cribb v. Freyberger*, [1919] W.N. 22; *Kinch v. Walcott*, [1929] All E.R. Rep.  
720; [1929] A.C. 482; *Re Drabble Brothers*, [1930] All E.R. Rep. 450; [1930] 2 Ch. 211;  
*Townsend v. Bishop*, [1939] 1 All E.R. 805.

A In February, 1965, Harry Roy Clarke commenced proceedings against the defendant in the present proceedings, Mrs. Evans, for specific performance of a contract made between them on Jan. 11, 1965, for sale to him of 230, Queen's Road, Portsmouth. The defence, delivered on June 17, 1965, so far as material, admitted the statement of claim, but it also pleaded that the contract was not binding on the defendant on the ground that she was induced to enter into it by duress on the part of Mr. Clarke. The defendant at the time counterclaimed for a declaration that the contract was voidable at the instance of the defendant and had been voided by her, and for other relief. A reply was delivered in August, 1965, which so far as material joined issue.

C A cheque for deposit on the purchase appears to have been signed by Mrs. Pople, the plaintiff in the present action, but although there was some solicitors' correspondence in January, 1965, about the contract it appears never to have been disclosed at that time that Mr. Clarke was acting as agent for Mrs. Pople or otherwise than as principal to the contract.

D In September, 1966, Mr. Clarke was adjudicated bankrupt and it then appears from the defendant's solicitors' letter of Feb. 8, 1967, that the official receiver informed them that Mr. Clarke acted as agent for Mrs. Pople in property transactions. Mrs. Pople's solicitors by letter dated May 18, 1967, claimed that he acted as her agent and trustee in the purchase of 230, Queen's Road from the defendant, Mrs. Evans. It also appears, however—and has been at any rate implicitly accepted throughout for the purposes of the present application—that the contract was made between Mrs. Evans and Mr. Clarke as agent for Mrs. Pople, as the principal both whose identity and whose existence were E disclosed to Mrs. Evans, and that, at the time of the pleadings in the 1965 Clarke action, and indeed until February to May of 1967 the existence of any such agency was not disclosed. In June, 1967, Mr. Clarke's trustee in bankruptcy informed the defendant's solicitors that he was not proceeding with the action, and on July 14, 1967, the action was dismissed by order made by the master. That order for dismissal is the order relied on to establish *res judicata* in this F case.

G On July 26, 1967, the present action by Mrs. Pople was commenced. The statement of claim is, so far as material, identical with the statement of claim in the Clarke action but with the added allegation that Mr. Clarke was at all material times Mrs. Pople's agent. No defence has been delivered in this present action, but on counsel's statement that it is intended to put in a defence so far as material identical *mutatis mutandis* with the defence in the Clarke action, it has been accepted with a view to saving costs, particularly as the defendant is legally aided, that the application should proceed as though such a defence had been delivered.

H It will be convenient first to dispose of two matters which were canvassed in argument: (1) the effect of the bankruptcy and the course taken by the trustee in bankruptcy on this application and (2), the application to this case of estoppel between parties and their privies, and of estoppel between parties and their privies and those in a quasi-privy relationship to them by reason of a contract of indemnity between such parties and quasi-privies.

I 1. Under R.S.C., Ord. 15, r. 7, Mr. Clarke's action did not abate on his bankruptcy. If Mr. Clarke's rights under the contract were held by him on trust for Mrs. Pople they would never vest in the trustee in bankruptcy at all; but, if they were not so held on trust, Mr. Clarke's rights would vest in the trustee in bankruptcy (see the Bankruptcy Act, 1914, s. 38 (1) (a) (c) and s. 167) (1). If they vested in the trustee in bankruptcy he would then have the right to elect whether or not to avail himself of the cause of action and go on with the action, and such

---

(1) For the Bankruptcy Act, 1914, s. 38 (1) (a) (c), and s. 167, see 2 HALSBURY'S STATUTES (2nd Edn.) 373, 442.

election is binding on the trustee and his successors in title (see *Wright v. Swindon, Marlborough, and Andover Ry. Co.* (2), *Warder v. Saunders* (3) and *Selig v. Lion* (4)). In this case the trustee in bankruptcy elected not to proceed. Therefore, whether Mr. Clarke's rights under the contract vested in the trustee or not, we are not concerned with any possible claim based on those rights by the trustee or those claiming under him.

2. I was referred to 15 HALSBURY'S LAWS OF ENGLAND (3rd Edn.), p. 196, para. 372, which classifies privies as being (i) in blood, (ii) in law and (iii) in estate. It is clear—and indeed I understand it to be common ground—that Mrs. Pople is not such a privy of Mr. Clarke. I will only add that as stated at p. 198, para. 374 in respect of privity of estate, the title relied on to establish such privity must arise after the judgment on which the *res judicata* is based, or at any rate after the commencement of the proceedings in which that judgment was made: and such title as Mrs. Pople might have here arose before relevant proceedings were commenced. A person who is under obligation to indemnify another in respect of liabilities may in certain circumstances be estopped from disputing a judgment obtained against that other, but such estoppel cannot arise here because it only operates as between the parties to the obligation to indemnify. It is not suggested here that Mrs. Evans is a party to such an obligation or that it arises otherwise than between Mrs. Pople and Mr. Clarke (see 15 HALSBURY'S LAWS OF ENGLAND, p. 199, para. 377 and *Mercantile Investment and General Trust Co. v. River Plate Trust, Loan and Agency Co.* (5)).

So I come to the two substantial issues in this case as argued before me. (A) Was Mr. Clarke trustee for Mrs. Pople of his rights under the contract with Mrs. Evans in such a sense as to enable Mrs. Evans to rely, as against Mrs. Pople, on the dismissal of the Clarke action; and (B) is that order of dismissal of such a nature that *res judicata* can be founded on it? If Mr. Clarke was a trustee for Mrs. Pople vis-à-vis Mrs. Evans of his rights under the contract then it is not disputed for Mrs. Pople for the purposes of this application (subject to the question whether the order in this case is of such a nature that *res judicata* can be founded on it) that Mrs. Pople would be estopped in this action by the judgment in the Clarke action; and the argument has proceeded on that basis. It is not disputed by Mrs. Pople—indeed it is claimed by her—that Mr. Clarke was her agent in entering into the contract, and in my view he would do so vis-à-vis Mrs. Pople as agent and trustee for her and would hold any property under that contract on trust for her; and that in my view would include all her rights under the contract (see, for example, *Harmer v. Armstrong* (6)). Mrs. Pople contends, however, that, vis-à-vis Mrs. Evans, Mr. Clarke was not a trustee for herself, Mrs. Pople. This raises the question whether an agent for a principal, whose identity and existence are undisclosed to a third party when the agent enters into a contract with that third party, is vis-à-vis the third party a trustee for the principal.

Where a contract is entered into with a third party by an agent for a principal, whose existence is not disclosed, the rights as against each other, of the principal and the agent on the one hand, and the third party on the other hand, may be summarised as a general rule in the ordinary case as follows. The contract may be enforced by the principal and the third party against each other (see 1 HALSBURY'S LAWS OF ENGLAND (3rd Edn.), p. 217, para. 494) and by the agent and the third party against each other (see p. 228, para. 516 and p. 236, para. 527). The agent's rights against the third party are lost by the intervention of the principal and are subject to any settlement with the principal (p. 237, para. 528). The principal's rights are not lost by payment to or settlement

(2) (1876), 4 Ch.D. 164.

(3) (1882), 10 Q.B.D. 114.

(4) [1891] 1 Q.B. 513.

(5) [1894] 1 Ch. 578 at pp. 595, 596.

(6) [1933] All E.R. Rep. 778; [1934] 1 Ch. 65.



**A** with the agent unless made within the scope of the agent's authority or apparent authority (p. 220, para. 500). The third party's rights against the principal or agent are lost by election of the third party, with the full knowledge of the facts, to look exclusively to the agent or the principal respectively or by judgment against the agent or the principal respectively (p. 219, para. 498 and 2 CHITTY ON CONTRACTS (22nd Edn.), para. 85). This mere summary of itself suggests

**B** that, as a general rule, in ordinary cases, the rights and obligations of the principal vis-à-vis the third party and of the agent vis-à-vis the third party are independent rights and obligations, save that the agent's rights are subordinate to those of the principal (see 2 CHITTY ON CONTRACTS (22nd Edn.), para. 60). There is no suggestion here that our case falls in any way out of the ordinary case or the general rule (7).

**C** In *Allen v. F. O'Hearn & Co.* (7), the first and last paragraphs of the headnote read as follows (8):

“C., an outside broker, who conducted his brokerage business through the defendants, who had a seat on the Toronto Standard Stock and Mining Exchange, gave instructions for the purchase and sale of shares without disclosing the name of his clients. Most of the transactions were on margin.

**D** C. found himself unable to find the cash for large purchases of a certain class of stock then open, and could not find the client for whom the purchases had been made. The defendants, purporting to act under powers given by the contract between them and C., proceeded to sell shares bought and held as security on the general account which mainly consisted of shares bought on behalf of C.'s clients, and in that way indemnified themselves

**E** against the loss on the particular stock in question. C. went into bankruptcy, making an assignment for the benefit of his creditors. On a claim for damages by C. and his trustee in bankruptcy against the defendants, the trial judge made a declaration (inter alia) that the defendants held the securities which they sold in trust for C. or his trustee in bankruptcy as trustee for C.'s customers and clients, and that the defendants had no right

**F** to charge those securities with the purchase price of the stock, and the judgment made provision for the determination and payment of damages. On appeal by the defendants the Court of Appeal of Ontario set aside this judgment. The plaintiffs appealed:—... Judgment of the Court of Appeal of Ontario, setting aside the judgment of the trial judge, affirmed.”

**G** LORD ATKIN gave the reasons of the Judicial Committee, a committee which also included LORD RUSSELL OF KILLOWEN and LORD MACMILLAN. LORD ATKIN dealt with the relations of the parties first in contract and then in property. With regard to contract he said (9):

“Their lordships are of opinion that this judgment cannot stand. So far as the rights of the parties depend upon contract, either Clarke's customers were undisclosed principals of Clarke in relation to the defendants, and had the contractual rights of such principals, or they were not. If they were, they had the right of suit for breaches of contract, or, alternatively, until they exercised their rights Clarke could sue: but these are ordinary legal rights. The supposed agent's rights would be to recover the damage suffered by him on the footing that he had been principal. He

**H** has no claim against the other party in the capacity of trustee; and though there have been countless actions in which an agent for undisclosed principals has sued in his own name, there appears to be no precedent for such an agent suing as trustee for his principals. What happens to the proceeds of a successful claim by such an agent is another matter. By virtue of his fiduciary relation to his principals, he may have to account to them for what he receives; but this is not the concern of the other party.”

(7) [1936] 3 All E.R. 828; [1937] A.C. 213.

(8) [1937] A.C. at pp. 213, 214.

(9) [1936] 3 All E.R. at pp. 830, 831; [1937] A.C. at p. 218.

It was suggested that these observations were directed to the ancient law of bailment, but this suggestion was founded on the mere reference in argument to *The Winkfield* (10) which was a bailment case. The passage quoted from LORD ATKIN's observations seems to me quite clearly to have no such restricted application. With regard to the claim in property, which consisted of the shares held by the third party brokers, LORD ATKIN said (11):

"If the case is looked at as a wrongful dealing with property apart from privity of contract the result is the same. As far as the shares agreed to be bought are concerned, if there is nothing due from the undisclosed principal either he or the agent must sue. No question of trusteeship arises. As far as the shares deposited as margin are concerned, the agent is in the position of mortgagee with a right to submortgage; a mortgagee is not a trustee; and if the shares are improperly dealt with by the submortgagee, the mortgagee can sue in his own right, or the mortgagor may under proper conditions sue to protect his property; but the mortgagee cannot sue as trustee for the mortgagor, for he is not trustee. In the case in question, either Clarke's rights passed to the trustee, or Clarke's customers alone could sue. Neither Clarke nor the trustee could sue as trustee for the customers . . ."

There is no question in our case, of course, of deposit of property as security, but in so far as the contract itself creates a right of property, it seems to me that it cannot afford any stronger ground for establishing a trust than in "the shares agreed to be bought" to which LORD ATKIN refers.

In *Kendall v. Hamilton* (12) EARL CAIRNS, L.C., thus explained the rights of a party who enters into a contract with an agent for an undisclosed principal (13):

"I take it to be clear that where an agent contracts in his own name for an undisclosed principal the person with whom he contracts may sue the agent or he may sue the principal, but if he sues the agent and recovers judgment, he cannot afterwards sue the principal, even though the judgment does not result in satisfaction of the debt. If any authority for this proposition is needed, *Priestly v. Fernie* (14) may be mentioned. The reasons why this must be the case are, I think, obvious. It would be clearly contrary to every principle of justice that the creditor who had seen and known and dealt with and given credit to the agent should be driven to sue the principal if he does not wish to sue him, and, on the other hand, it would be equally contrary to justice that the creditor on discovering the principal, who really has had the benefit of the loan, should be prevented from suing him if he wishes to do so. It would be no less contrary to justice that the creditor should be able to sue first the agent and then the principal, when there was no contract, and when it was never the intention of any of the parties that he should do so. Again, if an action were brought and judgment recovered against the agent, he, the agent, would have a right of action for indemnity against the principal, while, if the principal were liable also to be sued, he would be vexed with a double action. Farther than this, if actions could be brought, and judgments recovered first against the agent and afterwards against the principal, you would have two judgments in existence for the same debt or cause of action. They might not necessarily be for the same amounts, and there might be recoveries had, or liens and charges created, by means of both, and there would be no mode upon the face of the judgments, or by any means short of a fresh proceeding, of showing that the two judgments were really for the same debt or cause of action, and that satisfaction of one was, or would be, satisfaction of both. In the present case, I think that when the appellants sued Wilson and McLay, and obtained judgment against them, they adopted a course which was clearly within their

(10) [1900-03] All E.R. Rep. 346; [1902] P. 42.

(11) [1936] 3 All E.R. at p. 831; [1937] A.C. at p. 219.

(12) [1874-80] All E.R. Rep. 932; (1879), 4 App. Cas. 504.

(13) [1874-80] All E.R. Rep. at pp. 935, 936; (1879), 4 App. Cas. at pp. 514, 515.

(14) (1865), 3 H. & C. 977.

A power, and to which Wilson and McLay could have made no opposition, and that, having taken this course they exhausted their right of action, not necessarily by reason of any election between two courses open to them, which would imply that, in order to an election, the fact of both courses being open was known, but because the right of action which they pursued could not, after judgment obtained, co-exist with a right of action on the same facts against another person."

B  
LORD CAIRNS was not considering there the rights of the principal or the rights of the agent against the third party, which was the subject of LORD ATKIN's consideration in *Allen v. F. O'Hearn & Co.* (15). But in LORD CAIRNS' observations again there is no question of any trust or relationship between the principal and agent being recognised as between the third party on the one hand and the principal and the agent on the other hand, although such recognition would enter into the situation which LORD CAIRNS was considering.

C  
These cases appear to me to establish that where there is a contract between an agent for a principal, whose identity is undisclosed and a fortiori whose existence is undisclosed, then, whether their relationship with the third party is considered as sounding in contract or in property rights, there is no trust relationship between any of the parties which can be recognised as between the third party on the one hand and the principal and agent, or either of them, on the other hand.

D  
So the relationship on which the defendant founds *res judicata* does not in my view exist and his submission that *res judicata* applies fails; and it is idle to speculate whether *res judicata* might be established in some other way or whether some other remedy, such as stay of proceedings, might be obtained on some ground or other, and for my part I can well understand no such case being advanced. Mr. Clarke's agency, which might conceivably have been relied on to fasten the judgment in the first action onto Mrs. Pople was admittedly terminated before judgment, and such agency was thus not relied on for the defendant.

E  
I come now to the second substantial issue, namely whether *res judicata* can be based on an order of the nature which Mrs. Evans obtained in the Clarke action.

F  
VISCOUNT RADCLIFFE in *Kok Hoong v. Leong Cheong Kweng Mines, Ltd.* (16) thus stated the law with regard to *res judicata* founded on default judgments:

G  
"... default judgments, though capable of giving rise to estoppels, must always be scrutinised with extreme particularity for the purpose of ascertaining the bare essence of what they must necessarily have decided and, to use the words of LORD MAUGHAM, L.C. (17), they can estop only for what must 'necessarily, and with complete precision' have been thereby determined."

H  
If the judgment in the Clarke action was a default judgment within LORD RADCLIFFE's observations then it seems to me necessarily to follow that as the material allegations in the statement of claim were admitted, and the only issue on which the defendant could have succeeded in the action was the issue of duress, then that issue must have been determined by the order in the Clarke action and is accordingly *res judicata*, entitling the defendant to succeed on that ground on the pleadings in the present action. But is the judgment in the Clarke action a default judgment within LORD RADCLIFFE's statement? In the Clarke action there is no admission of duress by pleading, by default or otherwise. There was no compromise of the action and there was no trial. Mr. Clarke's trustee in bankruptcy elected not to proceed with the action and Mr. Clarke just did not attempt to carry it on. The position is thus stated in para. 4 of the affidavit of Mr. Mathews, the defendant's solicitor:

(15) [1936] 3 All E.R. 828; [1937] A.C. 213.

(16) [1964] 1 All E.R. 300 at p. 306; [1964] A.C. 993 at p. 1012.

(17) In *New Brunswick Ry. Co. v. British & French Trust Corp., Ltd.*, [1938] 4 All E.R. 747 at p. 756; [1939] A.C. 1 at p. 21.



"On Sept. 28, 1966, Clarke was adjudicated bankrupt. Clarke's trustee in bankruptcy refused to intervene in the said action *Clarke v. Evans* since he recognised that Clarke had at all times acted as the plaintiff's agent in or about the agreement. The defendant issued a summons in the said action *Clarke v. Evans* for an order that the action be dismissed on account of Clarke's bankruptcy; the official receiver was the sole respondent to this summons. The said summons was heard before Master HAWKINS in Chambers on June 21, 1967. At such hearing my London agents, Messrs. Bulcraig & Davis by Mr. Baskett attended and explained to Master HAWKINS that Clarke acted as the plaintiff's agent in and about the agreement and that the plaintiff wished to be substituted as plaintiff in the said action *Clarke v. Evans* though no formal summons for this purpose had been issued. The learned master however held that the plaintiff had no locus standi in the said action and that since Clarke's trustee in bankruptcy wished to take no part in the said action the same must be dismissed and the learned master duly made an order to that effect. At no stage before Master HAWKINS was any argument directed as to whether the agreement was valid and enforceable against the defendant and in this sense the merits of the action were not determined before the learned master."

So it seems clear to me that the dismissal was not as the result of trial admissions pleading default or otherwise in any sense a decision on the merits. It was just dismissal for want of prosecution.

In the *Kok Hoong* case (18), the judgment relied on to establish res judicata was a judgment in favour of the plaintiff in default of the defendant obtaining leave to appear and defend (19); it was not a dismissal for want of prosecution. Other cases were referred to for the defendant, but they were cases in which the order relied on for res judicata was founded on compromise, admissions or default tantamount to admissions, and thus in a sense at any rate on merit, and certainly not on mere want of prosecution.

I was referred to two cases in which res judicata based on want of prosecution were dealt with. The first was the Irish case of *Byrne v. Frere* (20). That was decided in the days of the old system of chancery procedure to which LORD RADCLIFFE'S comments on applying decisions covered by the old common law procedure are equally applicable. He said (21):

"But it is a valid criticism of its utility for the solution of questions of estoppel that arise now or in the future that the formula itself [the formula which was adopted in the old case of *Howlett v. Tarte* (22) to which LORD RADCLIFFE had just referred] could hardly avoid being conditioned by the special and very complicated rules by which the system was governed (see per LORD SHAW in *Hoystead v. Taxation Comr.* (23), and the exercise of imagination that is required in order to translate modern pleadings into the forms of the older ritual becomes progressively harder to achieve for those for whom the work of translation is by now merely an antiquarian exercise."

In *Byrne v. Frere* (24) it is stated that in 1797 the plaintiff filed another bill.

"That bill was answered, and issue joined, and the plaintiff not proceeding, the cause was set down by the defendant and the bill was dismissed in 1804, and the order of dismissal duly enrolled. The present bill was filed in 1808, and the plaintiff relied that not having appeared at the hearing for dismissal in 1804, the order of dismissal was an ex parte order, and was not a bar to a new bill for the same purpose."

(18) [1964] 1 All E.R. 300; [1964] A.C. 993.

(19) [1964] 1 All E.R. at pp. 302, 303; [1964] A.C. at p. 996.

(20) (1828), 2 Moll. 157. (21) [1964] 1 All E.R. at p. 306; [1964] A.C. at p. 1012.

(22) (1861), 10 C.B.N.S. 813.

(23) [1925] All E.R. Rep. 56 at p. 63; [1926] A.C. 155, at p. 168.

(24) (1828), 2 Moll. at p. 160.

A The Lord Chancellor of Ireland said (25):

"... it is truly said, dismissal of a bill for non-prosecution is not a bar to a new suit. It amounts to nothing. It has no effect even on the running of time. It lets in the operation of time, ab initio, as if no such bill had ever been filed. It may, I think, be looked to as evidence of conduct, certainly not as a record. But a bill dismissed after publication passed, is not a bill dismissed for non-prosecution. There is a difference between a mere dismissal for want of prosecution, and where the plaintiff having struggled for more time, the court has after publication dismissed the bill. That was the kind of dismissal in 1804. That approaches to adjudication. It cannot be called a dismissal for want of prosecution, because publication was passed, and after publication there can be no dismissal for want of prosecution. The defendant then has a right to a dismissal of a higher kind by setting down the cause, and having the decree of the court. It cannot be for want of prosecution, because the suit has been prosecuted when issue is joined, and each party has been at liberty to prove his case as he can, and publication passed. The dismissal after that is the judgment of the court pronounced against the plaintiff, and may be pleaded in bar if enrolled, or insisted on by way of answer. The decree if not enrolled must, and if enrolled may be given in evidence, if not pleaded in bar. A dismissal for non-prosecution has a different effect, being in effect a mere nullity;—so that the suit so terminated does not even affect the running of time. This is the doctrine which is consistent with common sense; otherwise a plaintiff perceiving that he failed in proving his case would suffer a dismissal, and then construct a new case upon the knowledge derived from the depositions in the suit terminated by dismissal after publication."

There it was held on the facts and in the context of the old procedure that the dismissal was not for want of prosecution; but it was recognised that *res judicata* could not be founded on dismissal for want of prosecution.

F The second case, *Magnus v. National Bank of Scotland, Ltd.* (26) was after the Supreme Court of Judicature Acts, 1873 and 1875. The second paragraph of the headnote conveniently states most of the facts:

"The plaintiffs, being in default in making discovery and answering interrogatories, informed the defendants that they intended to abandon the action, and would pay the costs. On the plaintiffs failing to do this, the defendants took out a summons to dismiss the action for want of prosecution. G The plaintiffs thereupon paid the defendants' costs, and at the hearing of the summons they appeared and consented to an order dismissing the action as against the defendants. The plaintiffs subsequently brought a fresh action against the same defendants in respect of the same subject-matter. The defendants raised the question whether the plaintiffs were not estopped by reason of the consent order made on the summons."

H I need only add to this a short paragraph (27). It reads:

"The question to be determined in the action against the National Bank of Scotland was precisely similar to that in the action brought by the plaintiffs against the Queensland National Bank; and it was thought more convenient that the action against the National Bank of Scotland should be I dismissed for want of prosecution or discontinued until after the action against the Queensland National Bank had been tried, and then to commence a fresh action if the decision was in the plaintiffs' favour."

It was held in that case that "as such order did not proceed upon a compromise of the cause of action, it was no bar to the subsequent action". KAY, J., said (28):

"Now, if that consent order had proceeded on a compromise of the cause

(25) (1828), 2 Moll. at p. 180.

(27) (1888), 58 L.T. at p. 618.

(26) (1888), 58 L.T. 617.

(28) (1888), 58 L.T. at pp. 619, 620.

of action, it would have been an absolute bar to a new action; but here the order was made on a summons to dismiss for want of prosecution, an order on which would not be a bar; and therefore, unless it is shown that the consent proceeded upon the compromise of the cause of action, I cannot see how it is possible to say this would be a bar. Can it be said that when you attend on a summons to dismiss for want of prosecution, and submit to an order by consent, that order is a bar to another action? That seems to me against all the rules of the court. There is a great deal more in this than mere technicality, because the principle of the court is that, unless the merits of the case have been dealt with, the dismissal of one action is not a bar to another action of the same kind. That is a very ancient rule of the Court of Chancery, which I should be sorry to see disturbed . . . how can it be justly said that this order, taken on summons to dismiss for want of prosecution, and taken by consent, ipso facto prevented another action being brought? It seems to me that where an order obtained on such a summons is expressed to be made by consent, the court may look behind the order, and see upon what terms that consent was given, and whether there be any ground for saying that it was intended to compromise the action altogether. On the other hand, if it is plain that there was no such agreement—no agreement whatever to put an end to the cause of action by compromise—then the mere fact that the order was worded ‘by consent’ does not, in my opinion, in the least degree prevent the bringing of this second action.”

This statement refers to the ancient chancery practice. It is in line with the passages quoted from *Byrne v. Frere* (29), and it applies to and bridges into the context of modern procedure the principle stated in *Byrne v. Frere* (29) that res judicata cannot be founded on an order of dismissal for want of prosecution. This is in keeping with the considerations of substance, not of technicalities, that have governed the development of res judicata. LORD MAUGHAM, L.C., said in *New Brunswick Ry. Co. v. British & French Trust Corp., Ltd.* (30):

“The doctrine of estoppel is founded on considerations of justice and good sense. If an issue has been distinctly raised and decided in an action in which both parties are represented, it is unjust and unreasonable to permit the same issue to be litigated afresh between the same parties or persons claiming under them; . . .”

That case and the *Kok Hoong* case (31) showed the concern of the courts to limit the operation of res judicata to issues which can be fairly regarded or treated as having been disposed of by the order relied on on their merits, for example, by trial admission or compromise. It seems to me that the non-technical and substantial nature of res judicata “founded on the considerations of justice and good sense” has no place for mere dismissal for want of prosecution, and that *Byrne v. Frere* (29) and *Magnus v. National Bank of Scotland, Ltd.* (32) rightly so establish.

So on each of the two grounds that have been argued I conclude that this application fails, that is (i) because Mr. Clarke was not vis-à-vis Mrs. Evans’ trustee for Mrs. Pople, and, independently of that ground, (ii) because the order dismissing the Clarke action was for want of prosecution, and res judicata cannot be founded on such an order.

*Motion dismissed.*

Solicitors: *Bulcraig & Davis*, agents for *H. F. E. Mathews*, Portsmouth (for the plaintiff); *Blyth, Dutton, Wright & Bennett*, agents for *Maidment, Palser, Watson & Bryant*, Portsmouth (for the defendant).

[Reported by JACQUELINE METCALFE, Barrister-at-Law.]

(29) (1828), 2 Moll. 157. (30) [1938] 4 All E.R. at p. 754; [1939] A.C. at p. 19.

(31) [1964] 1 All E.R. 300; [1964] A.C. 993.

(32) (1888), 58 L.T. 617.



A

## R. v. BENNETT.

[COURT OF APPEAL, CRIMINAL DIVISION (Widgery and Fenton Atkinson, L.J.J., and Roskill, J.), April 4, 1968.]

B

*Criminal Law—Sentence—Hospital order—Court of Appeal substituting hospital order with restriction for sentence of imprisonment—Transfer direction previously made by Secretary of State—Medical evidence available on appeal—Mental Health Act, 1959 (7 & 8 Eliz. 2 c. 72), s. 60, s. 65, s. 72—Criminal Appeal Act 1966 (c. 31), s. 4 (2)—Criminal Justice Act 1967 (c. 80), s. 97 (7).*

C

The appellant pleaded guilty to charges of indecent assault. The case was one where medical treatment would be appropriate, but, as no medical evidence complying with s. 60 of the Mental Health Act, 1959, was available, a sentence of imprisonment was imposed. After leave to appeal was given, an order was made by the Secretary of State under s. 72 of the Act of 1959 for the admission of the appellant to Broadmoor as a patient. On appeal evidence satisfying s. 60 was available.

D

**Held:** by virtue of s. 97 (7) of the Criminal Justice Act 1967 the Court of Appeal could entertain the further evidence and could make a hospital order, without contravening s. 4 (2) of the Criminal Appeal Act 1966, since a hospital order, which was remedial in purpose, could not be regarded as more severe than a sentence of imprisonment; accordingly the sentence of imprisonment would be quashed and a hospital order under s. 60 of the Mental Health Act, 1959, with a restriction under s. 65 for an indefinite period would be substituted (see p. 755, letters B, C and D, post).

E

Appeal allowed.

[As to hospital orders, see 29 HALSBURY'S LAWS (3rd Edn.) 524, 525, para. 985.

For the Mental Health Act, 1959, s. 60, s. 65, s. 72, see 39 HALSBURY'S STATUTES (2nd Edn.) 1013, 1019, 1027.

F

For the Criminal Appeal Act 1966, s. 4 (2), see 46 HALSBURY'S STATUTES (2nd Edn.) 55.]

Case referred to:

R. v. *Frith*, [1965] Crim. L.R. 736.

### Appeal.

G

This was an appeal by Daniel Joseph Bennett, who had pleaded guilty at Romford magistrates' court in March, 1967, to two charges of indecent assault on a boy. The appellant was committed for sentence to North-East London Quarter Sessions, where he asked for twenty-two similar offences to be taken into consideration. On Apr. 18, 1967, sentence was passed on him of three years' imprisonment concurrent on each charge. He appealed against sentence.

H

N. R. *Hannah* for the appellant.

**WIDGERY, L.J.:** The deputy chairman of North-East London Sessions obviously thought that this was a case for medical treatment and clearly, we think, would have been minded to make an order for medical treatment if he had had the power on the material put before him. Unfortunately, for a reason which has not been fully disclosed, the appellant was not represented in the court below; there was no one to see to it that the appropriate medical evidence was provided, and although one adjournment was ordered to try and remedy this omission the deputy chairman eventually found himself on Apr. 18 with a report from the prison medical officer which indicated the desirability of psychiatric treatment, but which was not a report complying with the requirements of the Mental Health Act, 1959, and thus insufficient to enable a hospital order to be made. Accordingly, the deputy chairman did all that he could do in the circumstances, namely, pass a sentence of imprisonment which would enable treatment

I

to be given under the prison rules, and the sentence which he passed was one of three years. A

Leave to appeal was given by the single judge, who clearly thought that another effort should be made to see whether an order involving medical treatment might not be substituted. As a result of that the appellant's mental condition was investigated afresh, and the reports forthcoming were such that the Secretary of State made an order under s. 72 of the Mental Health Act, 1959, under which he was admitted to Broadmoor as a patient. B

On the face of it that might have met the needs of the case, but the appellant proceeds with his appeal, contending through counsel that the proper order in this case was a hospital order under s. 60 of the Mental Health Act, 1959. He recognises that if a restriction order is imposed it may involve his being detained for more than three years, but recognises also that if he recovers within three years he may then regain his liberty. To that end this court has been provided with the appropriate medical evidence to satisfy the terms of s. 60 of the Mental Health Act, 1959. In particular, Dr. Neustatter, a medical officer qualified under s. 28 of the Act of 1959 and who is, of course, very well known to this court, has examined the appellant on two occasions and finds that he is suffering from schizophrenia and recommends that a hospital order should be made. That evidence is confirmed by a written statement from Dr. Schildt, who also diagnosed schizophrenia and also supports the view that a hospital order should be made. The appellant being already in Broadmoor no special arrangements for his admission are required. C D

This court is quite satisfied that the most effective way to deal with this case is to make a hospital order under s. 60 with a restriction under s. 65 for an indefinite period; and it only remains to consider whether there are any technical obstacles in the path of making such an order. First of all, the court's attention has been drawn to *R. v. Frith* (1) decided in the Court of Criminal Appeal on Oct. 11, 1965, where, in circumstances virtually identical with the present case, LORD PARKER, C.J., when giving the judgment of the court said: E

"The court has been asked notwithstanding to hear evidence now to the effect that at any rate since August this man has qualified for a hospital order. There is no evidence that at the time of the trial any hospital order could have been made. In those circumstances this court has refused to hear the further evidence, and that being the only point, the appeal is dismissed." F

The view taken there evidently was that further medical evidence called before this court would not justify the making of a hospital order; but, in our judgment, the difficulty then presented has been removed by the provisions of the Criminal Justice Act, 1967. Section 4 (3) of the Criminal Appeal Act, 1907, under which *R. v. Frith* (1) was decided, provided: G

"On an appeal against sentence the Court of Criminal Appeal shall, if they think that a different sentence should have been passed, quash the sentence passed at the trial, and pass such other sentence warranted in law by the verdict (whether more or less severe) in substitution therefor as they think ought to have been passed, and in any other case shall dismiss the appeal." H

No doubt the view was taken that since it could not be said that the court below ought to have made a hospital order without evidence that the Court of Criminal Appeal could not do so either. Happily there has now been a relaxation on this point by s. 97 (7) of the Criminal Justice Act 1967, which provides that: I

"On an appeal against sentence under this section or s. 3 of the Criminal Appeal Act 1907, the Court of Appeal, if it considers that the appellant should be sentenced differently for any offence for which he was dealt with by the court below, may—(a) quash any sentence or order which is the

- A subject of the appeal; and (b) in place of it pass such sentence or make such order as it thinks appropriate for the case and as the court below had power to pass or make when dealing with him for the offence . . .”

In our judgment, those new words permit us to hear the evidence of Dr. Neustatter and Dr. Schildt and to act on it, notwithstanding that there was no evidence before the court of trial on which a hospital order could be made.

- B Finally, it is necessary to consider whether the order which we now wish to make is in any way prohibited by the terms of the Criminal Appeal Act 1966 by virtue of which, as is well known, this court cannot when substituting a sentence impose a sentence of greater severity than that which was imposed in the court below. In our judgment, a hospital order, which is a remedial order designed to treat and cure the appellant, cannot be regarded as more severe than a sentence of imprisonment, even though in certain events the hospital order may involve the detention of the appellant for a longer period of time.

- C We are accordingly satisfied that no technical obstacle lies in our path and we are happy to allow this appeal, to quash the sentence of three years' imprisonment and to substitute a hospital order under s. 60 of the Mental Health Act, 1959, with a restriction under s. 65 for an indefinite period, coupled with a direction that he be returned to Broadmoor.

*Appeal allowed. Sentence varied.*

Solicitors: *Argles & Court* (for the appellant).

[Reported by S. A. HATTEEA, Esq., Barrister-at-Law.]

E

## SELDON v. DAVIDSON.

- F [COURT OF APPEAL, CIVIL DIVISION (Willmer and Edmund Davies, L.JJ.), May 2, 1968.]

*County Court—Appeal—Ruling that on the pleadings the burden of proof lay on the defendant, who therefore should begin—Whether appeal lies from such a ruling—Whether the ruling was a direction, decision or order within County Courts Act, 1959 (7 & 8 Eliz. 2 c. 22), s. 108.*

- G *Money—Loan—Burden of proof—Receipt of money admitted by defendant—Allegation by defendant that money a gift, alternatively that it was not repayable when the action was brought—No presumption of advancement arising—Whether burden of proof lay on defendant.*

- H By cheques drawn on Feb. 16 and Mar. 16, 1966, the plaintiff paid to the defendant, who was then her chauffeur-handyman, sums totalling £1,550 to buy himself a house, which he did. Subsequently the plaintiff demanded repayment of the money, the defendant refused, and the plaintiff brought an action in the county court to recover it. In his defence the defendant admitted receipt of the money but alleged that it was a gift, alternatively that it was not repayable at the date of issue of the writ. On appeal against a ruling of the county court that the burden of proof lay on the defendant, having regard to his admission of having received the money and that he, therefore, should begin,

- I **Held:** assuming that appeal lay against such a ruling, the burden of proof was on the defendant, who should therefore begin, because, in the absence of any circumstances tending to show that a presumption of advancement arose or that the money had been paid in settlement of an existing debt or that the cheques were given in return for cash, the admitted payments imported a *prima facie* obligation to repay (see p. 757, letters E, F and I, and p. 759, letters C, F and G, post).



*Cary v. Gerrish* ((1801), 4 Esp. 9) and *Welch v. Seaborn* ((1816), 1 Stark. 474) distinguished. A

**Quære** whether an appeal lies from a ruling of a county court judge that on the pleadings the burden of proof is on the defendant and that he therefore should begin (see p. 757, letter D, and p. 758, letter E, post).

[As to money paid at the request of another being repayable by him, see 8 HALSBURY'S LAWS (3rd Edn.) 227, para. 392; and for cases on the subject, see 12 DIGEST (Repl.) 587-589, 4533-4566. B

As to payment by cheque not being evidence of the existence of a debt, see 15 HALSBURY'S LAWS (3rd Edn.) 410, para. 734 text and note (c).

As to the nature of loans, see 27 HALSBURY'S LAWS (3rd Edn.) 13, para. 15; and as to presumptions of gift, see 18 *ibid.*, 386, 387, para. 736. C

As to cases in which no appeal lies from a county court to the Court of Appeal, see 9 HALSBURY'S LAWS (3rd Edn.) 322, para. 783; and for cases on the subject of county court appeals, see 13 DIGEST (Repl.) 464-475, 872-984.

For the County Courts Act, 1959, s. 108, see 39 HALSBURY'S STATUTES (2nd Edn.) 183.]

Cases referred to:

*Cary v. Gerrish*, (1801), 4 Esp. 9; 170 E.R. 624; 22 Digest (Repl.) 371, 3995. D

*Welch v. Seaborn*, (1816), 1 Stark. 474; 171 E.R. 534; 34 Digest (Repl.) 247, 448.

### Interlocutory Appeal.

This was an appeal by the defendant, George Shand Davidson, from a ruling that the burden of proof in the action lay on him, and that he should therefore begin, given by His Honour JUDGE LAWSON CAMPBELL, at Colchester County Court on Mar. 26, 1968. The action was brought by the plaintiff, Doris Ellen Seldon, for repayment of £1,550, receipt of which the defendant admitted. The facts are set out in the judgment of WILLMER, L.J. E

*R. A. W. Sears* for the defendant.

*C. W. S. Lubbock* for the plaintiff. F

**WILLMER, L.J.:** The defendant was employed as chauffeur and handyman by the plaintiff. In or about February or March, 1966, he was desirous of purchasing a house. For that purpose the plaintiff paid to him by way of two cheques, drawn respectively on Feb. 16 and Mar. 16, 1966, a sum of money amounting to £1,550. With the aid of that, we are informed, the defendant in fact bought the house. Later the parties appear to have fallen out, and the defendant was dismissed from his employment. In those circumstances the plaintiff sought to get back the money which she had paid to the defendant. On the money not being forthcoming, a specially endorsed writ was issued in the High Court. Appearance was entered but no defence was delivered, and in due course the plaintiff recovered judgment in default of defence. It appeared, however, that the absence of defence was due to some mistake on the part of the solicitor. Application was therefore made to set aside the judgment obtained by default, and an order in those terms was obtained. By agreement between the parties the action was remitted to the Colchester county court. In due course a defence was delivered, and subsequently amended. In its amended form it admitted the receipt of the two sums of money amounting to £1,550, but alleged that the payments made by the plaintiff were intended as a gift. Alternatively it was alleged that, if the payments were intended as a loan, then the loan was not repayable at the date of the issue of the writ. G

On those pleadings the case went to trial, and on Mar. 26, 1968, it was duly called on. At that point a submission was put before the judge by counsel for the plaintiff that, having regard to the admission of the receipt of these two cheques, the legal burden was on the defendant to prove one or other of the defences, that is either that there was a gift or, if a loan, it was not repayable at H

A the date of the issue of the writ. The judge ruled in favour of that submission. Application was then made by counsel for the defendant to adjourn the trial of the case in order that that ruling might be tested in this court. The matter, therefore, is sought to be brought before this court as a preliminary point.

Now that the case has reached this court, we are faced with a further preliminary point in objection to the appeal. It is said that there is no right of appeal against a ruling made in such circumstances as these. We have been referred in that connexion to s. 108 of the County Courts Act, 1959, the material part of which provides as follows:

C "Subject to the following provisions of this Part of this Act, if any party to any proceedings in a county court is dissatisfied with the determination or direction of the judge in point of law or upon the admission or rejection of any evidence, the party aggrieved by the judgment, direction, decision or order of the judge may appeal therefrom to the Court of Appeal ..."

It is said that, this being a mere ruling in the course of the trial, the matter does not come within any of the words used in that section, and consequently no appeal lies.

D I find that a question of some difficulty. There is considerable substance in the objection, but I do not propose to express any concluded opinion thereon. I am prepared to assume for the purpose of argument that an appeal against such a ruling does lie. I am happy to make that assumption because I am by no means satisfied that, if an appeal does lie, it is one which is entitled to succeed.

E In other words, I am not prepared to say that the learned judge gave a wrong ruling when he decided, as he did, that it was for the defendant to begin, the burden of proof being on him to make good the assertion put forward in his defence.

The way I look at it is this. Payment of the money having been admitted, prima facie that payment imported an obligation to repay in the absence of any circumstances tending to show anything in the nature of a presumption of advancement. This is not a case of father and child, or husband and wife, or any other such blood relationship which could have given rise to a presumption of advancement. Counsel for the defendant who has argued the case in support of the appeal, was constrained to admit that the house, which had been bought with the aid of the money paid by the plaintiff, is no doubt prima facie subject to a resulting trust in favour of the plaintiff. That being so, it would be strange indeed if the same considerations did not apply to the money paid by the plaintiff to the defendant to assist him in the purchase of the house.

There is very scanty authority on this subject. The researches of counsel took us back to the year 1801, and we were referred to *Cary v. Gerrish* (1). That was a case which no doubt bore a certain similarity to the present case, but it is, I think, distinguishable on the grounds which appear from the judgment of LORD KENYON. When this question was discussed before him, he said (2):

"No evidence is offered of the circumstances under which the draft was given; it might be in payment of a debt due by the testator, or the defendant might have given cash for it at the time."

I No such considerations arise in the present case; indeed, they are clearly ruled out because we have from the defendant in this case a clear admission of the payment of the money, and no suggestion that it was paid in settlement of an existing debt, or that it was given in return for cash, or anything of that sort. In the absence of any such circumstances, money paid by the plaintiff in circumstances such as these is prima facie repayable on demand. If the defendant seeks to evade repayment of the money which was paid to him, it seems to me that

(1) (1801), 4 Esp. 9.

(2) (1801), 4 Esp. at p. 10.

the learned judge was right in placing the onus on him to prove the facts which he alleges show that the money was not repayable. A

In those circumstances, even assuming that there is a right of appeal to this court on a ruling such as was given in this case, I am not prepared to say that the judge gave a wrong ruling, and I would therefore dismiss the appeal.

**EDMUND DAVIES, L.J.:** As to the first point, namely, whether an appeal is maintainable before this court in the present circumstances, I share the considerable doubts expressed by my lord whether this matter is properly before us. Counsel for the defendant concedes that he finds great difficulty in even attempting to persuade us that the judge's ruling that it was for the defence to begin was a "direction" within the meaning of s. 108 of the County Courts Act, 1959; but he says, so I understand, that he can bring himself within the later words of that same section where reference is made to "the party aggrieved by the judgment, direction or decision or order of the judge", counsel submitting that the judge here, by the action that he took, made an interlocutory order. He submits that, there being power to come before this court in respect of interlocutory orders, this appeal properly lies. B C

Like **WILLMER, L.J.**, I do not propose to express a final view on that submission. But, if it be right that whenever a judge makes a ruling in a county court matter, the party against whom that ruling is given may, in effect, say: "I do not want this county court hearing to proceed any further; I want to go to the High Court to get the ruling tested" and, on such an application being made, the county court judge adjourned the case, it may well be that a chaotic state of affairs would arise. As at present advised (but refraining from committing myself finally) I do not take the view that there was any "order" made by the county court judge in the present case save an order at the request of the defence that the trial should stand adjourned. D E

Leaving that matter in that somewhat inconclusive way, I propose to turn to the real gist of this appeal, for it would be regrettable, the parties being here, that they should go away empty-handed. F

Since the advancement of loans and the making of gifts have been common transactions amongst mankind for many centuries, there is a remarkable paucity of authorities as to on whom the burden lies of distinguishing the one type of transaction from the other. **CHITTY ON CONTRACTS** (3) and other standard works have been referred to, and from them have been culled two decisions. I propose to refer to both. They are old cases; they are none the worse for that, of course, but they are extremely briefly reported, and the extent to which they throw light on the circumstances of the present case is, with all respect, doubtful. G The important fact in the present case is that there is no blood relationship of any kind between the plaintiff and defendant. It appears that in 1966 the defendant (who for some years was employed by the plaintiff) was minded to buy a house. But he lacked the wherewithal to do so, and, as the pleadings disclose, in February and March, 1966, the plaintiff accordingly advanced to the defendant two sums of money amounting to £1,550. This money he utilised in order to purchase a house that he desired to secure for himself and his wife. There being no blood relationship, no husband-and-wife, no father-and-child, no adoptive-parent and adopted-child relationship between the plaintiff and the defendant, counsel for the defendant was forced to concede that in those circumstances, which accordingly gave rise to no presumption of advancement, the house must *prima facie* be regarded as being held by the defendant by way of a resulting trust for the benefit of the plaintiff. But, although that is conceded, it is nevertheless said that it is for the plaintiff to prove that the money was advanced by way of a loan and not as a gift. H I



A In the case referred to by counsel for the defendant, *Cary v. Gerrish* (4), LORD KENYON observed:

“There is no evidence to establish a debt. No evidence is offered of the circumstances under which the draft was given; it might be in payment of a debt due by the testator; or the defendant might have given cash for it at the time.”

B None of those possibilities arise in the present case. It is clear, from the assertion contained in the defence, that the advancements were made by way of gift, that no question here arises of the plaintiff repaying by the advancements a debt which she owed to her employee, nor is there any question of the defendant having given cash in return for the cheques drawn by the plaintiff. Again, if one turns to the only other case cited in CHITTY ON CONTRACTS (22nd Edn., Vol. 2, p. 413) *Welch v. Seaborn* (5), the facts are quite distinguishable. There the assignees of a bankrupt, in order to establish the petitioning creditor's debt, proved that a sum of money had been paid over; and LORD ELLENBOROUGH, whose judgment is reported in a mere 3½ lines, is said to have been

D “of the opinion there was not sufficient evidence to leave it to the jury whether this money had been advanced . . . by way of loan, since the presumption of law was that money when paid is paid in liquidation of an antecedent debt.”

Again, the state of the pleadings in the present case rules out any such presumption here.

E Accordingly, one is really driven back to consider this matter without the assistance of authority; and, being so unassisted, I ask myself what is to be inferred as to the nature of the transaction when the simple payment of money is proved or admitted between strangers. I entirely agree with WILLMER, L.J., that on that bald state of affairs, proof of payment imports a prima facie obligation to repay the money in the absence of circumstances from which a presumption of advancement can or may arise.

F WILLMER, L.J., has expressed the view that the loan would be repayable on demand. I would say, if not repayable on demand, at least repayable within a reasonable time of a request for repayment; and, of course, if it be the case that mere loans were made, and later on the borrower repudiates the loans and asserts that the advancements were by way of out-and-out gifts, that repudiation of the true nature of the transaction would upon any view render the loans immediately repayable.

G Accordingly, assuming that this court has jurisdiction to hear this appeal, I have come to the conclusion that the ruling of the judge below was perfectly right, and that this trial should proceed on the basis that it is for the defendant to establish that which he asserts, namely, that he received the two sums of money from the plaintiff was by way of a gift.

H I would therefore dismiss this appeal.

*Appeal dismissed.*

Solicitors: *Oswald Hickson, Collier & Co.*, agents for *Desmond Pye*, Clacton-on-Sea (for the defendant); *Thompson, Smith & Puxon*, Colchester (for the plaintiff).

I [Reported by HENRY SUMMERFIELD, Esq., Barrister-at-Law.]

(4) (1801), 4 Esp. at p. 10.

(5) (1816), 1 Stark. 474.

NOTE.FORSPAN *v.* ALTMANN.

[CHANCERY DIVISION (Megarry, J.), May 16, 17, 21, 22, 23, 1968.]

*Practice—Trial—Lists—Witness list—Estimate of expected duration—Revision of estimate in the light of supervening circumstances—Chancery Division.***Action.**

This action was set down for trial and entered in Part 1 of the witness list. The duration of the trial was estimated at between two and three days. After the hearing had lasted four days a settlement was reached. After the settlement was agreed and HIS LORDSHIP (MEGARRY, J.) had made an order staying all further proceedings except for the purpose of carrying the terms into effect, he referred to the estimate of expected duration of the trial, intimating that it seemed to have been a substantial under-estimate. There had been no communication with any official of the court that the estimate which was given some while before the case was tried and at a time when the bundle of documents had not yet been agreed, was likely to prove an under-estimate. Moreover counsel who signed the certificate had not at that time seen any of the witnesses, one of whom at any rate, the plaintiff, was not able to speak English fluently.

MEGARRY, J., intimated that estimates were essentially for the counsel concerned to discuss between themselves, that if either side knew of any element that might extend the hearing, there was a duty to disclose it to the other side, and that if there were, as in the present case, a witness (or perhaps witnesses) whose command of English was rather less than perfect that was a consideration that should be disclosed to the other side. [HIS LORDSHIP continued:] In this case the estimate made by junior counsel on each side then engaged in the case was made apparently some while before the hearing commenced. The estimate put in did not in fact bear any date, as it should have done. The estimate was for two to three days. The hearing in this case has so far taken some four days, although part of that time was occupied by judgment being delivered in another case. At all events, well over three full days have been devoted to this case. In that time the case has been opened, the evidence of two witnesses taken on commission has been read, but apart from that no witness called by the plaintiff has yet completed his evidence, and the plaintiff himself is still under cross-examination.

Paragraph 5 of a *Practice Direction* in 1954 (1) relating to the witness list, reads as follows:

“If circumstances affecting the probable length of a case appearing in the list arise, notice of the fact, and, where appropriate, a revised estimate of the length of the hearing, must be given promptly to the cause clerk, who will note it and transmit it to the clerk of the judge in charge of the list.”

In a further *Practice Direction*, given in 1966 (2), it is directed:

“If a case is settled, or if circumstances affecting its probable length arise, notice of the fact, and, where appropriate, a revised estimate in writing of the length of the hearing, must be left promptly with the cause clerk (room 136), who will note it and transmit it to the clerk to the judge in charge of the list.”

I should make it plain that I regard it as the primary responsibility of junior counsel to make this estimate, for they are in the best position to judge, or ought to be able to put themselves in that position. Where leading counsel are briefed in a case, as they were in this, they must share that responsibility. The briefing of leading counsel, too, may well be one of the circumstances affecting the probable length of a case within the *Practice Direction* (2) and so require a reconsideration of any estimate already made.

(1) [1954] 1 All E.R. 946; [1954] 1 W.L.R. 693.

(2) [1966] 2 All E.R. 720, para. 3; [1966] 1 W.L.R. 1125.

- A** In the present case there has been a woeful under-estimate of the duration of the case, and this under-estimate was never revised. Such under-estimates make the task of regulating the list far more difficult, and in particular they are liable to cause hardship to other litigants and witnesses, their solicitors and their counsel, by making it impossible to provide a judge on the date fixed for the trial. Nobody who has practised for any time at the Bar can fail to appreciate the
- B** great difficulty of estimating the duration of a case, and I certainly do not; but I cannot refrain from saying that in this case the estimate of two to three days seems to me to be one which, at the outset of the trial, it was quite impossible to justify as being realistic, even making the most generous allowances for the difficulties inherent in all prophecies, and discounting to the full the advantages of hindsight.
- C** I say no more about this particular case, but I have said what I have said in the hope that it will be appreciated by counsel practising in this Division that an estimate of the length of a witness action is not something to be made and then forgotten, but is a continuing representation which may easily become falsified by supervening events. And, I may add, it is not only in the field of vendor and purchaser, where there is *With v. O'Flanagan* (3) to remind us, that
- D** there is a duty to correct a representation if, though true when made, it later becomes untrue.

[Reported by R. W. FARRIN, ESQ., Barrister-at-Law.]

## **E** R. v. LONGMAN. R. v. RICHARDSON.

[COURT OF APPEAL, CRIMINAL DIVISION (Edmund Davies and Widgery, L.JJ., and Lyell, J.), March 25, 26, 27, 1968.]

*Criminal Law—Evidence—Character of accused—Evidence of good character tendered—Bad character shown by cross-examination—Weight to be given by jury to both categories of evidence when assessing general credibility of accused.*

- F** Evidence of character, when properly admitted, goes to the credibility of the witness concerned, whether the evidence discloses good character or bad character; accordingly, if an accused calls evidence of good character and is shown by cross-examination to have a bad character, the jury may give this fact such weight as they think fit when assessing the general credibility of the accused, but they cannot be expected to disregard the evidence of bad character in their assessment of the accused's credibility (see p. 768, letter D, post).
- G**

*R. v. Rowton* ([1861-73] All E.R. Rep. 549) distinguished; and direction in *R. v. Cook* ([1959] 2 All E.R. 97) considered and explained.

- H** *Criminal Law—Evidence—Credit—Impeaching credit of witness—Evidence of belief that witness not worthy of credit—Particular facts, circumstances and incidents forming basis of opinion not admissible in examination-in-chief.*

In examination-in-chief of a defence witness as to the reputation for veracity of the principal prosecution witness, the former was asked whether he would believe her on oath and answered that "in certain particulars she could be believed on her oath". The trial judge intervened to stop further answer, the defence witness merely adding "but . . .". No further question was permitted to be put in this respect. On appeal against conviction, it was accepted that defending counsel would have put the further question whether, from personal knowledge of the prosecution witness, the defence witness would believe her on her oath. The expected reply to this would

(3) [1936] 1 All E.R. 727; [1936] Ch. 575; 105 L.J.Ch. 247; 154 L.T. 634; 35 Digest (Repl.) 32, 233.



have been that if the prosecution witness was frightened (as it seems that she was) she would have been capable of telling lies on oath.

**Held:** the further question stated above should have been allowed and (semble) the defence witness should not have been cut short in his attempt to qualify his initial answer, but no miscarriage of justice had resulted, for even if the expected answer had been given it would not have helped the jury in reaching their decision; accordingly, if there had been irregularity in disallowing evidence, the proviso would be applied (see p. 766, letters B, C, F and G, and p. 767, letter B, post).

Principles governing the admissibility of evidence to impeach the credibility of a witness summarised (see p. 764, letter I, to p. 765, letter A, post).

*R. v. Gunewardene* ([1951] 2 All E.R. 290) considered.

Appeals dismissed.

[As to credibility of witnesses other than defendant, see 10 HALSBURY'S LAWS (3rd Edn.) 448, 449, para. 827; and for cases on the subject, see 14 DIGEST (Repl.) 322, 3115; 515-518, 4987-5010.]

As to cross-examination of defendant as to character, see 10 HALSBURY'S LAWS (3rd Edn.) 449-451, para. 828; and for cases on the subject, see 14 DIGEST (Repl.) 410-412, 4008-4085.]

Cases referred to:

*R. v. Bellis*, [1966] 1 All E.R. 552, n; [1966] 1 W.L.R. 234; 130 J.P. 170; 50 Cr. App. Rep. 88; Digest (Cont. Vol. B) 171, 3994b.

*R. v. Cook*, [1959] 2 All E.R. 97; [1959] 2 Q.B. 340; [1959] 2 W.L.R. 616; 123 J.P. 271; 43 Cr. App. Rep. 138; Digest (Cont. Vol. A) 374, 4942a.

*R. v. Gunewardene*, [1951] 2 All E.R. 290; [1951] 2 K.B. 600; 115 J.P. 415; 35 Cr. App. Rep. 80; 14 Digest (Repl.) 531, 5154.

*R. v. Rowton*, [1861-73] All E.R. Rep. 549; (1865), Le. & Ca. 520; 34 L.J.M.C. 57; 11 L.T. 745; 29 J.P. 149; 10 Cox, C.C. 25; 14 Digest (Repl.) 322, 3115.

*Toohy v. Metropolitan Police Comr.*, [1965] 1 All E.R. 506; [1965] A.C. 595; [1965] 2 W.L.R. 439; 129 J.P. 181; 49 Cr. App. Rep. 148; Digest (Cont. Vol. B) 263, 5319a.

### Appeals and applications.

These were appeals and applications for leave to appeal against conviction and sentence. The appellant Albert John Longman and the appellant Charles William Richardson were convicted at the Central Criminal Court on July 20, 1967, before O'CONNOR, J., and a jury of two counts of conspiracy to pervert the course of public justice. The appellant Longman was sentenced to eight and six years' imprisonment concurrent, the appellant Richardson to twelve and eight years' imprisonment concurrent. The following statement of facts is summarised from the judgment of the court.

Between June 28 and July 27, 1966, there was a trial at the Central Criminal Court which arose out of an affray on Mar. 8, 1966, at a club in Catford, in the course of which there were many seriously injured and one man was killed. Among those being tried for taking part in that affray was Edward Richardson, the brother of the appellant Richardson. The appellants were known to each other. The case for the Crown was that the appellants, with others, conspired together to pervert the course of public justice: they were charged on count 1 with trying to influence the jury, and on count 2 with suborning witnesses at that trial. The evidence on the existence of those conspiracies depended for all practical purposes entirely on the testimony of a Mrs. Clemence whose evidence conflicted with that of the appellants.

Serving on the jury at the affray trial was Mr. Charles North. On July 1, 1966, he was visited by two unknown men, seeking to tamper with him in the discharge of his duties as a juror. Mr. North reported the visits to the police. On July 13, 1966, a bottle containing a threatening note was thrown through one

**A** of his windows. Two other jurors testified that they had also received telephone calls from strangers while they were acting as jurors.

In evidence, Mrs. Clemence said that, in September, 1964, the appellant Longman had arrived at her flat telling her that he had been told by the appellant Richardson to look after her and her flat. By November, 1964, they were living together as man and wife; and, except for a period between August, 1965, and

**B** February, 1966, they continued to do so until July, 1966.

The particulars of the charge laid in count 1, which related to the period between June 28 and July 28, 1966, were that the appellants had conspired with others to attempt to influence the jury in trying Edward Richardson at the Central Criminal Court. Mrs. Clemence testified that, during the week beginning

**C** with July 11, 1966, the appellant Longman visited the Central Criminal Court, according to him, each day, saying to her that he was going there to look at the jurors' faces and try to find out where one of them lived; and that he also told her that the appellant Richardson wanted a new trial. She gave evidence of three visits which she had paid with the appellant Longman to the appellant Richardson's house, the last being on July 16, 1966, the other two probably being on July 13 and 14, 1966. She said that, on the first visit, they picked up a

**D** man at a public house who followed them in his car to the appellant Richardson's house. On the way the appellant Longman told her that the man they had picked up had just done ten years for safe blowing. She stayed in the car outside the appellant Richardson's house but later went in, quite shortly after which the man they had picked up left. She then saw the appellant Richardson read out from a list the names of the jurors to the appellant Longman, telling him to

**E** find their names in the telephone books and to ring up the names until he was sure that he had got the right one. She remembered three of the names which she had heard, one of them being North. Mrs. Clemence asserted that, during this visit, she heard the appellant Longman explain to the appellant Richardson that he planned to follow one of the jurors from the Central Criminal Court to his home. She said that the following evening the appellant Longman again drove

**F** her to the appellant Richardson's house where once more she remained outside. Later, she saw the appellant Richardson and a man named James Fraser leave the house. The appellant Longman took her to a public house, after which they went back to the appellant Richardson's house. She asserted that the appellant Longman told her that the appellant Richardson had thrown a bottle through a juror's window and threatened her to say nothing about it, or of Fraser and the

**G** appellant Richardson leaving the house that night. On July 16, 1966, she said that when she and the appellant Longman arrived at the appellant Richardson's house, she again remained outside in the car. Whilst she was there, she saw the man that they had picked up in the public house on the first visit arriving with another man in a car. She said that she became terrified that she was going to be hurt and that she went to a telephone box and telephoned New Scotland

**H** Yard. That telephone call was confirmed by the police. While she was telephoning, the appellant Longman drove up and she cut short her conversation telling him that she had been speaking to her father. She did not see the appellant Richardson, nor, after that day, did she see either of the appellants. She further said that, during that week, the appellant Longman told her that he was a professional frightener.

**I** Other evidence tendered in support of the allegations of conspiracy consisted of documents found at one or another of the appellant Richardson's premises and they all related to some part of the affray trial. There was a cigarette packet which had the name of North written on it in the appellant Richardson's handwriting, others were about North and certain police officers being in a conspiracy, and another was a document with the name "Sutters" on it, that being the name of the foreman of the affray jury.

The second count was laid between Mar. 8 and July 18, 1966. It alleged a

conspiracy to pervert justice by suborning Crown witnesses on the trial of Edward Richardson for making an affray. The evidence as to that was again that of Mrs. Clemence, who said that, while the appellants were talking during the first visit to the appellant Richardson's house, she heard him say that he was very pleased about the way a girl had given her evidence and asked the appellant Longman if he had looked after her. The appellant Longman replied that they had given her the money and seen her off to Manchester. A document in support of that testimony was tendered. It was in the appellant Richardson's handwriting and contained an entry "Longman 50 Manchester". The appellant Richardson said in evidence that that related simply to £50 which he had lent to the appellant Longman who wanted to go to Manchester.

Mrs. Clemence was strongly attacked, not only as an unreliable witness in the ordinary sense but as a person suffering from hallucinations. It was said that she had spells of drunkenness when her imagination ran riot and she entertained entirely groundless fears. She was said to be a prostitute and a deliberate perjurer, and her whole history and background, as well as her relationship with the appellant Longman was investigated. She maintained that she was terrified of the appellant Longman, that she did not want him at her flat, had no affection for him and had repeatedly tried to get away from him. The appellant Longman said that she was happy with him and even wanted him to marry her.

Apart from the appellant Longman accepting that he went on three occasions with Mrs. Clemence to the appellant Richardson's house, the appellant denied all of Mrs. Clemence's evidence. The appellant Richardson gave an explanation of the document with the name "Sutters" on it, his photograph and name having appeared, it seemed, in a newspaper after the affray trial. To support their case and to discredit Mrs. Clemence, a Mrs. Davies was called to say that Mrs. Clemence appeared to be perfectly happy with the appellant Longman; and a Dr. Hitchens was called to testify concerning Mrs. Clemence's reputation for veracity (see p. 765, letters B to F, post).

*C. L. Hawser, Q.C., and L. K. Lassman* for the appellant Longman.

*R. Millner, Q.C., and J. Lloyd-Eley* for the appellant Richardson.

*E. J. P. Cussen and C. J. Crespi* for the Crown.

EDMUND DAVIES, L.J., having stated the nature of the appeals and reviewed the facts and the evidence, continued:] The principal ground relied on by both appellants involves a point of pure law and it is, therefore, one on which they are entitled to appeal as of right, and, in respect of this and other points of law to be mentioned, we treat this as the hearing of the appeals based on them. It arises from what transpired at the trial when counsel for the appellant Longman sought to discredit the vital evidence of Mrs. Clemence by calling a witness to establish that her testimony could not be relied on. The method resorted to for this purpose, although little known, has considerable antiquity in the law. It was considered in detail by LORD GODDARD, C.J., in *R. v. Gunewardene* (1), which in this respect was unaffected by, and indeed approved, in *Toohy v. Metropolitan Police Comr.* (2). The legal position may be thus summarised:—

1. A witness may be asked whether he has knowledge of the impugned witness's general reputation for veracity and whether (from such knowledge) he would believe the impugned witness's sworn testimony.
2. The witness called to impeach the credibility of a previous witness may also express his individual opinion (based on his personal knowledge) whether the latter is to be believed on his oath and is *not* confined to giving evidence merely of general reputation.
3. Whether, however, his opinion as to the impugned witness's credibility be based simply on the latter's general reputation for veracity or on his personal knowledge, the witness cannot be permitted to indicate during his examination-in-chief the

(1) [1951] 2 All E.R. 290 at pp. 292-294; [1951] 2 K.B. 600 at pp. 606-610.

(2) [1965] 1 All E.R. 506; [1965] A.C. 595.



A particular facts, circumstances or incidents which formed the basis of his opinion, although he may be cross-examined as to them.

This method of attacking a witness's veracity, though ancient, is used with exceeding rarity. Nevertheless, it was sought to be made use of in the present case by junior counsel who appeared for the appellant Longman. He called a Dr. Hitchens, a geologist, who occupied with his wife a flat immediately above

B that of Mrs. Clemence, and the material part of the transcript reads in this away:

"Q. Are you aware, doctor, of her reputation for veracity? A. In a general way, yes. Q. Would you believe that lady on her oath? (O'CONNOR, J.) Now think carefully before you answer that question. You are on your oath. Do you understand the question which counsel had put to you?

C A. I do indeed, my lord. Q. Yes? A. I would say that in certain particulars she could be believed on her oath. (O'CONNOR, J.) Yes, that is enough.

A. But—— (O'CONNOR, J.) No that is enough. (Counsel) With your lordship's permission—— (O'CONNOR, J.) Certainly not. You have got your answer from the witness. (Counsel) The witness has said that certain

conditions might be applied to her oath. (O'CONNOR, J.) You are not allowed to enquire into conditions. I have ruled on it and I am not going to permit it.

D (Counsel) In my respectful submission, the witness should be permitted by your lordship to finish the answer to the question which he has given.

[Then the learned judge intervened] He has answered that question. You cannot put it again. (Counsel) My lord, with respect—— (O'CONNOR, J.)

E He has given you your answer, and I am not going to permit you to put it again. (Counsel) Would your lordship forgive me? (O'CONNOR, J.) That is

the question framed in a different way, from a different case. It is only an example of a writer of a text-book giving examples of this anomaly in our

law. (Counsel) My lord, I am bound to say that on my understanding of the two questions set out in ARCHBOLD (3), para. 1350, there is difference in substance between those two questions. (O'CONNOR, J.) I have ruled against you on this."

F We have thought it right out of respect for junior counsel and for the submission based on it to quote the entirety of the passage in the transcript which relates to this particular matter. Dealing with Dr. Hitchens' evidence in the course of his summing-up, the trial judge said:

G "The law permits a defendant to call a witness to come and say, if he is prepared to do so, 'I would not believe that witness on her oath'. Full stop.

And I assure you it was in no way derogatory to Dr. Hitchens that I asked him whether he had any religion before he was sworn. I wanted to make sure, if he was going to give that piece of evidence—because there was no

other purpose to call him, there was nothing more that he could say—that you should appreciate just where we stood on it, and that he should appreciate

H it; what he was saying, if he was going to say, 'I don't believe that person on oath.' When it came to the crunch, of course, he didn't say it.

Perhaps it came as no surprise to you."

The criticism based on these passages is of two kinds and we deal with them in turn. First, it is said that, while junior counsel was permitted to ask Dr. Hitchens whether, in the light of Mrs. Clemence's general reputation for veracity,

I he would be prepared to believe her on her oath, the question was never allowed to be answered in its entirety. It is submitted that the form of such answer as

Dr. Hitchens gave showed that he desired to qualify it in some way and was prevented by the judge from uttering more than the single qualifying word,

"But——." It is clear from the transcript that junior counsel also desired to ask another question of Dr. Hitchens, and we were told (and we accept) that it would have been in this form: "From your personal knowledge of Mrs.

Clemence would you believe her on her oath? " That question, in our judgment, he should have been permitted to put, but we have some sympathy with the trial judge suddenly confronted as he was with a situation which so rarely arises that not one of their lordships who decided *Toohy's* case (4) had throughout their extensive careers ever experienced it. Nevertheless, we are obliged to rule that the trial judge was technically wrong in ruling out that further question. Whether he was also wrong in cutting short Dr. Hitchens' attempt to qualify his earlier answer is far less clear; for it looks very much as though the witness was proceeding to adduce his reasons for qualifying it, and we know of no authority which permits that to be done. In any event, however, granted some degree of technical irregularity, the ultimate question must be whether it appears that a miscarriage of justice resulted or whether this is a case for applying the proviso to s. 4 (1) of the Criminal Appeal Act, 1907. To enable this court to decide that point, we inquired of leading counsel for the appellant Longman what was the most that junior counsel hoped to elicit from Dr. Hitchens had he not been checked by the trial judge. With the candour one would expect, leading counsel told the court that junior counsel hoped to obtain from Dr. Hitchens evidence establishing the following passage in his proof (and I quote it verbatim):

" If she [Mrs' Clemence] were under pressure or frightened or bore some hostility towards someone, she would be capable of telling lies on oath. I would not say she would always be, and in my opinion it would depend on the circumstances."

This court entertains the strongest doubt that, in the light of the existing authorities, Dr. Hitchens could have been permitted to say any such thing. It seems tantamount to giving reasons why at times he would not believe Mrs. Clemence even when on oath, and that would certainly be impermissible; but even if such an answer were strictly admissible, what possible help could the jury have derived therefrom? Did they need to be told that Mrs. Clemence, in common with a myriad other people, might be tempted to stray from the path of strict veracity if she walked in terror or suffered from feelings of hostility! The material question for them (as for any jury in any case) was whether the particular witness could in the proved circumstances be regarded as reliable, and as to this the hoped-for answer from Dr. Hitchens would afford no guide whatsoever. Accordingly, if irregularity there was, we have no hesitation in holding that no miscarriage of justice resulted therefrom and applying the proviso thereto.

It is secondly complained that, in the passage from the summing-up which we have quoted, the trial judge did not accurately represent the answer which Dr. Hitchens in fact gave and made no reference to the qualifications which he desired to make. As far as it went, we think that the summing-up was correct, for it was the truth that Dr. Hitchens had not unqualifiedly said: "I don't believe Mrs. Clemence on oath". The jury had heard all that had transpired, and we have already expressed our doubts that junior counsel was entitled to pursue the matter any further than he did. Even were he entitled to do so, however, and had elicited from Dr. Hitchens the aforementioned material, and assuming that the effect thereof had been duly dealt with in the summing-up, we cannot conceive that it could have made any possible difference to the outcome of the trial. In this respect also, if it be necessary, we do not hesitate to hold that no miscarriage of justice resulted and that the proviso should be applied to cure any possible technical irregularity. [His LORDSHIP then referred to other grounds of appeal on behalf of the appellant Longman, said that the court found them ill-founded and refused the application for leave to appeal founded thereon and continued:] Furthermore, for the reasons already given, the appeal by the appellant Longman based on points of law against his conviction on both counts is dismissed.

A We turn to the case of the appellant Richardson. We have already said all that we desire to say regarding the point of law as to the evidence of Dr. Hitchens as to which this appellant also is entitled to appeal as of right, which appeal we now have heard. Counsel for the appellant Richardson's next submission, involving as it does a point of law, entitled the appellant Richardson to appeal, and again that appeal we have heard. It has reference to the direction of the learned judge on the relevance of evidence relating directly not to the appellant Richardson but to the appellant Longman's previous bad character. The defence, having attacked the character of Mrs. Clemence, it was obvious that the appellant Longman would in due course be cross-examined as to his previous criminal record, and to anticipate this his counsel brought out his record in examination-in-chief. The judge's direction on the relevance of evidence of bad character was in these terms:

"As far as Longman is concerned, you have heard that he has got a long and painful criminal record for dishonesty and violence. You have heard that Mrs. Clemence has been before the court a long time ago. Only make use of that as far as Longman is concerned in helping you to make up your minds as to whether you can believe what he has to say. The mere fact that he has been guilty of crimes over a long period of time, however serious, is not evidence that he is guilty of this one. Just bear it in mind as one of the factors as to whether you think he may have been telling you the truth. Bear in mind at all times that it is not for him to prove anything. It is for the prosecution to make sure before you can convict."

E Subsequently this passage is to be found:

"Do not hold it against Longman, save when it comes to considering whether you can believe him, that he had got a long criminal record."

Then the learned judge proceeded to deal with Mrs. Clemence. Counsel for the appellant Richardson accepts that, when evidence is properly given as to the good character of the accused, this evidence goes to credibility and that the jury should be instructed that they may treat a proved good character as an indication that the witness is likely to be truthful; see *R. v. Bellis* (5). Counsel denies, however, that the converse applies to evidence of bad character and complains that the judge was wrong in telling the jury that they could make use of the appellant Longman's bad character "in helping you to make up your minds as to whether you can believe what he has to say".

G The basis of this submission is that evidence of the accused's bad character is admissible only in particular circumstances and can be used only in relation to the situation which rendered it admissible. Thus, so it is submitted, if the accused's character is let in under proviso (f) (ii) to s. 1 of the Criminal Evidence Act, 1898, by reason of the accused calling evidence of good character, it is contended by counsel for the appellant Richardson that evidence of bad character can do no more than rebut or cancel out the effect of the evidence of good character and that the jury must be instructed not to be influenced by the evidence of bad character in general assessment of the accused's credibility. We do not think that this is the general practice, and we have the gravest doubts whether a jury could be expected to understand such a direction, which verges on the metaphysical. There is nothing in the statute to suggest that the use of evidence of bad character should be restricted in this way but counsel says that this follows from certain pre-1898 authorities, notably *R. v. Rowton* (6). That case decided that, if the accused called evidence of good character, the Crown could adduce evidence of bad character by way of rebuttal, and much stress has been laid on the frequent references in the report to the fact that the Crown evidence is called to "rebut" that relied on by the accused. We get no assistance, however, from this, because evidence of the prisoner's character could

(5) [1966] 1 All E.R. 552, n.

(6) [1861-73] All E.R. Rep. 549; (1865), 10 Cox C.C. 25.



not in those days have gone to his credibility, since he was not a competent witness. Further, we see no reason to attach specific significance to the word "rebut" in this context, since it was the obvious word to describe a procedure which all would recognise is that of calling evidence in rebuttal. The weakness of counsel's argument is disclosed by further reference to s. 1 of the Act of 1898, under which there are many instances of bad character being admissible when there has been no previous evidence of good character to rebut; for example, when the accused has made an attack on the character of a witness for the prosecution. Counsel seeks to argue by parity of reasoning and to say that, in this case, the evidence of bad character can be used only to neutralise the attack on the prosecution witness, and he seeks to support this by reference to the direction to the jury in *R. v. Cook* (7), set out in a footnote in *CROSS ON EVIDENCE* (3rd Edn.) at p. 355, which direction was approved of by the Court of Criminal Appeal (7). We have studied the direction in *R. v. Cook* (7) and do not think that it was so restricted or that any jury could have been expected so to regard it.

In our view, evidence of character, when properly admitted, goes to the credibility of the witness concerned, whether the evidence discloses good character or bad character. If the accused calls evidence of good character and is shown by cross-examination to have a bad character, the jury may give this fact such weight as they think fit when assessing the general credibility of the accused. They cannot be expected to execute the metaphysical feat of treating the evidence as relevant to credibility on one issue but irrelevant on another, and they are not required to do so. No fault, can, therefore, be found in the direction in this case as to the manner in which they should deal with the evidence of the appellant Longman's previous convictions.

The only other point pursued before us on the appellant Richardson's behalf does not involve a point of law and is treated accordingly as an application. It was that, insofar as the judge put his defence before the jury at all, he did so by (as it were) inserting it by fragments into the interstices of the Crown case as he reviewed it. We do not think that this was so. There are two broadly different types of summing-up. The first is to proceed solidly and stolidly through the Crown case before touching on the defence. When this is adopted, the familiar criticism is that the jury was denied proper assistance in contrasting the conflicting versions. The second type is, when dealing with the allegations of the prosecution, to remind the jury there and then of the answer put forward by the accused so that they can have the contrasting versions of each incident brought to their attention before proceeding to the next stage, and many consider that the more helpful method. Be that as it may, it was the one here adopted and, as we think, fairly adopted.

None of the grounds submitted on the appellant Richardson's behalf is, in our judgment, sound. Accordingly, in his case (as in that of the appellant Longman), his appeal on the points of law involved is dismissed and his application for leave to appeal on other grounds is refused. [His LORDSHIP considered the applications of both the appellants for leave to appeal against their sentences, refused the application of Richardson, granted the application of Longman, treated it as the hearing of the appeal and substituted concurrent terms of five years' imprisonment on each count.]

*Appeals and applications for leave to appeal against conviction dismissed. Sentence for the appellant Longman varied.*

Solicitors: *Cowan, Lipson & Rumney* (for the appellant Longman); *Seifert, Sedley & Co.* (for the appellant Richardson); *Director of Public Prosecutions* (for the Crown).

[Reported by N. P. METCALFE, Esq., Barrister-at-Law.]

# A MANN AND ANOTHER v. GOLDSTEIN AND ANOTHER.

[CHANCERY DIVISION (Ungoed-Thomas, J.), November 1, 3, 7, 15, 1967.]

*Company—Winding-up—Compulsory winding-up—Creditor's application—Disputed debt—Existence of debt disputed—Company unable to meet its debts as they fell due—Petitions presented by alleged creditors of two companies—Injunctions sought to restrain prosecution of petitions—Debts disputed on substantial grounds—Whether prosecution of petitions an abuse of process of the court—Whether injunctions should be granted.*

The shares in each of two companies, J., Ltd. and C., Ltd., were held equally by the plaintiffs and by the first defendant and his wife. Each company was insolvent in the sense that it was unable to pay its debts as they fell due. The first defendant presented a winding-up petition against J., Ltd., based on an alleged debt for director's fees. The debt was contested on the ground of the first defendant's drawings from J., Ltd. without deduction for income tax. There was no authority for the drawings other than the voting of the director's fees. Thus there was a substantial defence to the alleged debt, which would require investigation before the debt was established. W., Ltd., the second defendant, presented a winding-up petition against C., Ltd., based on an alleged debt of £347 for goods supplied. C., Ltd. and M., Ltd., which latter company had been sold to the first defendant, used the same premises. There appeared to have been confusion whether goods ordered from W., Ltd. were supplied to C., Ltd. or M., Ltd. Thus there was again a substantial defence to the alleged debt, which required investigation. There was evidence that a winding-up petition would injure the goodwill of each company. In an action to restrain the prosecution of the winding-up petitions,

**Held:** the existence of the debt on which each winding-up petition was founded was disputed on grounds showing a substantial defence requiring investigation the petitioner did not establish that he was a creditor and thus had the locus standi to present the petition and the companies court was not the appropriate court to decide the dispute; accordingly, the presentation of the petitions was an abuse of the process of the court, and injunctions would be granted restraining, until trial or further order, the advertisement or prosecution of the winding-up petitions (see p. 776, letter I, and p. 778, letters C and F, post).

Dicta of LINDLEY, L.J., in *Re Gold Hill Mines* ((1883), 23 Ch.D. at p. 215) and of KEKEWICH, J., in *New Travellers' Chambers, Ltd. v. Cheese and Green*, ((1894), 70 L.T. at p. 272) applied.

[**Editorial Note.** Where the dispute is as to the amount of indebtedness to a petitioning creditor, but not to the existence of any indebtedness at all to him, a dispute as to the precise amount owed (there being no dispute as to an amount sufficient to entitle the creditor to petition) will not provide a sufficient answer to a winding-up petition against an insolvent company (see *Re Tweeds Garages, Ltd.*, [1962] 1 All E.R. 121, cited at p. 776, letter C, post).

As to winding-up a company where the petitioner's debt is disputed, see 6 HALSBURY'S LAWS (3rd Edn.) 538, para. 1038 text and notes (r)-(c); and for cases on founding winding-up petitions on disputed debts, see 10 DIGEST (Repl.) 870-872, 5721-5752, and DIGEST (Cont. Vol. A) 186, 572a.]

Cases referred to:

*Bolton (H. L.) Engineering Co., Ltd., Re*, [1956] 1 All E.R. 799; [1956] Ch. 577; [1957] 2 W.L.R. 844; Digest (Cont. Vol. A) 186, 5783a.

*Culiz Waterworks Co. v. Barnett*, (1874), L.R. 19 Eq. 182; 44 L.J.Ch. 529; 31 L.T. 640; 10 Digest (Repl.) 871, 5743.

*Company, A, Re*, [1894] 2 Ch. 349; 63 L.J.Ch. 565; 71 L.T. 15; 10 Digest (Repl.) 866, 5697.

- Forté (Charles) Investments, Ltd. v. Amanda*, [1963] 2 All E.R. 940; [1964] A Ch. 240; [1963] 3 W.L.R. 662; Digest (Cont. Vol. A) 187, 5857a.
- Gold Hill Mines, Re*, (1883), 23 Ch.D. 210; 49 L.T. 66; 10 Digest (Repl.) 870, 5722.
- Imperial Guardian Life Assurance Society, Re*, (1869), L.R. 9 Eq. 447; 39 L.J.Ch. 147; 10 Digest (Repl.) 871, 5741.
- New Travellers' Chambers, Ltd. v. Cheese and Green*, (1894), 70 L.T. 271; 10 Digest (Repl.) 872, 5748.
- Niger Merchants Co. v. Capper*, (1877), 18 Ch.D. 557, n.; 10 Digest (Repl.) 872, 5745.
- Tweeds Garages, Ltd., Re*, [1962] 1 All E.R. 121; [1962] Ch. 406; [1962] 2 W.L.R. 38; Digest (Cont. Vol. A) 186, 5752a.
- Welsh Brick Industries, Ltd., Re*, [1946] 2 All E.R. 197; 10 Digest (Repl.) C 872, 5752.

### Motion.

By writ issued on Oct. 20, 1967, the plaintiffs, Peter Mann and his wife Anita Mann, brought an action against the defendants Sidney Bernard Goldstein and Wallands Laboratories, Ltd., for injunctions to restrain the first defendant from prosecuting a winding-up petition against Joanita, Ltd. ("Joanita") and to restrain the defendant company from prosecuting a winding-up petition against Charmaine Coiffeur d'Art Ltd. ("Charmaine"). By notice of interlocutory motion dated Oct. 24, 1967, the plaintiffs sought an injunction against the first defendant that he might be restrained until the trial of the action or further order from advertising or taking any further steps in the prosecution of a winding-up petition against Joanita, and against the defendant company, that it might be restrained until the trial of the action or further order from advertising or taking any further steps in the prosecution of a winding-up petition against Charmaine. Both companies against which winding-up petitions had been presented were unable to pay their debts as they fell due, but the alleged indebtedness on which the winding-up petitions were founded was disputed. The facts relating to the petitioning creditors' alleged debts are set out in the judgment at p. 775, letter H, to p. 776, letter B, p. 776, letters F and H, and p. 777, letters A to I, post.

*P. S. A. Rosedale* for the plaintiffs.

*G. M. Godfrey* for the first defendant.

*P. J. Millett* for the second defendant company.

*Cur. adv. vult.* G

Nov. 15. **UNGOED-THOMAS, J.**, read the following judgment: This is an action by Mr. Peter Mann and his wife, against Mr. Sidney Bernard Goldstein and Wallands Laboratories, Ltd. ("Wallands"). The notice of motion asks that the first defendant, Mr. Goldstein, might be restrained until trial of the action or further order from advertising or taking any further steps in the prosecution of a winding-up petition against Joanita, Ltd. ("Joanita"); and it also asks for an injunction in similar terms against the second defendant in respect of a petition against Charmaine Coiffeur d'Art, Ltd. ("Charmaine"). Leave was given to amend so as to join those two companies as defendants and enable the plaintiffs to sue, in a representative capacity, for shareholders in those companies, other than the defendant, Mr. Goldstein.

Each of the companies carries on a hairdressing business and the shares in each company are held equally between Mr. Mann on the one hand and Mr. Goldstein on the other hand, or between Mr. and Mrs. Mann on the one hand and Mr. and Mrs. Goldstein on the other hand. Mr. Mann managed the Joanita business in Pinner and Mr. Goldstein the Charmaine business in Haverstock Hill. Since July, there have been strained relations between Mr. Mann and Mr. Goldstein, apparently, partly because Mr. Mann thought that he did not have a fair deal over the sale of a subsidiary company of Charmaine called Charmaine Marguerite, Ltd. ("Marguerite") which was sold to Mr. Goldstein.



A It was also partly due to friction over Marguerite's business continuing to be conducted from the Charmaine premises at Haverstock Hill after that sale.

Proposals for one side to buy out the other in Charmaine and Joanita were made, but no agreement was reached, and in these circumstances Mr. Goldstein presented a creditor's winding-up petition to wind up Joanita—and I quote from the petition—"... for loans made to or monies left in the company, the present amount of such indebtedness being £1,869 16s. 3d." Wallands also presented a petition to wind up Charmaine as creditor for £340 for goods sold and delivered to Charmaine.

The hostility between Mr. Mann and Mr. Goldstein has become acute and there is, apparently, a deadlock between them over the conduct of the two companies, Joanita and Charmaine: but Mr. Goldstein's petition is not based on deadlock, nor has deadlock been relied on by either side in the submissions made to me. The plaintiffs claim that they are entitled to the injunctions mentioned in the notice of motion, on the grounds that (i) the defendants are not creditors at all of these companies; or, alternatively, (ii) that their debts are disputed on substantial grounds: (iii) that the petitions are not bona fide petitions but an abuse of the process of the court: and (iv) that the companies are solvent.

D Each of these grounds involves questions of fact and of law and it will be convenient to deal first with the law.

It is well established that this court has jurisdiction to restrain the presentation or advertising of a winding-up petition and restrain all further proceedings on it. That jurisdiction is a facet of the court's inherent jurisdiction to prevent an abuse of the process of the court. It will be exercised where a winding-up application is presented or prosecuted otherwise than in accordance with the legitimate purpose of such process (see, for example, *Re A Company* (1)).

The presentation of a petition is governed by statutory provision. Section 224 of the Companies Act, 1948, provides that an application to wind up a company shall be by petition presented, so far as material for present purposes "... by any creditor or creditors ...". The section seems to me plainly, on the face of it, exhaustive, so that a person not within its ambit cannot petition. This conclusion is in accordance with the note in BUCKLEY ON THE COMPANIES ACTS (13th Edn.) 462, based on the observation of WYNN-PARRY, J., in *Re H. L. Bolton Engineering Co., Ltd.* (2). Of course, a person not named in s. 224 as a person entitled to present a winding-up petition, does not become so named because the company is insolvent. Therefore, so far as material to our case, if the defendants are not creditors they are not entitled to present or advertise their petitions or apply for a winding-up order; they have no locus standi, and their petitions are bound to fail even though the company be insolvent. So if a creditor's petition is not restrained by such an application as is now before me and comes before the companies court, that court will, in limine, before proceeding further, consider the petitioner's claim to be a creditor. As stated in BUCKLEY ON THE COMPANIES ACTS (13th Edn.), p. 451, in a passage quoted with approval by LORD GREENE, M.R., in *Re Welsh Brick Industries, Ltd.* (3):

"At one time petitions founded on disputed debt were directed to stand over till the debt was established by action. If, however, there was no reason to believe that the debt, if established, would not be paid, the petition was dismissed. The modern practice has been to dismiss such petitions. But, of course, if the debt is not disputed on some substantial ground, the court may decide it on the petition and make the order."

I What the companies court will not do is to proceed any further at all on a petition founded on a debt which is not thus shown in limine to exist, for in such a case there are not, of course, the necessary creditors required by s. 224 to apply for a winding-up order.

(1) [1894] 2 Ch. 349. (2) [1956] 1 All E.R. 799 at p. 801; [1956] Ch. 577 at p. 583.  
(3) [1964] 2 All E.R. 197 at p. 198.

The defendants, however, relied on the observation of SIR GEORGE JESSEL, M.R., in *Niger Merchants Co. v. Capper* (4), that

"... where a company is insolvent, no doubt it is reasonable to wind up the company, even where the debt is disputed."

This statement, however, is tentatively phrased in an apparently unreserved judgment, unreported at the time, in the early period of the development of the jurisdiction, and, so far as I know, stands alone. Naturally judges have referred, with due regard to the facts of the particular cases before them, to a company's solvency or insolvency, as the case might be, as emphasising the desirability of the dismissal of an application to restrain winding-up proceedings or of granting an injunction to restrain such proceedings, as the case might be. There is no authority, however, so far as I have been able to ascertain, to support the suggestion that a company might be wound up on a creditor's petition where the company is insolvent, though the debt on which the petition is founded is disputed. It seems to me to be neither in accordance with the requirements of the Companies Act nor the practice recognised by LORD GREENE, M.R. (5), and I do not consider it justifiable to treat SIR GEORGE JESSEL, M.R.'s (6) observations as other than the incidental and tentative observation which it appears to me to be.

To enable the companies court to make the winding-up order itself, not only must the petitioner have been shown to be entitled to present the petition, but also one of the grounds specified in s. 222 of the Companies Act, 1948 (7) must be established: and the only such ground relied on in the petition and before me was that the company is unable to pay its debts. This requirement is additional to the pre-condition of presenting the petition, that the petitioner must be a creditor, and is not alternative to it. The insolvency requirement, however, unlike the creditor requirement, is only a pre-requisite of the order and not a pre-requisite of the presentation of the petition. So if a person is entitled to present a petition, then the company's inability to pay its debts is the very matter which it is appropriate for the companies court to enquire into and decide in the exercise of its jurisdiction to make a winding-up order.

I come now to the allegation of lack of bona fides and to abuse of process. It seems to me that to pursue a substantial claim in accordance with the procedure provided and in the normal manner, though with personal hostility or even venom and from some ulterior motive, such as the hope of compromise or some indirect advantage, is not an abuse of the process of the court or acting mala fide but acting bona fide in accordance with the process. Certainly no authority suggesting otherwise has been brought to my attention. In *Re Welsh Brick Industries, Ltd.* (5) LORD GREENE, M.R., treated a bona fide claim as being a claim based on some substantial ground, when he referred to

"... considering whether or not the dispute is a bona fide dispute, or, putting it in another way, whether or not there is some substantial ground for defending the action."

So far as is material here, the winding-up process provides that the petition shall be presented by a creditor and that the winding-up order shall be on the ground that the company is unable to pay its debts. As SIR RICHARD MALINS, V.-C., said in *Cadiz Waterworks Co. v. Barnett* (8), if the court

"... sees a petition to wind-up presented, not for a bona fide purpose of winding-up the company, but for some collateral and sinister object, on that ground it will be dismissed with costs."

(4) (1877), 18 Ch.D. 557, n. at p. 559, n.

(5) [1946] 2 All E.R. at p. 198.

(6) (1877), 18 Ch.D. at p. 559, n.

(7) For s. 222 of the Companies Act, 1948, see 3 HALSBURY'S STATUTES (2nd Edn.) 639.

(8) (1874), L.R. 19 Eq. 182 at p. 196.

**A** There the purpose of winding-up the company is treated as a bona fide purpose in contrast with some purpose other than the winding-up of the company.

What then is the course for this court to take (i) when the creditor's debt is clearly established; (ii) when it is clearly established that there is no debt; and (iii) when the debt is disputed on substantial grounds?

**B** (i) When the creditor's debt is clearly established it seems to me to follow that this court would not, in general at any rate, interfere even though the company would appear to be solvent, for the creditor would, as such, be entitled to present a petition and the debtor would have its own remedy in paying the undisputed debt which it should pay. So, to persist in non-payment of the debt in such circumstances would itself either suggest inability to pay or that the application was an application that the court should give the debtor relief which it itself could provide, but would not provide, by paying the debt. Further, the winding-up order on the ground of inability to pay debts would be the very matter which it would be for the companies court to decide after presentation of the petition: and validly to present a creditor's petition which the company inexplicably would not pay could hardly, in general at any rate, be an abuse of the process of the court.

**D** (ii) When it is clearly established that there is no debt, it seems to me similarly to follow that there is no creditor, that the person claiming to be such has no locus standi and that his petition is bound to fail. Once that becomes clear, pursuit of the petition would be an abuse of process, and this court would restrain its presentation or advertisement. Indeed, I understand counsel for the second defendant to concede this proposition.

**E** (iii) When the debt is disputed by the company on some substantial ground (and not just on some ground which is frivolous or without substance and which the court should, therefore, ignore) and the company is solvent, the court will restrain the prosecution of a petition to wind up the company. As SIR RICHARD MALINS, V.-C., said in *Cadiz Waterworks Co. v. Barnett* (9), of a winding-up application,

**F** "... it is not a remedy intended by the legislature, or that ought ever to be applied, to enforce payment of a debt where these circumstances exist—solvency and a disputed debt."

As SIR GEORGE JESSEL, M.R., (10) said in the judgment from which I have already quoted, "When a company is solvent, the right course is to bring an action for the debt: . . ." So, to pursue a winding-up petition in such circumstances is an abuse of the process of the court.

**G** What, however, if the debt is disputed by the company on some substantial ground but it appears that the company is unable to pay its debts? Researches have not produced any decision covering this point. Words interpreted out of context are amply available to support the plaintiff's claim that this court should, in such circumstances, grant the injunction. Thus, for example, in *Re Imperial Guardian Life Assurance Society* (11), SIR WILLIAM JAMES, V.-C., said, "A winding-up petition is not to be used as machinery for trying a common law action". In that case, however, voluntary liquidators had in fact offered to be personally liable and set aside assets to meet the disputed claim if proved and that was the only claim against or debt due from the company. In *Re Gold Hill Mines* (12), SIR JAMES BACON, V.-C. said:

"The Act of Parliament [that is the Companies Act] has given a creditor who cannot get paid a right to present his petition against a company which not only refuses to pay him, but is in a state of insolvency. That is all the Act does. It does not countenance applications to wind up as a means of enforcing the payment of debts which the company dispute."

(9) (1874), L.R. 19 Eq. at p. 194.

(10) (1877), 18 Ch.D. at p. 559, n.

(11) (1869), L.R. 9 Eq. 447 at p. 450.

(12) (1883), 23 Ch.D. 210 at pp. 211, 212.



Then LINDLEY, L.J. said (13):

"Now it ought to be understood that winding-up proceedings are not to be had recourse to for the purpose of recovering a disputed debt, especially when, as here, the company appears to be solvent . . . In fact we have no evidence of insolvency."

In *Niger Merchants Co. v. Capper* (14), SIR GEORGE JESSEL, M.R. said that SIR RICHARD MALINS, V.-C., in *Cadiz Waterworks Co. v. Barnett* (15), granted an injunction to restrain winding-up proceedings

"... on the ground that it is the object of the court to restrain the assertion of doubtful rights in a manner productive of irreparable damage . . ."

WILLMER, L.J., in *Charles Forte Investments, Ltd. v. Amanda* (16), quoted this passage of SIR GEORGE JESSEL, M.R., with approval. In *Niger Merchants Co. v. Capper* (17) and *Cadiz Waterworks Co. v. Barnett* (18), however, where the debt was disputed and the injunction was granted, the company was solvent. In *Charles Forte Investments, Ltd. v. Amanda* (19), the petition was not a creditor's petition but a contributory's petition, where an injunction was granted on the ground that the petition was bound to fail and an abuse of the process of the court, and it is in line with the early leading case of *Re A Company* (20), which I have already mentioned.

The strongest statement which I have seen in favour of the plaintiff's contention is that of KEKEWICH, J., in *New Travellers' Chambers, Ltd. v. Cheese and Green* (21):

"Of course the question whether this is a debt or not may possibly be tried by a winding-up petition; but it has been said over and over again, that the presentation of a winding-up petition is not a convenient, and often not a proper method of trying a disputed debt. If there is any reasonable ground for disputing the existence of the debt—if the question is not a mere question of quantum, but whether there is in fact a debt or not—a petition ought not to be presented, and therefore the court ought to restrain the presentation of the petition."

No reference was expressly made here to irreparable damage to the company, but, again, it appears, from the end of the argument as reported, that the company was in fact solvent, and it could then well go without saying that the presentation of the petition which was restrained would cause irreparable damage to the solvent company.

If the company is unable to pay its debts as they fall due, it seems to me that the presentation or advertisement of the petition might or might not cause it damage. It might prevent its pulling through a period of financial difficulty and becoming solvent, or it might result in worse insolvency. In the case of *Charmaine* the evidence is that its profits are improving, and in the case of both companies that a winding-up petition would injure goodwill.

It might be suggested that this court should, where the company is insolvent, intervene on the ground that it would be to the detriment of future possible creditors to countenance the continuation of a company unable to pay its debts as they fall due. The companies court, however, in accordance with the practice which I have mentioned, does dismiss a petition founded on a substantially disputed debt whose validity it cannot conveniently decide even though the

(13) (1883), 23 Ch.D. at p. 215.

(14) (1877), 18 Ch.D. at p. 558, n.

(15) (1874), L.R. 19 Eq. at p. 196.

(16) [1963] 2 All E.R. 940 at p. 945; [1964] Ch. 240 at pp. 251, 252.

(17) (1877), 18 Ch.D. 557, n.

(18) (1874), L.R. 19 Eq. 182.

(19) [1963] 2 All E.R. 940; [1964] Ch. 240.

(20) [1894] 2 Ch. 349.

(21) (1894), 70 L.T. 271 at p. 272.

A company be insolvent. Also, as I have indicated, this, in my view, is in accordance with the requirements of s. 224 of the Act of 1948; and this court is certainly no less conveniently placed than the companies court to decide a disputed claim. Of course, if a creditor's petition turns out before the companies court to be based on a substantially disputed debt, there is the opportunity, under the Companies (Winding-up) Rules, 1949 (22), r. 37, for substituting another petitioner in place of the one whose debts are disputed. Such other petitioner, however, could in any event present such a petition—as indeed could the plaintiff, Mr. Mann, in this case, on the ground of deadlock.

These considerations appear to me to be complicated and inconclusive and afford no satisfactory basis for the exercise of the court's jurisdiction. For my part, I would prefer to rest the jurisdiction directly on the comparatively simple propositions that a creditor's petition can only be presented by a creditor, that the winding-up jurisdiction is not for the purpose of deciding a disputed debt (that is, disputed on substantial and not insubstantial grounds) since, until a creditor is established as a creditor he is not entitled to present the petition and has no *locus standi* in the companies court; and that, therefore, on substantial grounds) or after it has become clear that it is so disputed is an abuse of the process of the court. This seems to me to be in accordance with the statement of KEKEWICH, J. (23), which I have quoted, even though it be borne in mind that the company in that case was solvent: and the references to irreparable damage in the other cases which I have mentioned, where the petitioners were contributories or creditors petitioning against solvent companies, do not exclude an injunction being granted to prevent an abuse of the process of the court. Indeed, the prevention of the abuse of the process of the court is the very essence of the whole of this court's jurisdiction to restrain the presentation of a winding-up petition.

So I return to what was mentioned earlier in this judgment, that it is an abuse of the process of the court to prosecute a winding-up application otherwise than in accordance with the legitimate purpose of such a process. The legitimate purpose of such a process is to wind-up a company on a ground specified in the Companies Act, 1948, which, so far as material to this case, is the ground that it is unable to pay its debts. It is not its legitimate purpose to decide whether a petitioner claiming to be a creditor is a creditor, because s. 224 makes it a pre-requisite that he should be a creditor before he is even entitled to present a petition at all and before any consideration of the company's insolvency can become relevant. So, in my view, when a petitioning creditor's debt is disputed on such substantial ground this court should restrain the prosecution of the petition as an abuse of the process of the court even though it should appear to the court that the company is insolvent.

So I come to examine the debts which the defendants allege to be due to them from the companies in this case.

The defendant Mr. Goldstein alleges a debt of £1,869 for director's fees and its payment was demanded before presentation of this petition. It is not now disputed that fees to this amount were duly voted by Joanita in the years 1959-60 to 1964-65; and none has been voted since. Mr. Mann's evidence is that, since October, 1965, until June 12, 1967, £33 a week was drawn by Mr. Goldstein from both companies, of which £15 was drawn from Joanita and the remainder from Charmaine, without deduction for P.A.Y.E., which Mr. Goldstein should bear. It is submitted for the plaintiffs that Joanita is liable to pay tax on the £15 so drawn, that Mr. Goldstein is ultimately liable to bear that tax, that the sums

drawn are, therefore, net sums, and that those sums grossed up, if I may use that useful phrase, at the appropriate rate of tax, are the sums, in effect, drawn by Mr. Goldstein from Joanita and that such sums exceed the £1,869. Mr. Goldstein has not contested this submission except by submitting that the £15 drawings must be treated as not being in respect of the fees voted amounting to £1,869, and that even if so treated the evidence establishes that the £15 figure should be £7, thus leaving a substantial part of the £1,869 still owing to Mr. Goldstein. There is no authority whatsoever for the drawings other than the voting of the £1,869 and I have no hesitation in concluding that the drawings were or are to be treated as being in payment of the £1,869.

With regard to the contention that the drawings from Joanita were £7 and not £15 a week, if part of the £1,869 were still owing to Mr. Goldstein, then, in accordance with KEKEWICH, J.'s observations (24) which I have quoted and the decision in *Re Tweeds (Garages, Ltd.)* (25), there would be sufficient debt to entitle the petitioner to qualify as a creditor for the purpose of presenting the petition. Mr. Mann's affidavit stated:

"Since October, 1965 and until July 12, 1967, Mr. Goldstein and I were each drawing £33 per week from both companies—as to £15 from Joanita and the remainder from Charmaine."

Mr. Goldstein observed on this that—"It is quite untrue . . . that he and I were drawing £33 each from Charmaine prior to July 12, 1967"—though, I may interject, Mr. Mann never in fact said that the £33 was drawn from Charmaine. Mr. Goldstein produced Charmaine's "Salary Book" to show that

". . . throughout the period covered by the entries therein both Mr. Mann and I were drawing a gross salary of £26 per week from that company."

The book does show from its commencement such entries of £26 gross each for the last fifteen weeks of one year and the first twenty weeks of the following year, making a total of thirty-five weeks. I am then invited to deduct the £26 gross mentioned by Mr. Goldstein from the £33 drawings mentioned by Mr. Mann as drawn from both companies to produce the figure of £7 which I have mentioned, and, further, to infer that Mr. Goldstein's drawings from Joanita were limited to that £7 not only during the thirty-five weeks which I have mentioned, but throughout the much longer period since October, 1965, mentioned by Mr. Mann. Mr. Mann, although he stated that £33 was drawn from both companies, also stated, perfectly clearly, that he and Mr. Goldstein drew £15 per week from Joanita. Mr. Goldstein has had ample opportunity to deal with that statement about Joanita. Nevertheless, his quoted observations appear to be directed entirely to drawings from Charmaine and not expressly, at any rate, to drawings from Joanita at all. I feel quite unable to conclude, on the material before me, that Mr. Goldstein's drawings from Joanita were limited to £7 a week. I am not satisfied that Mr. Goldstein is a creditor of Joanita for any part of the debt on which his petition is founded, although it is possible that if full investigation of Mr. Goldstein's claim to the debt were made, with full discovery and cross-examination, that some substantial part of the alleged debt at any rate would be established. There is, however, in my view, a substantial defence to the whole of Mr. Goldstein's claim and, as I have indicated, the companies court is not the proper court to decide the issue that thus arises.

So I come to the debt on which the Wallands company's petition against Charmaine is based and the payment of this debt appears to have been duly demanded.

Wallands is a company incorporated in the course of this year to take over the

(24) (1894), 70 L.T. at p. 272.

(25) [1962] 1 All E.R. 121; [1962] Ch. 406.



A business of a Mr. and Mrs. Muller, and it claimed to be the creditor of Charmaine in respect of wigs and similar goods supplied on its own account, and as assignee of debts in respect of such goods supplied to Charmaine by Mr. and Mrs. Muller. The Mullers had business dealings with Charmaine Marguerite, Ltd., which, as I have said, was a subsidiary of Charmaine and to which the Mullers supplied such goods. The businesses of both Charmaine and Marguerite were carried on by B Mr. Goldstein at the same premises and Mr. Goldstein ordered goods from the Mullers for both Marguerite and Charmaine. The Mullers' dealings with Marguerite were far bigger than any dealings which they had with Charmaine. They amounted to £1,000 to £1,500 a week, whereas the debts claimed against Charmaine for wigs, and so on, spreading over the nine months January to September, 1967, amounted only to £347, according to Mr. Muller's evidence; and it is on these alleged C debts that the Wallands' petition is founded. Mr. Muller seeks to establish it by a list "... in which ..." he says "... there is itemised all goods sold to Charmaine between Jan. 13, 1967, and the end of September, 1967", amounting, in total, to £347. He then says, "All goods shown thereon were despatched to Charmaine's premises ...". Charmaine's premises, however, were the same as Marguerite's premises. He adds, "... and to the best of my knowledge were ordered by Mr. D Goldstein for Charmaine and were despatched to that company". Mr. Goldstein says, "To the best of my recollection all the items shown therein [that is, in Mr. Muller's list] were ordered by me on behalf of Charmaine, were delivered to Charmaine and subsequently sold to Charmaine's customers". Statements so phrased themselves invite doubt whether the goods were sold to Charmaine at all.

Mr. Muller, in his affidavit, said that Charmaine paid, in May, 1967, £87 6s. E in respect of debts due from it up to Dec. 31, 1966. The £87 6s. was certainly paid by a cheque of Charmaine Coiffeur d'Art, Ltd. It seems clear, however, from the evidence of Mr. Shelley, a chartered accountant, who gave evidence for the plaintiffs, that, of the six invoices for this debt, only one was invoiced in 1966, namely, on Dec. 27, 1966, for £17, and that the rest were in 1967; that four F invoices were to "Marguerite", that one was to "Charmaine Marguerite" and only one to "Charmaine"—without the addition of "Marguerite" or "Coiffeur d'Art"—and that not one was invoiced to Charmaine Coiffeur d'Art. It seems that here not only was Mr. Muller confused in respect of the debts, but he was treating goods invoiced to Marguerite as goods supplied to Charmaine and that, insofar as any sum is owing in respect of debts now relied on by Wallands, it is the plaintiffs' contention here that the goods were supplied to Marguerite and not to G Charmaine at all. Further, Mr. Muller said, as I have mentioned, that his list itemised all goods sold between January, 1967, and the end of September, 1967, to Charmaine; but as the £87 6s. was in payment of a number of invoices for goods sold between those dates it is clear that this statement is not accurate if, as Mr. Muller said, the £87 6s. was for payment of goods sold to Charmaine, or even if the one invoice addressed to "Charmaine" were to "Charmaine Coiffeur d'Art".

H However, on July 20, Marguerite ceased to carry on business at Charmaine's premises, and from about the middle of September Mr. Goldstein ceased to attend there regularly and Mr. Mann conducted Charmaine's business. The only invoice forthcoming for goods within Wallands' claim is an unreceipted invoice addressed to "Charmaine London, N.W.3" showing an amount of £7 charged for goods supplied, dated Sept. 28, 1967, and an invoice number corresponding to those in I the last item in Mr. Muller's list of invoices in respect of the debt claimed. This invoice, however, is produced by Mr. Goldstein without any explanation how he obtained it, though he did say elsewhere in his evidence that he visited Charmaine's premises intermittently since he ceased to conduct this business. He adds that two names appearing on the invoice, opposite the two items of goods there mentioned as supplied, were those of a hairdresser and customer of Charmaine. Mr. Mann says that he is informed by Charmaine's receptionist/cashier that for the past four or five months all deliveries from Mr. Muller or his company have

been for cash-on-delivery, and that she understood that this had been the arrangement since about the beginning of this year. A

I find this evidence and much of the evidence on both sides very unsatisfactory. The evidence with regard to the claim for the £7 for goods supplied in September is stronger than with regard to the rest of the claim, but I do not consider even the claim for this sum satisfactorily established having regard to all the circumstances of this case. All that is perfectly clear is that there is considerable confusion of goods ordered for Charmaine and goods ordered for Marguerite and that the evidence before me has to be approached with considerable care. There is here a defence to Wallands' claim that requires thorough investigation, with full discovery and opportunity for cross-examination. As in Mr. Goldstein's allegations of debt against Joanita, I am not satisfied that any of the debt on which Wallands founds its petition is owing, though the debt may, of course, be established in proper proceedings for the purpose. As I have indicated, winding-up proceedings are not proper proceedings for that purpose. B C

There remain two matters which I can quite quickly dispose of. The first is the plaintiffs' allegation of the lack of bona fides in the defendants in presenting their petitions. I have already dealt with the meaning of bona fides in presenting a petition. It is clear, if I am correct in my conclusion so far, that, as the debts are disputed on substantial grounds, to pursue the petitions would be an abuse of the process of the court. That is all I need say on bona fides or all that it is advisable that I would say on it at this stage of the conflict between the parties. D

The second matter to mention is the companies' insolvency. Insolvency in connexion with a winding-up petition means inability to pay debts as they fall due and not a deficiency of assets as compared with liabilities. Indeed, insolvency in that sense, of inability to pay debts as they fall due, clearly appears from Mr. Mann's own affidavits. The evidence of such insolvency of both companies is altogether so conclusive to my mind that I do not propose to analyse or particularise it, especially as I do not rely on it for my conclusion but come to my conclusion despite it. E

My conclusion, therefore, is, in the case of each company, for the reasons which I have given at length, that the plaintiffs are entitled to the injunctions which they claim, until trial or further order, unless, of course, the parties, by chance, consent to agree to treat this motion itself as the trial of the action. F

*Orders accordingly.*

Solicitors: *Martins* (for the plaintiffs); *Lewis, Cutner & Co.* (for the defendants). G

[*Reported by* JACQUELINE METCALFE, *Barrister-at-Law.*]

A

## MOORE v. MAXWELLS OF EMSWORTH, LTD. AND ANOTHER.

[COURT OF APPEAL, CIVIL DIVISION (Harman, Diplock and Fenton Atkinson, L.JJ.), April 8, 1968.]

B

*Road Traffic—Negligence—Unlighted motor vehicle stationary on dark night—Prima facie evidence of negligence, there being no street lighting—Rebuttal of presumption of negligence.*

C

On a dark night in January the driver of a lorry, towing a trailer, stopped on an unlit two-track by-pass because of a signal from another driver, and found that the tail light of the trailer had failed. In finding the cause, a fault in the plug connecting the trailer lights to the lorry, he fused all the lights on the trailer. He sent his mate to stand by the rear of the trailer to try to stop on-coming traffic colliding with it, while he changed the plug by the light in his cab. He did not think that it would take him long to change the plug and mend the fuse. The driver of a chassis, who was not keeping a proper look out, drove violently into the trailer. The lorry-driver had tested his lights, and found them to be in working order, after coupling up the trailer before setting off for his journey, and again before lighting-up time. Seven hundred yards or so ahead of the lorry the road was lit, but the lorry-driver did not know this. There was a wide verge at the point where the lorry stopped, but the lorry was so heavy, and the verge so soft, that had the driver driven his lorry on to the verge he would have needed a crane to extricate it. In an action by the chassis-driver against the owners and driver of the lorry for damages for negligence, the defendants gave no evidence as to the servicing of the lorry.

D

E

**Held:** the lorry-owners and driver had both shown that they had taken all reasonable steps to avoid creating or prolonging the danger caused by the stationary unlit lorry, and accordingly the presumption of negligence arising from its presence unlighted on the unlit road had been rebutted; the lorry-driver's decision that he could mend the vehicle's lighting without driving on to another place was a reasonable decision, and the chassis-driver's action failed (see p. 781, letters C and H, and p. 782, letters C, D and F, post).

F

Observations of DENNING, L.J., in *Hill-Venning v. Beszant* ([1950] 2 All E.R. at p. 1153) and of EDMUND DAVIES, J., in *Parish v. Judd* ([1960] 3 All E.R. at pp. 36, 37) considered.

G

Decision in *Hill-Venning v. Beszant* ([1950] 2 All E.R. 1151) distinguished on the facts.

Appeal dismissed.

[As to negligence in relation to highways, see 28 HALSBURY'S LAWS (3rd Edn.) 63, para. 60; and for cases on the subject, see 36 DIGEST (Repl.) 89-94, 472-511.]

H

Cases referred to:

*Hill-Venning v. Beszant*, [1950] 2 All E.R. 1151; 36 Digest (Repl.) 94, 511.  
*Parish v. Judd*, [1960] 3 All E.R. 33; [1960] 1 W.L.R. 867; 124 J.P. 444;  
 Digest (Cont. Vol. A) 1167, 538a.

### Appeal.

I

This was an appeal by the plaintiff, Derek John Moore, against the judgment of DONALDSON, J., dated Nov. 9, 1967, dismissing his action for damages for negligence against the defendants, Maxwells of Emsworth, Ltd., the owners of a lorry and trailer with which the plaintiff's vehicle had collided while the lorry was stationary and unlighted on the road at night, and against their servant, David Charles Ind, the driver of the lorry. The facts are set out in the judgment of HARMAN, L.J.

*M. R. Hickman* for the plaintiff.

*Patrick Bennett* for the defendants.



**HARMAN, L.J.:** This is a very stale case. The accident happened as long ago as January, 1964, and it did not come to trial till November, 1967. How, under the circumstances, any witness could expect to remember anything much about it I do not myself understand; but it is the fact that two victims of the accident, one of whom was the plaintiff, are without any recollection of the circumstances at all and, therefore, what we do know about it is largely a matter of inference.

It appears that Mr. Ind, the second defendant ("the defendant driver"), who was the employee of the first defendants ("the defendant lorry-owners") and engaged on their business of transport, was driving a very heavy lorry and trailer, loaded with agricultural tractors, southwards on the Oxford by-pass between Headington and Cowley on the evening of Jan. 27, 1964. It was about 5.30 p.m., and it would be dark of course. There was no moon; it was fine and clear. He was going along the near side of the track, this being a two-track road, and was passed by a motorist who flashed his lamps at him, which indicated to him that there was something wrong. So he got out and sure enough there was: the tail light of the trailer was out. So the defendant driver thought that he might locate the trouble by seeing whether there was any fault in the coupling, that is to say the plug which connected the trailer's light with the lorry's lights. The lorry's lights, or at least the obligatory ones, were on the same circuit as the obligatory lights on the trailer, which also had reflectors on the back. While the defendant driver was trying to mend the lighting, he fused all the obligatory lights and was left in the dark. He decided to try to change the plug and mend it. He got back to his lorry, sent his mate to the rear to stand by and to try to stop oncoming traffic from colliding with the vehicle, that being the best that he could do, and was proceeding with the aid of a light in the cab of the lorry to change the plug. At that moment he was run into violently from behind by the plaintiff, who was driving a brand new vehicle having a lorry chassis with no body on it but merely a cab with a screen in front. It seems quite clear that the plaintiff hardly saw the defendants' vehicle at all. On the evidence he did swerve very slightly at the last moment. He never put his brakes on. He ran violently into it. He not only injured himself, he injured the defendant driver's mate seriously as well. He sues each of the defendants severally in negligence saying that each on his own account was in default in that duty which a man owes to his neighbour in circumstances such as these.

In this court, at any rate, it is not denied that the plaintiff was guilty himself of negligence in that he did not keep an adequate look-out. It was said below that he did not keep any at all, but that the judge did not accept, and I do not think it necessary to go as far as that; but he did not keep any adequate look-out anyhow and so he is to blame, and the question here is whether there is contributory negligence on the part of one or other of the defendants.

The point of attack in counsel for the plaintiff's very well marshalled argument as against the defendant lorry-owners is this: that there is a presumption of negligence (counsel says) in the presence of an unlit vehicle on a road, and for that he cites some words of DENNING, L.J., in *Hill-Venning v. Besant* (1):

"The presence of an unlighted vehicle in a road is prima facie evidence of negligence on the part of the driver, and it is for him to explain how it came to be unlighted and why he could not move it out of the way or give warning to oncoming traffic."

The case itself I do not find of any assistance because, like all other accident cases, the facts differ from the facts of this case, and in particular there was no reason why the motor-cycle there in question should not have been lifted on to the verge, which was a perfectly simple and obvious precaution to take: but anyhow there is this presumption.

(1) [1950] 2 All E.R. 1151 at p. 1153.

A The fact of the vehicle being on the road unlighted does need explanation, and the explanation given is that this was a sudden and unforeseeable failure of the lighting system, for whatever cause, and that so far as fulfilling his duty to his neighbour was concerned the defendant driver had fulfilled that by testing the lights when he coupled up the trailer to the body of the lorry and testing them again just before lighting-up time and on both occasions they were working perfectly. I do not see what more can be demanded of the employer than that his employee should do that.

C It is said that the lorry-owners ought to have produced some evidence of regular servicing of the lighting system. I do not think that the absence of that evidence means that the owners have failed to discharge the burden which is on them. I do not think that it is a point which called for explanation from them in that particular detail, and, therefore, I think that the mere fact that this vehicle was where it was without any lights is sufficiently explained to rebut that presumption of negligence.

D Next it is said that the lorry-owners should have provided flashing lamps or torches for their employee and his mate to stand at the rear of the vehicle and wave them or keep them flashing so as to call attention to the fact that the lorry was there; but I do not think that is itself evidence of negligence. There was no evidence that the provision of such flash-lamps is, or anyhow was in 1964, when the accident happened, prevalent or even known; and, in the absence of any evidence that it was customary or that it was the proper thing to do, I cannot think that that is evidence of negligence. That really completes the tale of the story against the lorry-owners.

E Now as to the employee, the driver, it is said first of all that when he found his tail light out and knew that he had to mend it he should have driven on to the verge. There was a wide verge at this point and I suppose we must take it that he could have driven on to it; but it was very soft and, as the police officer said, entirely unsuitable. He had a very heavy lorry: he could have got on to the verge, I suppose, but he never would have got off it again without a crane, and I do not think that he was bound to take any such drastic action as that; and that is where the case differs from the one that I have cited, *Hill-Venning v. Beszant* (2).

G Next it is said that he should have driven on until he found either a place where there was sufficient street lighting or where there was a lay-by. There was street lighting, as we now know, though he did not know, seven hundred yards or so ahead, where there was a roundabout which was lit. This has been the critical point so far as I am concerned; but even supposing that it was a misjudgment on the part of this man, it was not, I think, an act of negligence. He did not suppose that it would take him very long to mend the fuse; he did not think that he ought to drive on without any lights; and the point, taken late in the case, that he still had his headlights is too doubtful to rely on at this juncture, and even if it were not so, I should not have thought that it made any difference. I think that the decision that he could afford to mend his light without driving anywhere else in order to do so was a decision which he might reasonably take; but that the plaintiff was negligent and could have seen the trailer if he had kept a look-out is not in dispute; the only question has been as to the conduct, or the want of precaution, on the part of the defendants.

I In the end, I have come to the conclusion that the judge arrived at the right assessment of this and that we ought not to interfere. I would dismiss the appeal.

DIPLOCK, L.J.: I agree, and would only add a little about the proposition submitted to us by counsel for the plaintiff about the duty of the owner of a vehicle on the road in relation to its lighting.

Counsel for the plaintiff, as I understood it, put the proposition this way. That if the lights of a vehicle fail, that is *prima facie* evidence of negligence on the part of the person responsible for the maintenance of the vehicle: in other words the doctrine of *res ipsa loquitur* applies, and the onus lies on the person responsible for the maintenance of the vehicle to prove that he has taken all reasonable steps for its maintenance.

Counsel for the plaintiff seeks to derive that proposition from observations of DENNING, L.J., in *Hill-Venning v. Beszant* (3), which HARMAN, L.J., has cited (4), and similar observations by EDMUND DAVIES, J., in *Parish v. Judd* (5). Those observations, however, are not authority for the proposition which counsel for the plaintiff has sought to advance but for a quite different one, which is, I think, not a proposition of common law but an application of common sense: that is, that the presence of an unlighted vehicle in a road is *prima facie* evidence of negligence on the part of the driver and it is for him to explain how it came to be unlighted and why he could not move it out of the way or give warning to oncoming traffic. That really means no more than this, that anyone in charge of a motor vehicle should realise that if he leaves it after dark in a highway it is a potential source of danger to other users of the highway, particularly those who are not taking reasonable care for their own safety. It follows, therefore, that the person responsible for its being there must show that he has taken all reasonable steps to avoid creating or prolonging that danger. In my view the two defendants in this case did succeed in showing that they took all reasonable steps to avoid creating or prolonging the presence of these unlighted vehicles on the road. So far as creating it is concerned, the defendant driver proved that before he set off on his journey at all, after coupling up the trailer, he tested the lights, and that before lighting-up time he tested them again, and on both those occasions they were working properly. It does not seem to me that in those circumstances any onus lay on the defendants to call evidence as to the maintenance of the vehicle. As regards the other matters of which the plaintiff has complained, I do not find it necessary to add anything to what has been said by HARMAN, L.J., except that I agree.

FENTON ATKINSON, L.J.: I also agree. The only point that has troubled me is what counsel for the plaintiff called the second barrel of his second gun. If it had been proved that the defendant driver knew or, by looking ahead, could readily have seen, that good street lighting began only seven hundred yards ahead, I see much to be said for the view that he should have proceeded that distance before undertaking any repairs to his rear light, having regard to the danger to other southbound traffic on a road of this kind, stopped, as he was, in a very dark spot and where he was unable to give any effective warning to traffic coming from behind; but on the evidence the necessary factual basis was not established; and I agree that this appeal fails.

*Appeal dismissed.*

Solicitors: *Parlett Kent & Co.* (for the plaintiff); *A. D. Vandamm & Co.* (for the defendants).

[Reported by HENRY SUMMERFIELD, ESQ., Barrister-at-Law.]

(3) [1950] 2 All E.R. 1151 at p. 1153.

(4) *Ante*, p. 780, letter I.

(5) [1960] 3 All E.R. 33 at pp. 36, 37.



## WAKEHAM v. MACKENZIE.

[CHANCERY DIVISION (Stamp, J.), January 25, 26, February 14, 1968.]

*Contract*—Oral contract that plaintiff should have deceased's house after his death—*Part performance*—Plaintiff gave up her flat and lived with deceased, looking after him and his house—*Specific performance of oral contract decreed after deceased's death*—*Question of relief where it would have been fraudulent for deceased to repudiate contract for want of writing*—*Law of Property Act, 1925 (15 & 16 Geo. 5 c. 20), s. 40.*

After his wife's death in December, 1963, B., who was seventy-two years of age, orally agreed with the plaintiff, who was a widow and sixty-seven years of age, that if she would move into his house, and look after it and him for the rest of his life, she should have the house (which he owned) and contents when he died. It was a term of the agreement that she should pay for her own board and coal. The plaintiff gave up her council flat and moved to B.'s house. She looked after it and him until he died, and she paid for her board and coal. B. died in February, 1966. He did not leave the house or contents to the plaintiff. In an action by the plaintiff for specific performance of the agreement.

**Held:** the giving up of the plaintiff's flat in order to make her home at B.'s house, her moving into that house, her acts in looking after B. and the house and in paying for her board and coal were acts of part performance which must be referred to some contract, and were referable to the contract that she alleged; accordingly the court would decree specific performance of the oral contract by B. with the plaintiff that she should have his house and contents after his death (see p. 787, letter H, and p. 788, letter B, post).

*Kingswood Estate Co., Ltd. v. Anderson* ([1962] 3 All E.R. 593) applied.

**Quaere** whether, assuming (contrary to the decision stated above) that there had not been part performance, the plaintiff would have been entitled to specific performance on the footing that it would have been fraudulent for B., immediately before his death, to have repudiated the oral contract for want of writing (see p. 788, letter E, post).

*Maxwell v. Lady Mountacute* ((1720), Prec. Ch. 526) referred to.

[As to the need for a written memorandum of a contract for the disposition of an interest in land, see 8 HALSBURY'S LAWS (3rd Edn.) 87, para. 151; and as to the doctrine of part performance, see *ibid.*, pp. 109, 110, para. 189, and 36 *ibid.*, p. 292, para. 412; and for cases on these subjects, see 12 DIGEST (Repl.) 182-184, 1241-1253, and 44 DIGEST (Repl.) 44, 45, 307-318.]

Cases referred to:

*Alderson v. Maddison*, (1881), 7 Q.B.D. 174; *affd.* H.L. sub nom. *Maddison v. Alderson*, [1881-85] All E.R. Rep. 742; (1883), 8 App. Cas. 467; 52 L.J.Q.B. 737; 49 L.T. 303; 47 J.P. 821; 12 Digest (Repl.) 182, 1245.

*Chaproniere v. Lambert*, [1916-17] All E.R. Rep. 1089; [1917] 2 Ch. 356; 86 L.J.Ch. 726; 117 L.T. 353; 30 Digest (Repl.) 408, 514.

*Kingswood Estate Co., Ltd. v. Anderson*, [1962] 3 All E.R. 593; [1963] 2 Q.B. 169; [1962] 3 W.L.R. 1102; Digest (Cont. Vol. A) 318, 250a.

*Maxwell v. Lady Mountacute*, (1720), Prec. Ch. 526; 24 E.R. 235; 12 Digest (Repl.) 188, 1291.

### Action.

This was an action brought by the plaintiff, Margaret Elizabeth Wakham, against the defendant, Lionel Rusk Sprot Mackenzie, the executor of George Frederick Ball, deceased, by writ issued on Aug. 31, 1966, claiming specific performance of an oral contract alleged to have been made by the deceased with the plaintiff in the months of October and November, 1964.

Mr. Ball, the deceased, lived with his wife at 172, Wilton Road, Shirley,

Southampton, which was a small house, having two living rooms and three bedrooms, one of which was very small. At the time of Mr. Ball's death, the house was valued for probate at £4,000. The plaintiff, Mrs. Wakeham, was an old friend and neighbour of Mr. and Mrs. Ball; she was a widow, aged sixty-seven, and lived in a council flat about half-a-mile away. She had little income, only her state pension and £9 monthly provided by her deceased husband. In December, 1963, Mrs. Ball died. Mr. Ball was then left living alone at No. 172. He was seventy-two and had bad health. Before Mrs. Ball died she had indicated to the plaintiff the hope that the plaintiff would look after Mr. Ball. The plaintiff went round to see Mr. Ball five or six times a week. On Oct. 7, 1964, the plaintiff was not well and did not go. Mr. Ball came to her flat, and suggested that she should give up her flat and move to his house, 172, Wilton Road, where she could have a room of her own and make the house her home. He promised that, if she did this, he would leave her the house and contents when he died. The proposition was discussed again a few days later on Oct. 12, 1964. On October 28, 1964, the matter was again discussed, the plaintiff's daughter then being present. According to their evidence at the trial Mr. Ball then said that he was leaving the house and contents to the plaintiff, that he had fixed things up with his solicitor and that the plaintiff could move in so soon as she wished. The plaintiff did not move in; she said in evidence that she was waiting for written proof before she gave up her council flat. On Nov. 23, 1964, Mr. Ball was not at all well. The plaintiff told him on this occasion that she would accept his proposition if he had made legal arrangements; she said in evidence that he gave her his word of honour that he had made legal arrangements. Accordingly she gave up her council flat and on Dec. 3, 1964, moved into 172, Wilton Road. Thereafter she shared the house with Mr. Ball, looking after it and him, and sharing the cost of food and coal. Mr. Ball died on Feb. 12, 1966. He had not in fact arranged anything with his solicitor and had not left the plaintiff anything by will.

*K. C. L. Smithies* for the plaintiff.

*M. Essayan* for the defendant.

*Cur. adv. vult.*

Feb. 14. **STAMP, J.**, read the following judgment in which, having stated the nature of the proceedings, he reviewed the circumstances and the evidence. In the course of this review **HIS LORDSHIP** intimated that in deciding what findings of fact he ought to make, he had had to bear in mind the suspicion with which the court should regard the claim against the estate of a deceased person and his duty to subject such a claim to a very close scrutiny. After referring to certain correspondence and the evidence in relation thereto, **HIS LORDSHIP** continued: It is not in issue that, from the day when the plaintiff moved into 172, Wilton Road, she did all that was contemplated by the arrangement which had been made. She kept house and tended Mr. Ball, she had her own room and furniture there, and 172, Wilton Road was her home. Mr. Ball and the plaintiff each contributed £2 a week for food and so on, and when it was not enough the plaintiff did not ask for more. At times she was very unhappy. He was only concerned with his own comfort and was very selfish. When Mr. Ball died there was no provision for the plaintiff.

I am satisfied not merely on the balance of probability but beyond all reasonable doubt that Mr. Ball promised the plaintiff that if she would move into 172, Wilton Road and make her home there, look after the house and him for the rest of his life, she should have it and its contents when he died. I am equally satisfied that the plaintiff accepted that offer orally on Nov. 23, 1965, and I find as a fact that it was a term of the agreement so made that the plaintiff should pay for her own board and coal; I find as a fact that the plaintiff performed her part of the agreement.

I also make these additional findings of fact, which are not necessary for the purpose of this judgment but which could be relevant, for reasons which I will

A explain later, if the case should go further. I find as a fact that there was prior to Nov. 23, 1964, an oral agreement in the terms I have found, but subject to a condition that Mr. Ball should put the agreement into legal form. I find as a fact that the condition was not performed because Mr. Ball on Nov. 23, promised and assured the plaintiff that it had been performed. I find as a fact that, before the condition had been performed, the plaintiff, relying on that promise and assurance, entered into oral agreement on Nov. 23, 1964, gave up her little council flat and moved into 172, Wilton Road. In making these additional findings, I record that the additional facts so found form part of the plaintiff's case as pleaded or argued, and that I have taken no account of them in coming to my conclusions.

C It was submitted on behalf of the defendant executor, first, that apart from s. 40 of the Law of Property Act, 1925, there was no contract enforceable against Mr. Ball; there was, it was said, want of mutuality. The plaintiff might have looked after the house and Mr. Ball well or she might have done so badly. Had she done it badly or had she failed otherwise to fulfil her promise, Mr. Ball would have had no remedy. His promise to leave her the house and contents was no more, so it was said, than a statement of his then present intention. D These and other similar submissions, in my judgment, assume the non-existence of a contract. If there was a contract in the terms which I have found and the plaintiff had failed to perform her obligations, Mr. Ball could not have had an action for a specific performance because the contract was a contract for the performance of personal service; but I cannot see why he should not have had damages, whether substantial or only nominal, for her failure to perform her part of the contract. E Nor does the submission that there was no more than a unilateral promise by Mr. Ball that, if the plaintiff looked after him for the rest of his life, he would leave her the house and contents appear to me well-founded.

If a man promise another that, if he serve him for a year, he will pay him £1,000 and the promisee does so serve, it has never been doubted that entering on the service is an acceptance of the offer, nor held that the promise to pay at the end of the year is unilateral and cannot be enforced when the service has been performed. No case has been cited to me which establishes that it makes any difference whether the service is for one year or five years or, as in this case, the life of the promisor. It is common ground that a contract to leave a house and its contents on death is one which this court can enforce. The submissions G that there was in this case no binding contract are not, in my judgment, well-founded.

Then it is contended that, assuming that there was a binding contract, no action can be brought on it by the plaintiff by reason of s. 40 of the Law of Property Act, 1925, which replaced part of s. 4 of the Statute of Frauds. It is an unhappy reflection that in this year of grace it should be possible, and indeed the duty of H the defendant as an executor and in answer to a contract so very clearly proved, to rely, if it applies, on a statute replacing one passed nearly three hundred years ago for "prevention of many fraudulent practices which were commonly endeavoured to be upheld by perjury and subornation of perjury"; a statute passed at a time in the history of our law, when the defendant to the action could not give oral evidence and when, as until recently, in an action at law on a I contract the facts were found by a jury; a statute which, almost from the outset of its existence, was held by the judges was not to be used as an engine of fraud or to cover fraud; a statute which was held not to operate to avoid a contract but merely to prevent an action being brought on it. Nothing could have been more fraudulent to the way of thinking of the old equity lawyers than that Mr. Ball, or his executor standing in his shoes, having induced performance of the contract and enjoyed the benefits of that performance, should have repudiated his obligations in reliance on the statute. And the question which I have to



decide is whether that performance was such as to raise equities which, consistently with the authorities, entitle the plaintiff to have the contract performed by the defendant: authorities which are neither consistent nor easy to reconcile because the common law judges until comparatively recent times regarded as most satisfactory a statute which the equity judges, not dependent on a jury to find the facts, would, if the doing of equity required it, endeavour to circumvent.

What is said on behalf of the defendant is that the acts of the plaintiff in performing the contract are not referable to a contract relating to any land or to a contract relating to 172, Wilton Road and, therefore, are not acts of part performance on which the plaintiff can rely. In support of this contention the defendant relies first on *Alderson v. Maddison* (1) in the Court of Appeal, and on appeal to the House of Lords, *Maddison v. Alderson* (2).

In *Chaproniere v. Lambert* (3), WARRINGTON, L.J., after referring very specifically to *Maddison v. Alderson* (2), summed the matter up by referring (4) to a passage in *FRY ON SPECIFIC PERFORMANCE* (5th Edn.) p. 290, in which it was stated that among other conditions required to satisfy the requirements of part performance to withdraw a contract from the operation of the statute, the acts of part performance must be such as to be not only referable to a contract such as that alleged, but to be referable to no other title. There are certainly passages in *Maddison v. Alderson* (2) from which this might be inferred. If the matter rested there I should of course endeavour to apply what WARRINGTON, L.J., said to the facts of the present case. I am however happily relieved of the task of doing so by the recent decision of the Court of Appeal in *Kingswood Estate Co., Ltd. v. Anderson* (5). The essential facts of that case as set out in the head-note, were that the tenant, an elderly widow, had resided for about forty-five years at premises controlled by the Rent Restriction Acts, of which she became the statutory tenant, her invalid son residing with her. Her landlords, a property development company, whose managing director, Y. was also a partner in the firm of estate agents who acted for the company, were anxious to obtain possession of the premises for the purposes of development. Accordingly, the landlords purchased another house and offered the tenant accommodation at a flat therein. Conversation then took place between the tenant and her daughters and Y. at which Y. stated that in the event of the tenant moving into the flat together with her son there would be no need for a tenancy agreement as they would be there for the rest of their lives. On the faith of Y.'s representations, the tenant with her son moved in September, 1959, to the flat and paid rent, being supplied with a rent book of a type ordinarily used for weekly tenancy. The landlords, having served the tenant with a notice to quit, claimed possession of the flat in the county court contending that the tenant had moved there on the terms that she was to become a contractual weekly tenant, entitled to no more than four weeks' notice.

All the lord justices took the view that there was a sufficient act of part performance to take the case outside s. 40 of the Law of Property Act, 1925. Because UPJOHN, L.J., referred specifically to the rules stated by WARRINGTON, L.J., in *Chaproniere v. Lambert* (4), I will refer first to his judgment where he rejected the argument which had been advanced, and which is advanced in the present case, that the part performance must be referable to the contract alleged and not to any other title. What he said was this (6):

"Then it is said that, even if that was the contract, it was an oral contract and there is no written memorandum to satisfy s. 40 of the Law of Property Act, 1925. But leaving No. 91 and going into possession of No. 46 constitute

(1) (1881), 7 Q.B.D. 174.

(2) [1881-85] All E.R. Rep. 742; (1883), 8 App. Cas. 467.

(3) [1916-17] All E.R. Rep. 1089; [1917] 2 Ch. 356.

(4) [1916-17] All E.R. Rep. at p. 1092; [1917] 2 Ch. at p. 361.

(5) [1962] 3 All E.R. 593; [1963] 2 Q.B. 169.

(6) [1962] 3 All E.R. at p. 604; [1963] 2 Q.B. at pp. 188, 189.

- A acts of part performance which entitled the tenant to rely on a bare oral contract and which prevents the landlords from taking any objection to the want of writing. With all respect to the submission of counsel for the landlords, I should have thought that his argument founded on the want of writing was quite unarguable, for, in my judgment, this is a complete text-book case of part performance. However counsel relies on the well-known conditions necessary to prevent the operation of the statute laid down by WARRINGTON, L.J., in *Chaproniere v. Lambert* (7), and says that the acts of part performance here do not satisfy the first condition, namely, that the acts of part performance must not only be referable to a contract such as that alleged, but be referable to no other title. So he says the acts of part performance here are equally consistent with a weekly tenancy and to a tenancy for lives, so that it cannot be said that the acts of part performance are referable to no other title. This, however, is a long exploded idea. The true rule is, in my view, stated in FRY ON SPECIFIC PERFORMANCE (6th Edn.), p. 278, s. 528: 'The true principle, however, of the operation of the acts of part performance seems only to require that the acts in question be such as must be referred to some contract, and may be referred to the alleged one; that they prove the existence of some contract, and are consistent with the contract alleged'."

WILLMER, L.J., took a similar view when he said (8):

- E "On the question of part performance, I do not think that there is any room for doubt. Where the question is whether there was an agreement for a tenancy, I cannot imagine any better evidence of part performance than the fact of a tenant going into actual occupation. It is said, however, that the act of the tenant in going into occupation was equivocal, in that it might be referable to any kind of tenancy agreement. I do not understand, however, that part performance must necessarily be referable to the agreement, and only the particular agreement, relied on. I cite from ANSON'S LAW OF CONTRACT (21st Edn., 1959), p. 75, where the principle is stated, as I think correctly, in the following terms: 'The acts of performance relied upon must of themselves suggest the existence of a contract such as it is desired to prove, although they need not establish the exact terms of that contract.' As I understand it, if there is evidence of such part performance, that is sufficient to warrant the admission of oral evidence to prove what the exact terms of the contract were."

- G RUSSELL, L.J., said quite simply (9):

"I agree further that the contract was partly performed by the tenant's move from No. 91 to No. 46; this is quite clear."

- H I conclude from *Kingswood Estate Co., Ltd. v. Anderson* (10), first that it is not the law that the acts of part performance relied on must be not only referable to a contract such as that alleged, but referable to no other title, the doctrine to that effect laid down by WARRINGTON, L.J., in *Chaproniere v. Lambert* (7) having been exploded; and, secondly, that the true rule is that the operation of acts of part performance requires only that the acts in question be such as must be referred to some contract and may be referred to the alleged one: that they prove the existence of some contract and are consistent with the contract alleged.

I The acts of part performance in this case, the giving up of the plaintiff's home to make her home at 172, Wilton Road, the moving into a new home, the acts which the plaintiff performed in looking after the deceased and looking

(7) [1916-17] All E.R. Rep. at p. 1092; [1917] 2 Ch. at p. 361.

(8) [1962] 3 All E.R. at p. 599; [1963] 2 Q.B. at p. 181.

(9) [1962] 3 All E.R. at p. 607, letter B; [1963] 2 Q.B. at p. 193.

(10) [1962] 3 All E.R. 593; [1963] 2 Q.B. 169.

after that home and putting £2 a week into the common pot clearly, in my judgment, raise an equity in her. Those acts were, in my judgment, such as must be referred to some contract. The expression "must be referred to some contract", used by UPJOHN, L.J., in the *Kingswood Estate* case (11), cannot exclude any act which could possibly be referable to love or affection, for whenever a man goes into possession of land he may be there by the grace and favour of another.

In the circumstances in which the plaintiff found herself at the relevant time I cannot suppose that she gave up her own home, took up residence at No. 172 and did what she did otherwise than by reference to some contract. If it were necessary to do so, I would further hold that the act in making her home at 172, Wilton Road during the whole of the residue of the life of Mr. Ball and keeping house, were acts of part performance relating to 172, Wilton Road.

Earlier in this judgment I made findings regarding Mr. Ball's statement to the effect that he had fixed things up with his solicitor, which I said were unnecessary for the purposes of this judgment. I did so because in my view it would have been fraudulent of Mr. Ball immediately before his death to have repudiated the bargain for want of writing. The defendant who stands in his shoes can be in no better position. The question whether in these circumstances, assuming I am wrong as to the effect of the part performance, the court ought to grant relief despite s. 40 was not argued and the facts on which such an argument could be based were not pleaded. It would therefore be wrong for me to consider whether such an argument could have been well-founded.

It is, however, perhaps just worth noting in this connexion the notes of the case of *Maxwell v. Lady Mountacute* (12). It is perhaps before I read worth observing, refreshingly enough, that the case was heard at my Lord Chancellor's House. The note of the case is this (12):

"In this case a distinction was taken, and agreed by the court that where, on a treaty for a marriage, or any other treaty, the parties come to an agreement, but the same is never reduced into writing, nor any proposal made for that purpose, so that they rely wholly on their part agreement, that unless this be executed in part, neither party can compel the other to a specific performance, for that the Statute of Frauds is directly in their way; but if there was any agreement for reducing the same into writing, and that is prevented by the fraud and practice of the other party, that this court will in such case give relief; as where instructions are given, and preparations made for the drawing of a marriage settlement, and before the completing of it the woman is drawn, by the assurances and promises of the man, to perform it, and after to marry him."

How far that is consistent with the later cases I know not. I made the additional findings of fact so that if the point is worth taking in a higher court and that court should think it right to allow it to be taken, the findings of fact may not be wanting.

*Declaration that plaintiff entitled to specific performance; direction that the defendant executor should convey 172, Wilton Road, and transfer the contents, to the plaintiff.*

Solicitors: *White & Leonard & Corbin Greener* (for the plaintiff); *Pracock & Goddard* (for the defendant).

[Reported by JENIFER SANDELL, Barrister-at-Law.]

(11) [1962] 3 All E.R. at p. 604; [1963] 2 Q.B. at p. 189.

(12) (1720), Prec. Ch. 526.



A

# A.M.F. INTERNATIONAL, LTD. v. MAGNET BOWLING, LTD. AND ANOTHER.

[QUEEN'S BENCH DIVISION (Mocatta, J.), January 15, 16, 17, 18, 19, 22, 23, 24, 25, 26, 29, 30, 31, February 1, 2, 5, 6, 7, 8, 9, 12, 13, 14, 15, 16, April 3, 1968.]

B

*Building Contract—Specialist contractor entering on building site on instruction of building owner to install equipment in building in course of erection—Building contractor concurring that building ready—Contractual and implied obligation of building owner that building ready to receive equipment—Damage to equipment by flood-water entering building—Exception clause inapplicable—Liability of building owner in contract—Liability of building owner and building contractors in tort.*

C

*Indemnity—Negligence—Building contract—Building owner negligent as well as building contractor, and both liable to specialist contractor for damage to his property on the site—Whether indemnity clause in building contract should be construed so as not to extend to building owner's liability for negligence.*

D

*Occupier—Negligence—Building owner—Installation of equipment by separate specialist contractor—Firm of architects engaged by architect-employee of company associated with building owner—Whether firm of architects independent contractors—Specialist contractor's equipment damaged by flood water during erection of building—Building owner relying on building contractors—Liability of building owner and building contractors for negligence and under Occupiers' Liability Act, 1957 (5 & 6 Eliz. 2 c. 31), s. 1 and s. 2 (4) (b).*

E

*Occupier—Negligence—Damages—Financial loss flowing from damage to property—Whether recoverable—Occupiers' Liability Act, 1957 (5 & 6 Eliz. 2 c. 31), s. 1 (3) (b).*

F

The first defendant ("Magnet") contracted with the plaintiff ("A.M.F.") that the plaintiff would provide and install valuable timber and other specialised bowling alley equipment (the woodwork being of a value of £40,000 in a total contract price of £57,651) in a building for whose construction Magnet contracted with the second defendants ("Trenthams"). A.M.F. were not sub-contractors of Trenthams. The timber used for the bowling lanes had to be kiln dried timber with a small moisture content.

G

Under the contract the title to the timber and goods to be installed remained in A.M.F. until completion of the installation. The architect in charge was in the employ of an associated company of Magnet, but he employed an outside firm of architects to provide certain architectural services under his overall professional responsibility. The architect in charge was regarded by the court as being in law in the full-time employment of Magnet, and the outside firm of architects were found not to be independent contractors.

H

Trenthams entered on the building site and began work in December, 1963. They, as well as Magnet, knew that A.M.F.'s installation would incorporate timber that was valuable and for which absence of damp and complete dryness was of great importance. At Magnet's request A.M.F. began installation, with Trenthams' concurrence, on July 6, 1964, the contract (which was signed subsequently) between Magnet and A.M.F. providing

I

(by cl. 3 (B)) that "the bowling centre shall be ready to accept delivery of the . . . goods and for the commencement and uninterrupted performance of their installation" therein on the date that Magnet should confirm. In fact precautions against entry of flood water into the building were not adequate at that time. An exception clause (cl. 5) in the contract provided that neither party should be liable to the other "for any . . . damage caused by . . . failure of performance of any part of this agreement occasioned by . . . flood . . . accident . . . act of God . . .". At about this time enquiry

of A.M.F. was made by Magnet about insurance cover during the period of installation. The reply was that A.M.F. "cover all their own risks". There was no express representation that A.M.F.'s insurance covered any interests but their own. On July 21, 1964, consequent on an exceptionally heavy rainstorm a considerable quantity of water entered the building through (so the court found) an uncompleted doorway, pouring over a plank let into the threshold as a guard against water. A.M.F.'s timber, which was then on the premises was seriously damaged. The flood damage was not, so the court found, attributable to an act of God, but the risk of water overcoming such defence as had been placed at the threshold was readily foreseeable and could have been guarded against fairly easily. The building contract between Magnet and Trenthams contained an indemnity clause (condition 14 (b)) whereby Trenthams were to indemnify Magnet against liability in respect of any damage to property arising "out of or in the course of or by reason of the execution of the works", provided that it was due to negligence of Trenthams. The court found that "the works" included items referred to in the bills of quantities which contained provisions requiring Trenthams to provide for the diversion of storm water, to allow for protection of all work and materials from injury by weather and to prevent the accumulation of water on the site; and the court further found that if these had been complied with water should not have entered the building. Condition 10 of the building contract provided that nothing contained in the bills of quantities should override or modify the application of the conditions of the building contract. In fact Magnet had relied wholly on Trenthams in regard to the discharge of their obligations in the contract. In an action by A.M.F. against Magnet and Trenthams, claiming damages for breach of contract and in tort against Magnet and the same sums as damages in tort against Trenthams, salvage expenses\* being treated as consequential loss (cf. holding (A) (iii) post) flowing from the damage to timber.

**Held:** (A) Magnet and Trenthams were both liable in damages to A.M.F. on the following grounds (see p. 809, letter D, post):

(i) (as between A.M.F. and Magnet, contractual liability) (a) Magnet were under a contractual obligation, either by virtue of cl. 3 (B) or by implied warranty of fitness, to A.M.F. that the building would be fit to receive delivery of A.M.F.'s goods, viz. would in particular be watertight against all reasonably foreseeable risks, and Magnet were in breach of that obligation; (b) the exception clause (cl. 5) was inapplicable because the damage to timber was occasioned by the failure to have the premises fit to receive A.M.F.'s goods not by flood (see p. 800, letters B, C and G, post).

(ii) (as between A.M.F. and Magnet, tortious liability) Magnet, as occupiers, were not within such protection as was afforded by s. 2 (4) (b)† of the Occupiers' Liability Act, 1957, because:

(a) Magnet should have taken some steps, through a qualified person, to check that the building would be ready for A.M.F. to start installation on July 6, 1964, but had not done so and had given no instructions in regard to anti-flooding precautions (see p. 803, letter E, and p. 806, letter G, post).

*Green v. Fibreglass, Ltd.* ([1958] 2 All E.R. 521) distinguished.

(b) although protection of the building against flooding was within the description work of "construction, maintenance or repair" in s. 2 (4) (b) (see p. 802, letter G, post), and although an occupier might be acting reasonably by employing a competent independent contractor to fulfil his duty in regard to technical work and might not incur liability for the negligence of the independent contractor (see p. 803, letter H, post), yet on the facts of the present case the firm of architects were not in the position

\* See p. 807, letter A, post.

† Section 2 (4), so far as material, is set out in footnote (5), post.

**A** of independent contractors in relation to Magnet, and Magnet could not escape tortious liability on this ground (see p. 805, letter H, and p. 806, letter E, post).

(iii) (as between A.M.F. and both Magnet and Trenthams, tortious liability) the liability of an occupier of premises under the rules applied by s. 1 (3) (b)\* of the Occupiers' Liability Act, 1957, extended to financial loss flowing from damage to property as well as to damages for physical injury to personal property (see p. 808, letter A, post).

**B** *Workington Harbour & Dock Board v. S.S. Towerfield (Owners)* ([1950] 2 All E.R. 414) distinguished.

(iv) (as between A.M.F. and Trenthams, tortious liability) Trenthams were occupiers of the premises as well as Magnet (see p. 808, letter I, post), and were liable under the Occupiers' Liability Act, 1957, for failure to take reasonable care in regard to temporary precautions against flooding; further, they would be similarly liable in negligence (see p. 809, letters B and D, post).

**C** *Clay v. A. J. Crump & Sons, Ltd.* ([1963] 3 All E.R. 687) applied.

(B) (as between Magnet and Trenthams) (i) Magnet were entitled to recover from Trenthams, as damages for breach of contract by virtue of the terms of the bills of quantities, the sum for which A.M.F. were entitled to judgment against Magnet in respect of damage to timber (see p. 815, letter H, post).

(ii) the extent of the responsibility of Magnet and Trenthams respectively for the damage suffered by A.M.F. was forty per cent. and sixty per cent., and accordingly any contribution mutually recoverable under s. 6 (1) (c), (2) of the Law Reform (Married Women and Tortfeasors) Act, 1935, in respect of their tortious liability would be in those proportions (see p. 810, letter D, post).

(iii) since Magnet were liable to A.M.F. in tort (see (A) (ii) and (iii) ante) Magnet were not entitled to indemnity under the exception clause (condition 14 (b) of the building contract) for Magnet's negligence had the consequence that Magnet's liability was outside the scope of the indemnity clause, which should be construed so as to extend only to liability of Magnet to third parties arising without negligence on Magnet's part (see p. 815, letters B and C, post).

**F** *Walters v. Whessoe, Ltd. and Shell Refining Co., Ltd.* ((1960), p. 816, post) followed.

**G** *Canada Steamship Lines, Ltd. v. Regem* ([1952] 1 All E.R. 305) applied.

(C) (as between Magnet and A.M.F., counterclaim by Magnet) Magnet were not entitled to damages against A.M.F. based on A.M.F.'s answer to Magnet's enquiry as to insurance, for the answer was not a representation that A.M.F.'s insurance would cover Magnet against liability for damage to A.M.F.'s property (see p. 801, letters G and H, post).

**H** [As to the duty of care to visitors to premises and responsibility for work of independent contractors, see 28 HALSBURY'S LAWS (3rd Edn.) 45, para. 40.

As to the measure of damages and contribution between tortfeasors, see 28 HALSBURY'S LAWS (3rd Edn.) 97, 96, paras. 103, 101.

As to the employment of architects, see 3 HALSBURY'S LAWS (3rd Edn.) 525, para. 1042.

**I** As to the construction of clauses of indemnity, see 18 HALSBURY'S LAWS (3rd Edn.) 535, para. 980 text and note (a); and for cases on exception clauses, see 3 DIGEST (Repl.) 102, 103, 286-288.

For the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6 (1) (c) (2), see 25 HALSBURY'S STATUTES (2nd Edn.) 360.

For the Occupiers' Liability Act, 1957, s. 1 (3), s. 2 (4), see 37 HALSBURY'S STATUTES (2nd Edn.) 833, 835.]

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\* Section 1 (3), so far as material, is set out at p. 807, letter E, post.



## Cases referred to:

- Alderslade v. Hendon Laundry, Ltd.*, [1945] 1 All E.R. 244; [1945] K.B. 189; 114 L.J.K.B. 196; 172 L.T. 153; 3 Digest (Repl.) 102, 286.
- Balfour v. Barty-King*, [1957] 1 All E.R. 156; [1957] 1 Q.B. 496; [1957] 2 W.L.R. 84; Digest (Cont. Vol. A) 1159, 411b.
- Canada Steamship Lines, Ltd. v. Regem*, [1952] 1 All E.R. 305; [1952] A.C. 192; 11 Digest (Repl.) 594, \*165.
- Clay v. A. J. Crump & Sons, Ltd.*, [1963] 3 All E.R. 687; [1964] 1 Q.B. 533; [1963] 3 W.L.R. 866; Digest (Cont. Vol. A) 75, 486b.
- Clayton v. Woodman & Son (Builders), Ltd.*, [1962] 2 All E.R. 33; [1962] 2 Q.B. 533 at p. 546; [1962] 1 W.L.R. 585; *rvsg.* [1961] 3 All E.R. 249; [1962] 2 Q.B. 533; [1961] 3 W.L.R. 987; Digest (Cont. Vol. A) 1147, 112a.
- Compania Naviera Maropan S.A. v. Bowaters Lloyd Pulp & Paper Mills, Ltd.*, [1955] 2 All E.R. 241; [1955] 2 Q.B. 68; [1955] 2 W.L.R. 998; *affg.*, [1954] 3 All E.R. 563; [1955] 2 Q.B. 68; [1954] 3 W.L.R. 894; 41 Digest (Repl.) 189, 259.
- Donoghue v. Stevenson*, [1932] All E.R. Rep. 1; [1932] A.C. 562; 1932 S.C. (H.L.) 31; 101 L.J.P.C. 119; 147 L.T. 281; 36 Digest (Repl.) 85, 458.
- East Ham Borough Council v. Bernard Sunley & Sons, Ltd.*, [1965] 3 All E.R. 619; [1966] A.C. 406; [1965] 3 W.L.R. 1096; Digest (Cont. Vol. B) 65, 131a.
- Farr (A. E.), Ltd. v. The Admiralty*, [1953] 2 All E.R. 512; [1953] 1 W.L.R. 965; 7 Digest (Repl.) 390, 206.
- Green v. Fibreglass, Ltd.*, [1958] 2 All E.R. 521; [1958] 2 Q.B. 245; [1958] 3 W.L.R. 71; Digest (Cont. Vol. A) 1155, 329a.
- Greenock Corpn. v. Caledonian Ry. Co., Same v. Glasgow and South-Western Ry. Co.*, [1916-17] All E.R. Rep. 426; [1917] A.C. 556; 86 L.J.P.C. 185; 117 L.T. 483; 36 Digest (Repl.) 166, 885.
- Hartwell v. Grayson Rollo and Clover Docks*, [1947] K.B. 901; [1947] L.J.R. 1038; 24 Digest (Repl.) 1089, 401.
- Hedley Byrne & Co., Ltd. v. Heller & Partners, Ltd.*, [1963] 2 All E.R. 575; [1964] A.C. 465; [1963] 3 W.L.R. 101; Digest (Cont. Vol. A) 51, 1117a.
- Hughes v. Percival*, [1881-85] All E.R. Rep. 44; (1883), 8 App. Cas. 443; 52 L.J.Q.B. 719; 49 L.T. 189; 45 Digest (Repl.) 297, 148.
- Indermaur v. Dames*, [1861-73] All E.R. Rep. 15; (1866), L.R. 1 C.P. 274; 35 L.J.C.P. 184; 14 L.T. 484; *affd.* Ex.Ch., [1861-73] All E.R. Rep. 15; (1867), L.R. 2 C.P. 311; 36 L.J.C.P. 181; 16 L.T. 293; 31 J.P. 390; 36 Digest (Repl.) 46, 246.
- Kate, The*, [1935] All E.R. Rep. 912; [1935] P. 100; 104 L.J.P. 36; 154 L.T. 432; 42 Digest (Repl.) 1143, 9513.
- Lochgelly Iron & Coal Co., Ltd. v. M'Mullan*, [1934] A.C. 1; 102 L.J.P.C. 123; 149 L.T. 526; 34 Digest (Repl.) 709, 4852.
- Mowbray v. Merryweather*, [1895-99] All E.R. Rep. 941; [1895] 2 Q.B. 640; 65 L.J.Q.B. 50; 73 L.T. 459; 59 J.P. 804; 3 Digest (Repl.) 97, 245.
- Nichols v. Marsland*, [1874-80] All E.R. Rep. 40; (1876), 2 Ex.D. 1; 46 L.J.Q.B. 174; 35 L.T. 725; 41 J.P. 500; 36 Digest (Repl.) 165, 880.
- Okehampton, The*, [1913] P. 54, 173; 83 L.J.P. 5; 110 L.T. 130; 41 Digest (Repl.) 550, 3282.
- Phillips v. Clark*, (1857), 2 C.B.N.S. 156; 26 L.J.C.P. 168; 29 L.T.O.S. 181; 140 E.R. 372; 41 Digest (Repl.) 301, 1124.
- Rutter v. Palmer*, [1922] All E.R. Rep. 367; [1922] 2 K.B. 87; 91 L.J.K.B. 657; 127 L.T. 419; 3 Digest (Repl.) 78, 159.
- Scott v. Foley, Aikman & Co.*, (1899), 5 Com. Cas. 53; 41 Digest (Repl.) 181, 218.

- A** *Sedleigh-Denfield v. O'Callaghan*, [1940] 3 All E.R. 349; [1940] A.C. 880; 109 L.J.K.B. 893; 164 L.T. 72; 36 Digest (Repl.) 316, 629.
- Sims v. Foster Wheeler, Ltd.*, [1966] 2 All E.R. 313; [1966] 1 W.L.R. 769; Digest (Cont. Vol. B) 67, 421b.
- Tennent v. Earl of Glasgow*, (1864), 2 Macph. (Ct. of Sess.) (H.L.) 22; 47 Digest (Repl.) 698, \*462.
- B** *Thomson v. Cremin*, (1941), [1953] 2 All E.R. 1185; [1956] 1 W.L.R. 103, n.; Digest (Cont. Vol. A) 1181, 846a.
- Travers (Joseph) & Sons, Ltd. v. Cooper*, [1914-15] All E.R. Rep. 104; [1915] 1 K.B. 73; 83 L.J.K.B. 1787; 111 L.T. 1088; 8 Digest (Repl.) 46, 278.
- Waddle v. Wallsend Shipping Co., Ltd.*, [1952] 2 Lloyd's Rep. 105; 41 Digest (Repl.) 363, 1554.
- C** *Walters v. Whessoe, Ltd. and Shell Refining Co., Ltd.*, (Nov. 18, 1960), see p. 816, post.
- Weller & Co., Ltd. v. Foot & Mouth Disease Research Institute*, [1965] 3 All E.R. 560; [1966] 1 Q.B. 569; [1965] 3 W.L.R. 1082; Digest (Cont. Vol. B) 554, 109c.
- Westcott v. J. H. Jenner (Plasterers), Ltd. and Bovis, Ltd.*, [1962] 1 Lloyd's Rep. 309; Digest (Cont. Vol. A) 74, 421a.
- D** *Wheat v. E. Lacon & Co., Ltd.*, [1966] 1 All E.R. 582; [1966] A.C. 552; [1966] 2 W.L.R. 581; *affg.* [1965] 2 All E.R. 700; [1966] 1 Q.B. 335; [1965] 3 W.L.R. 142; Digest (Cont. Vol. B) 556, 245Ab.
- Workington Harbour & Dock Board v. S.S. Towerfield (Owners)*, [1950] 2 All E.R. 414; [1951] A.C. 112; 42 Digest (Repl.) 1057, 8769.

**E** **Action.**

This was an action for damages, brought by A.M.F. International, Ltd. (in this report called "A.M.F.") against Magnet Bowling, Ltd. (in this report called "Magnet") and G. Percy Trentham Co., Ltd. (in this report called "Trenthams") claiming a sum of £21,453 12s. 10d. as damages in respect of damage caused by water entering a building, a bowling centre, then in course of erection

**F** by Trenthams for Magnet, in which A.M.F.'s equipment, in particular wood for bowling lanes which it was important to keep dry, was being installed by A.M.F. The installation of the timber of sixteen alleys had been almost completed at the time when the water entered. The claim was made in contract and in tort against Magnet and in tort against Trenthams. Magnet claimed indemnity or

**G** contribution from Trenthams both by virtue of an indemnity clause in their building contract with Trenthams and under s. 6 of the Law Reform (Married Women and Tortfeasors) Act, 1935. The issues are stated at p. 797, letter A, to p. 798, letter D, post. There was no contract between A.M.F. and Trenthams, but both companies contracted directly with Magnet. The price which A.M.F. were to receive under their contract with Magnet for the provision, sale and installation of their equipment in the bowling centre was £57,651 17s. 1d., of which the

**H** woodwork constituted about £40,000.

*John D. Stocker, Q.C.*, and *M. Stuart-Smith* for the plaintiffs (A.M.F.).

*I. N. Duncan Wallace* and *Humphrey Lloyd* for the first defendants (Magnet).

*Bernard Caulfield, Q.C.*, and *P. J. M. Kennedy* for the second defendants (Trenthams).

**I**

*Cur. adv. vult.*

Apr. 3. **MOCATTA, J.**, read the following judgment: The plaintiffs ("A.M.F.") are an English subsidiary of an American company called the American Machine and Foundry Corporation. In this action they claim £21,453 12s. 10d. as damages for breach of contract and in tort against the first defendants and the same sum as damages in tort against the second defendants. Their claim arises out of a flood at the partially constructed bowling centre of the first defendants at Barnsley on July 21, 1964, which caused great damage to A.M.F.'s

equipment then being installed. The first defendants, whilst denying all liability to A.M.F., claim an indemnity from the second defendants under the terms of the building contract entered into between the two defendants. Alternatively, the first defendants claim contribution from the second defendants under the Law Reform (Married Women and Tortfeasors) Act, 1935. It was agreed on the first day of the trial that I was concerned with liability only. A

A.M.F. (inter alia) manufacture in this country and install the woodwork and machinery required in a modern ten-pin bowling alley. [His LORDSHIP then referred to the growing popularity in this country of the highly sophisticated and mechanised modern form of ten-pin bowling, and after explaining the high precision required in the construction of the lanes, whose surface is composed of pine and maple, kiln dried and with a moisture content of not more than seven per cent., and after indicating the cost of the installation and the value of the woodwork, His Lordship continued:] The first defendants ("Magnet") were incorporated in September, 1963, have their head office in London, and are a subsidiary of the well-known industrial holding company, British Electric Traction, Ltd., whom I will call "B.E.T." Another such subsidiary, called the Potteries Motor Traction Co., Ltd., whom I will call "P.M.T.", with its head office at Stoke-on-Trent, was an associated company of Magnet. At all material times P.M.T. had at their head office an architect's department, of which the head in 1963 and down to May 26, 1964, was one R. C. L. Jones, A.R.I.B.A. Mr. D. C. Smith, who had been working in the architect's department of P.M.T. from 1954, then became chief architect and head of the department. In connexion with the building of their Barnsley bowling alley Magnet made use of P.M.T.'s architect's department. No point was taken that Magnet and P.M.T. were and are separate legal entities and the case was conducted on the basis that Mr. Jones and Mr. Smith could be treated in law as in the whole-time employment of Magnet. B C D E

It is clear that some time in 1963, if not earlier, B.E.T. had decided in principle to go in for bowling alleys in a big way and that, before the incorporation of Magnet in September, 1963, there had been discussions between some manifestation of the group and A.M.F. for the provision and installation by A.M.F. of bowling alley equipment in bowling centres belonging to the group. The main contract between A.M.F. and Magnet was not in fact signed until Mar. 24, 1964, but its principal terms at least must, on the evidence, have been agreed in the late autumn of 1963, if not earlier. Under the main contract it was recited that Magnet intended to establish ten-pin bowling centres at Longton, Barnsley, Mansfield, Crews, Bristol and Cambridge, with varying numbers of lanes, and at further centres in the United Kingdom up to a total of 250 lanes and desired that all those centres should be equipped with bowling equipment to be acquired from A.M.F. on the terms and conditions therein set out. By cl. 2 it was agreed that A.M.F. should sell and Magnet purchase exclusively from A.M.F. 250 bowling lanes and other related bowling equipment, as described in Sch. A to the contract, for installation in ten-pin bowling centres to be established by Magnet in the U.K. on sites approved in advance by A.M.F. By cl. 3 the purchase price was to be the list price generally being quoted by A.M.F. at the time each purchase order was signed by Magnet. By cl. 6 Magnet were, not less than twenty weeks before the date chosen by them for the commencement of the installation of the equipment in each centre, to deliver to A.M.F. a purchase order, which should be accepted by A.M.F., and not less than twelve weeks before the chosen date a duly signed sale agreement in the form attached at Sch. C. Clause 15 contained an exception clause headed "Performance" in the same terms as a similar (1) clause, numbered 5, in Sch. C. Clause 16 provided: F G H I

"So far as is consistent herewith the schedules hereto shall be deemed to be part of the agreement and their terms shall be deemed to be incorporated



A herein, such terms governing inter alia performance of this agreement by A.M.F. and [Magnet].”

Documentation between A.M.F. and Magnet consistently lagged behind the event. The site for the proposed centre at Barnsley, an old car and bus park, seems to have been acquired in or about September, 1963, and a building contract  
 B to have been negotiated between Magnet and the second defendants, whom I will call “Trenthams”, in or about November of that year. By Dec. 5 Trenthams were in correspondence with A.M.F. about their provisional building programme, and on Dec. 16 A.M.F. were represented at a meeting with (inter alia) Trenthams at which various details in relation to the building and A.M.F.’s installation were discussed. Trenthams had been given possession of the site  
 C on Dec. 9, 1963. Notwithstanding these and other matters, A.M.F. did not provide Magnet with a quotation until Apr. 14, 1964. This was accepted by Magnet on May 5, 1964, in a letter which must be regarded as a purchase order in the language of the main contract; this in turn was acknowledged by A.M.F. on May 7, 1964. It was, however, only the next day that a discussion was opened with A.M.F. as to when they might begin installation. The scheme of the main contract was further departed from in that although A.M.F., at Magnet’s request, began installation on July 6, 1964, and, after the flood of July 21, began a second installation in September, the sale agreement in the form of Sch. C to the main contract, with some deletions made owing to the late date, was not signed by A.M.F. and Magnet until Oct. 29, 1964, by which time installation by A.M.F. had long been completed. Although a point was taken in Magnet’s defence based on this ex post facto documentation, it was not pursued in argument, quite rightly in my opinion. The contractual position as between A.M.F. and Magnet must be determined on the true construction of the main contract and the terms of the form of sale agreement at Sch. C thereto. I must consider those terms in detail later, but it is important to note at this stage that they provided that title to and ownership of the goods should remain in A.M.F. until completion of installation.

Similar ex post facto documentation occurred between Magnet and their builders, Trenthams. The latter are a large and well-known company carrying on business as building contractors. Their head office is in Reading, but they have area offices in Stoke and Liverpool. The building contract between them and Magnet for the construction of the bowling centre on the site mentioned in the centre of Barnsley was a negotiated one, that is to say it did not result from  
 G Magnet calling for tenders from various contractors. The bill of quantities, which formed part of the ultimate written contract in the R.I.B.A. form, was dated November, 1963. Trenthams were given possession of the site on Dec. 9, and immediately began work, but the final contract was not executed until June 2, 1964. Fortunately, again, nothing turns on the late execution of the contract. It is, however, interesting to note that the contract sum for the works to be constructed, called “a bowling centre shell and finishings with ancillary works” was £134,543 13s. 8d. A.M.F. were, of course, not sub-contractors to Trenthams but direct contractors to Magnet. The cost to Magnet of their contract with A.M.F., namely £57,651, was therefore a very substantial addition to the cost of the building contract and if the woodwork element of the A.M.F. contract was in the region of £40,000, it was equivalent in value to nearly  
 H a third of the total cost of the building contract.

I must complete this introduction of the mis-en-scène by referring to Messrs. Clarke & Harper, a firm of architects carrying on their practice from offices in Stoke-on-Trent and, therefore, in close proximity to the architect’s department of P.M.T. and the area office of Trenthams. One partner in this firm was Mr. Harper, who was not called as a witness, and another was Mr. Bate, who was. The exact relationship of Clarke & Harper to Mr. Jones, Mr. Smith and Magnet was the subject of much evidence and argument, since if I found negligence on

the part of the firm, it was contended for Magnet that they were not vicariously responsible for it in tort. The appointment of Mr. Harper or his firm was contained in a much debated letter from Mr. Jones of Sept. 20, 1963, to which I must return later, but which it is convenient to read at this stage. The letter is addressed to A. R. Harper, Esq., A.R.I.B.A., Messrs. Clarke & Harper, 86 Moorland Road, Burslem, Stoke-on-Trent. A

"Dear Mr. Harper, Bowling Centre at Barnsley Following our recent meetings regarding your capacity for carrying out certain architectural services for me, I now confirm that I would like you to act for me in the above project along the lines we discussed and I am to retain overall professional responsibility as consulting architect for this and any other similar project which I may decide to release to you, and my name is to appear on all principal drawings. All matters of policy to be decided by me and copies of any relative important correspondence you may have with others are to be forwarded to me. All drawings are to be forwarded for perusal and must bear my approval stamp before being released. Specialists, suppliers and nominated sub-contractors to be approved by me. Mining engineers, soil investigation reports, quantity surveyors and all other consultants to be nominated by me and their fees will be paid direct. If not already in existence, your firm is to provide and prove that you hold professional indemnity insurance sufficient for the projects upon which you will be engaged. By reason of my overall responsibility, copyright on all drawings to be vested in me. Regarding our present arrangement on fees these to be based on [two-thirds of] the standard R.I.B.A. scale for new works and I also confirm that, in order to assist your firm financially, I am prepared to sanction intermediate fees accounts at rather more frequent intervals than provided for in the scale at such times as may be mutually agreed. An appropriate scale of fees will require to be discussed and agreed when considering standardization of Centres if and when the need transpires. For the present time all correspondence and drawings forwarded to this office must be addressed to me personally marked 'Strictly Confidential'. Yours sincerely, (signed) R. C. L. Jones, A.R.I.B.A., Company Architect." B C D E F

The articles of the building contract recited that drawings and bills of quantities had been prepared by or under the direction of "Clarke & Harper, A.R.I.B.A. . . . and R. C. L. Jones, Esq., A.R.I.B.A., consultant architect of P.M.T.", and provided that the term "the architect" in the conditions of the R.I.B.A. form should mean "A. S. Harper A.R.I.B.A. of Clarke & Harper". From the evidence it appeared that, although Mr. Harper played some part in the work performed by his firm in relation to the building contract, the lion's share fell to Mr. Bate. I should add that in March, 1966, before serving their defence, Magnet initiated third party proceedings against Clarke & Harper based on allegations of professional negligence by the latter and pleadings took place therein. Shortly before the trial, however, Magnet discontinued those proceedings. G H

The trial of this action took five long weeks during the course of which the pleadings were extensively amended and re-amended. In part the length of the trial and the need for amendments was due to very indifferent discovery, particularly on the part of Trenthams, but to some extent also on the part of Magnet. Apart, however, from what came to light as the result of additional discovery given frankly and fully after the trial had started, the original defences of Magnet and Trenthams required considerable amendment. Ultimately the pleadings did cover the major points arising, though not of course all the issues in law, and before going further into the facts it will be convenient if I briefly summarise the salient issues of fact and law. I omit points pleaded, such as nuisance and estoppel, which were not pursued in the later stages of the trial. I

There is no doubt that a considerable quantity of water entered the uncompleted building during the afternoon of July 21, 1964, causing serious damage

**A** to the timber which A.M.F. then had on the premises with which they were constructing the thirty-two bowling alleys. The installation of the timber work of sixteen of such alleys had been more or less completed at the time. As regards this entry of water it was in issue, as primary matters of fact, (i) whether the water entered through (a) the roof (b) a doorway at the N.E. corner of the building and/or (c) another doorway at the N.W. corner: (ii) if it entered at all through either

**B** of the doorways, whether its source was in whole or in part (a) the rainwater stacks from the gutter running along the north wall, (b) backpounding through an incomplete twelve-inch diameter drain ending in the open more or less opposite the N.E. doorway, (c) run-off from higher land to the north and east of the building, (d) an uncharted drain, exposed during excavation for foundations, coming from the N.E. and S.E. and open near to and a little to the south of the

**C** N.E. corner of the building.

The next question arising, which is perhaps a mixed question of law and fact, is whether the entry of water, consequent on the exceptionally heavy storm that undoubtedly occurred, was reasonably foreseeable as a possible cause of damage and was a risk of the type which a reasonable man would take steps to guard against. On this point, counsel for Magnet took up the cudgels for the

**D** defence, receiving only the most luke-warm support from counsel for Trenthams, and argued strongly that on the facts and law this was an act of God. He prayed this in aid as a defence both in contract and in tort.

A.M.F.'s case against Magnet in contract stated shortly was, first, that the state of the building on July 6, 1964, and thereafter until July 21 was such that it was not ready to receive A.M.F.'s timber and that there was a breach of an express

**E** term of the contract contained in the sale agreement in Sch. C to the main contract (2); secondly, that, in the alternative, there was a breach of an implied term as to the fitness of the building. Magnet denied that on the true construction of the contract there was any relevant express term, but admitted there was an implied term as to fitness the breach of which was denied. Magnet further relied on the exception clause (3) in their contract with A.M.F.

**F** A.M.F.'s case in tort against Magnet was based alternatively on the Occupiers' Liability Act, 1957, or the general law of negligence as exemplified in *Donoghue v. Stevenson* (4). As regards liability under the Act of 1957, counsel for A.M.F. argued that s. 2 (4) (b) had no application (5) because (a) on the facts there was nonfeasance here and not faulty execution of any work, etc., and (b) Magnet had not taken reasonable steps to satisfy themselves that Trenthams had done their

**G** work properly. If (which was denied) Clarke & Harper were independent contractors, Magnet could not, as a matter of construction of the Act of 1957, escape liability by reason thereof. Magnet's answer was that, whilst admitting that they were occupiers, they were not liable for the negligence, if there were any, of Trenthams or Clarke & Harper, both of whom were independent contractors; alternatively, that they brought themselves within s. 2 (4) (b). They raised the

**H** same defence as regards independent contractors in answer to the claim in tort outside the Act. In connexion with these points taken on behalf of Magnet the relationship between Mr. Jones and Mr. Smith on the one hand and Clarke & Harper on the other became relevant. The answer of counsel for A.M.F., with which counsel for Trenthams joined, was that (i) Clarke & Harper were not, on

(2) The relevant clause, cl. 3, in Sch. C is set out at p. 799, letters F to H, post.

(3) The exception clause, cl. 5 of Sch. C, is set out at p. 800, letters D to F, post.

(4) [1932] All E.R. Rep. 1; [1932] A.C. 562.

**I** (5) Section 2 (4) of the Act of 1957 provides that "In determining whether the occupier of premises has discharged the common duty of care to a visitor, regard is to be had to all the circumstances, so that (for example) - . . . (b) where damage is caused to a visitor by a danger due to the faulty execution of any work of construction, maintenance or repair by an independent contractor employed by the occupier, the occupier is not to be treated without more as answerable for the danger if in all the circumstances he had acted reasonably in entrusting the work to an independent contractor and had taken such steps (if any) as he reasonably ought in order to satisfy himself that the contractor was competent and that the work had been properly done".



the most unusual facts here, independent contractors and (ii) if they were, they were not properly instructed by Mr. Smith. Finally Magnet raised a counterclaim, if they were liable, based on the principle in *Hedley Byrne & Co., Ltd. v. Heller & Partners, Ltd.* (6).

As against Trenthams, A.M.F. relied on the Occupiers' Liability Act, 1957, and the general law of negligence. Counsel for Trenthams argued that Trenthams were not occupiers and that, owing to the interposition of Clarke & Harper and Magnet between them and A.M.F. they could not be liable to the latter. He also raised a novel and interesting point as to the damages recoverable under the Act of 1957 for damage to property. As between the two defendants, Magnet relied on (a) an indemnity (7) under cl. 14 (b) of the building contract and (b) the provisions of the bill of quantities. Alternatively they claimed one hundred per cent. contribution under the Law Reform (Married Women and Tortfeasors) Act, 1935. Trenthams raised various points of construction and law in answer to the contractual claims and, as regards contribution, argued that on the facts Magnet were at least equally to blame and that, at the worst, liability should be borne equally.

I will now make my findings as to how the water entered the building and its source or sources. [HIS LORDSHIP reviewed the evidence as to the entry of the water in to the building and concerning the guttering and drainage. The building was in essence a shell with a concrete slab base of 190 feet from east to west and 92 feet from north to south on which the bowling alley lanes were being constructed. On a visit to the site on June 10, 1964, Mr. Smith had observed water on the concrete floor, and was somewhat alarmed by this, since by then it had been agreed by A.M.F. that they would begin installation on July 6, and Mr. Smith, as well as Trenthams' site agent (Mr. Tyrer, who left on July 10, 1964), Mr. Bate of Clarke & Harper, Mr. Dravers (Magnet's general manager) and Mr. Normington (Magnet's sales executive) all knew, as they always had, of the great importance of complete dryness and absence of damp to the woodwork of the bowling lanes. A plank or board was set, prior to the flooding, across the threshold of the north-east doorway. The doorway had been fitted with a wire framework covered in polythene to keep out rain and moisture, but the door had not yet been fitted. The level of the ground to the north-east of the building was materially higher than that of the concrete floor of the building and of a sump, which had been formed by excavation adjacent to the threshold of the doorway. The sub-soil in the area was clay. The rainfall during the week-end prior to Tuesday, July 21, 1964, was heavy. On the afternoon of July 21 an estimated rainfall of 2.63 inches fell during the one hundred minutes of the storm. HIS LORDSHIP found that all the water that entered the building and damaged A.M.F.'s timber came through the doorway at the north-east corner of the building, where it was seen by a foreman on the site at the time pouring over the board that had been let into the threshold. The bottom portion of the wire framework over the door had been bent inward and upwards by the pressure of the water. The architect expert witnesses called by the parties agreed that the drainage of a building should be designed to deal with rainfall at a rate of three inches per hour for ten minutes. HIS LORDSHIP found that unconnected rainwater stacks were a source of the water that entered the building, and that water from the two most easterly stacks could have found its way into the sump and thence through the doorway of the building; he further found that an additional source of the water was from the land to the north and north-east of the doorway, from which water could have run off. Thus the source of the water was from the roof and from the higher land. HIS LORDSHIP considered an argument on behalf of Magnet that the danger of the storm on July 21, 1964, was so unexpected and exceptional that failure to take special steps to guard against it were not negligence; after considering the decisions in

(6) [1963] 2 All E.R. 575; [1964] A.C. 465.

(7) Clause 14 (b) of the building contract is set out at p. 810, letter G, post.

- A** *Nichols v. Marsland* (8), *Sedleigh-Denfield v. O'Callaghan* (9), and *Greenock Corpn. v. Caledonian Ry. Co.* (10), relevant to the defence of the act of God, HIS LORDSHIP continued:] On the evidence I take the view and find as a fact that that the risk of water collecting in the sump and overcoming the not very robust defences of the threshold was readily foreseeable, that it could have been fairly easily guarded against and that steps should have been taken to guard against it over and above what was done, particularly in view of the special and known susceptibility of the A.M.F. timber and its value. [HIS LORDSHIP then considered the evidence given by the three architect expert witnesses, all of whom were agreed that the danger was evident and suggested precautions which could have been taken to prevent the ingress of water into the building. HIS LORDSHIP also referred to the evidence of Trenthams' site agent (who had left on July 10, 1964, and not been succeeded by another site agent till the day of the flood) that had A.M.F. been subcontractors of Trenthams, he would not with his ordinary knowledge of the English climate have allowed A.M.F. to bring in their valuable equipment until he had been perfectly satisfied that the building was thoroughly watertight. HIS LORDSHIP then continued:] I need say little more on this matter. It is true no water entered during the week-end and that it is impossible to say what intensity of rainfall was required to force an entry. In view, however, of the evidence as to the obvious danger of flooding and risk of damage and the relatively simple precautions that could have been taken, apart altogether from giving warning of the risk involved before A.M.F. were allowed in, I am quite unable to accede to the argument of Magnet's counsel. I think that he signally failed to establish that an act of God took place within LORD WESTBURY'S definition in *Tennent v. Earl of Glasgow* (11), namely,

"circumstances which no human foresight can provide against, and of which human prudence is not bound to recognise the possibility."

I can now deal with A.M.F.'s claim in contract against Magnet. Clause 3 of Sch. C to the main agreement between them reads as follows:

- F** " (A) The purchaser shall make at its own expense and in accordance with A.M.F. specifications all alterations and changes to the bowling centre and its equipment required for the installation of the said goods (including without prejudice to the generality of the foregoing main electrical conduits and wiring and a flat concrete surface for the machines and lanes, all to A.M.F. specifications) and shall ensure that the heating installation of the bowling centre shall have been continuously operating for not less than seven days immediately preceding the commencement of the installation by A.M.F. (B) The bowling centre shall be ready to accept delivery of the said goods and for the commencement and uninterrupted performance of their installation therein on or about . . . 196 . . . and the purchaser hereby agrees to confirm the said date to A.M.F. at least . . . days prior thereto. (C) Subject to compliance by the purchaser with the provisions of paras. (A) and (B) of this clause A.M.F. shall deliver and install the said goods within . . . days following the date referred to in cl. 3 (b) above and agrees to notify the purchaser of the estimated date of delivery at least fourteen days prior thereto."

- I** Counsel for A.M.F. argued that on the facts the bowling centre was plainly not ready to accept delivery of A.M.F.'s goods on July 6, 1964, and that there was a clear breach of an express term of the contract. He did not claim that the obligation as to the physical readiness of the building made Magnet an insurer. He submitted that cl. 3 (B) amounted to an undertaking that the building would (inter alia) be watertight against all reasonably foreseeable risks. Counsel for

(8) [1874-80] All E.R. Rep. 40; (1876), 2 Ex.D. 1.

(9) [1940] 3 All E.R. 349; [1940] A.C. 880.

(10) [1916-17] All E.R. Rep. 426; [1917] A.C. 556.

(11) (1864), 2 Macph. (Ct. of Sess.) (H.L.) 22 at p. 24.

Magnet argued that cl. 3 (B) only referred to freedom from interference by other work or subcontractors and availability of space. Fitness of the building qualitatively was covered by cl. 3 (A). I think this argument unsound. Clause 3 (A) only refers to certain aspects of the qualitative fitness of the building. Indeed the first half seems wholly inappropriate to a purpose-built building as distinct from one being adapted. The second half only deals with heating. Accordingly I think counsel for A.M.F. right in his express term argument.

This is, however, a little academic since counsel for A.M.F. and counsel for Magnet were ad idem that if the word "ready" in cl. 3 (B) did not include watertightness, there must be an implied term that the building should be fit for the reception of A.M.F.'s timber, such fitness to include watertightness and to be judged by the standard of the exercise of reasonable care. On my findings, regardless of whether the failure to exercise reasonable care to protect against flood damage was that of Trenthams, of Clarke & Harper, of Mr. Smith, or of someone else in Magnet or of some or all of them, it is plain that A.M.F. must succeed in contract, subject to the argument of counsel for Trenthams on the exception clause, with which I now deal.

Clause 5, headed "Performance", of Sch. C reads:

"Neither party shall be liable to the other for any loss or damage caused by delays in or failure of performance of any part of this agreement occasioned by war or warlike operations fire flood embargo transport shortage accident explosion act of God confiscation or commandeering or wilful destruction by any government or governmental authority or by any municipal or local authority materially affecting this agreement strike lockout or any labour troubles stoppage of or interference with or reduction of the supply of materials relevant to this agreement whether because of governmental action affecting either or both of the parties or their suppliers any action suit or proceeding at law or in equity or otherwise or any events whatsoever over which the parties have no control."

Counsel for Magnet argued that they were protected by the word "flood" in this clause and, even if they were negligent by themselves, their servants or agents, on the application of the well-known principle laid down in *Alderslade v. Hendon Laundry, Ltd.* (12), the exception clause still applied. In my judgment the clause is inapplicable to the facts here as I have found them, regardless of whether that principle applies on the true construction of the clause to negligence by Magnet. A.M.F.'s timber was damaged by reason of the failure of performance of Magnet to comply with the express or implied terms as to readiness. That failure existed on July 6; it was in no way occasioned by flood. The argument fails in limine. It fails for similar reasons as an answer to A.M.F.'s claims in tort if those are otherwise well founded.

It is convenient to deal here with Magnet's counterclaim, though this, if sound, applies whether A.M.F. succeed in contract or in tort. The counterclaim relies on paras. 4 (f) and 9 of the defence, which I must read:

"(4) . . . In rebuttal of the alleged implied term the defendants will rely on the facts and/or contentions: . . . (f) that on or about the date for starting work, the plaintiffs by one Mayard in response to a specific enquiry assured one Normington on behalf of the defendants that the parties' interests in the plaintiffs' equipment and materials were covered by insurance taken out by the plaintiffs against all risks during the period of installation.

"(9) Further or alternatively, in reliance upon the plaintiffs' representation set out in para. 4 (f) hereof the defendants did not (as they were willing and able to do) insure their interest in the plaintiffs' materials and equipment against all risks, and the defendants will contend that the plaintiffs are thereby estopped from claiming damages for breach of contract in respect of



A any matter insurable under an all risks policy, and in particular the matters relied upon in the statement of claim in this action."

The counterclaim is:

B "By way of counterclaim the defendants repeat paras. 4 (f) and 9 hereof. The representation made by the plaintiffs set out therein was made in the knowledge that it would be acted on by the defendants and in circumstances where the plaintiffs owed the defendants a duty of care in relation thereto, but in breach of the said duty the statement was inaccurate in that only the plaintiffs' interest in their goods and materials was insured and the defendants have thereby suffered damage equivalent to any sum awarded to the plaintiffs in this action."

C On the evidence as it came out the facts proved fell far short of what would be required to support the counterclaim based on *Hedley Byrne & Co., Ltd. v. Heller & Partners, Ltd.* (13). I have already pointed out that A.M.F. were direct and not sub-contractors. Accordingly the provisions of the building contract between Magnet and Trenthams regarding insurance were inapplicable to A.M.F.'s timber. Mr. Smith, as appears from the correspondence, drew this to the attention of D Mr. Normington shortly before July 7, 1964, and asked him to enquire of A.M.F. as to the insurance position. Mr. Normington accordingly paid a visit to Mr. Mayard, whose office was a few doors away. He asked Mr. Mayard the specific question whether or not A.M.F.'s insurance covered the period of installation. Mr. Normington said he was assured by Mr. Mayard that it did so and he reported accordingly to Mr. Dravers, Magnet's general manager. In answer Mr. Dravers E wrote to Mr. Smith on July 9, 1964, as follows:

"I confirm the information given you by Mr. Normington that A.M.F. cover all their own risks prior to a centre being handed over to the operator."

F Mr. Normington confirmed in evidence that that letter accurately set out what he had told Mr. Dravers and what Mr. Mayard told him. Mr. Mayard had no recollection of any such conversation, but I accept that it took place in the terms spoken to by Mr. Normington. That is the totality of the evidence on this point, save that if Mr. Dravers had appreciated that A.M.F.'s policy did not cover Magnet against liability for damage to A.M.F.'s property, Mr. Dravers would have seen that Magnet insured. There was clearly no express representation by Mr. Mayard that A.M.F.'s insurance covered any interest but their own. Nor is there any G evidence that Mr. Mayard's mind was specifically directed to the question whether A.M.F.'s insurance went any further than he said it did. He was asked a specific question and gave an accurate answer. A.M.F. cannot be held to blame or to be under any legal liability if the Magnet personnel concerned misconstrued Mr. Mayard's answer or were ignorant of or not alive to the relevance of the doctrine of subrogation. The counterclaim, therefore, fails.

H I must now deal with A.M.F.'s alternative claims in tort against Magnet, primarily because they are very material to the position as between the two defendants, and also lest I should be wrong in my decision that A.M.F. are entitled to succeed in contract. I will first deal with their claim under the Occupiers' Liability Act, 1957. It is admitted that Magnet were occupiers. Counsel for A.M.F. submitted, first, that, unless someone who was sued under the Act as an occupier could bring himself within s. 2 (4) (b), it was of no avail to him to establish that he had employed a qualified independent contractor and that the latter had been negligent (14). In particular, in support of this argument he relied on the words in s. 2 (4) (b) "the occupier is not to be treated *without more* as answerable for the danger", etc. (The italics are mine.) It seems to me there is I great weight in this argument, at least in cases to which the opening words of s. 2 (4) (b) apply, namely, "where damage is caused to a visitor by a danger

(13) [1963] 2 All E.R. 575; [1964] A.C. 465.

(14) Section 2 (4) (b) is set out at footnote (5), ante.

due to the faulty execution of any work of construction, maintenance or repair", and I accept it. Secondly, counsel for A.M.F. argued that on the facts here s. 2 (4) (b) had no application for the following reasons: (i) the facts did not bring the case within the words "faulty execution of any work of construction, maintenance or repair", because here nothing was done at all to drain the area around the north and north-east corner of the building. It was a case of non-feasance, not faulty execution; (ii) whilst it was reasonable to entrust the work of flood precautions to Trenthams, who are experienced builders of high repute, this was a case in which Magnet should have taken steps to see that Trenthams did or had done their work properly, that they could not as a matter of law escape liability if they left this to Clarke & Harper (assuming the latter to have been negligent) on the grounds that they in turn were independent contractors; (iii) alternatively, on the facts the defence that Clarke & Harper were independent contractors, if otherwise good, was not available to Magnet, since Clarke & Harper were never properly instructed on the relevant matter; (iv) on the peculiar and very special facts Clarke & Harper were not independent contractors; (v) Magnet were themselves in the person of Mr. Smith or alternatively Mr. Bate responsible for seeing that Trenthams did their work properly, and both Mr. Smith and Mr. Bate were negligent in this respect.

Points (i) and (ii) are points primarily of law and of considerable importance, but they can fortunately be dealt with shortly. The other three points require further examination of the evidence. As to (i) I approach the point of construction with a self-confessed reluctance to adopt too rigid and technical an interpretation of an Act passed to bring order into what had become, notwithstanding the clarity of the words of WILLES, J., in *Indermaur v. Dames* (15), a jungle of technicalities and refinements. It seems to me that if a builder in the course of constructing a building fails to take adequate precautions against flooding and that causes damage to the property of a visitor, it would be altogether too technical to hold this not within the true construction of the words "a danger due to the faulty execution of any work of construction, maintenance or repair". It is true that no ultimate drainage work of any kind relevant to the protection of the N.E. doorway had been done. On the other hand the upright board had been fixed across the threshold and the polythene screen fitted to the doorway and, according to Mr. Kelly, there was the small trench or gulley which it was the handyman's duty to keep free from silt. Something, however inadequate, had therefore been done to prevent flooding during the work of construction. I would hold that this was sufficient to bring the matter within the words "faulty execution of any work of construction" or "maintenance". I would add that the bill of quantities provides in item 1/8/B:

"Provide as necessary for the diversion of storm water to requisite channels, drains, etc., and provide temporary connections, as may be required, where storm and foul drains are to be diverted."

Counsel for Trenthams argued that on its true construction this provision only applied when storm and foul drains were to be diverted, but in my view the two halves of the sentence are plainly to be read disjunctively. This provision constituted part of the obligations of Trenthams under the building contract. This may not be conclusive, but supports my view that the facts here do fall within the words in question. I reject this argument of counsel for A.M.F.

As to (ii), s. 2 (4) (b) of the Act of 1957 (16) contemplates that it may be reasonable to delegate work of construction or maintenance to an independent contractor. It is accepted, clearly rightly, that it was reasonable for Magnet to employ Trenthams. But the subsection also contemplates that in such circumstances, in determining whether the occupier has discharged the common duty of care, the court may further have to consider whether the occupier ought to have taken

(15) [1861-73] All E.R. Rep. 15; (1866), L.R. 1 C.P. 274.

(16) For s. 2 (4) (b), see footnote (5), ante.

A any steps to satisfy himself that the work had been properly done by the independent contractor. In the case of the construction of a substantial building, or of a ship, I should have thought that the building owner, if he is to escape subsequent tortious liability for faulty construction, should not only take care to contract with a competent contractor or shipbuilder, but also to cause that work to be supervised by a properly qualified professional man such as an architect or surveyor, or a naval architect or Lloyd's surveyor. Such cases are different in fact and in everyday practice from having a flat re-wired (as in *Green v. Fibreglass, Ltd.* (17)).

Whilst these examples refer to completed work, I cannot think that different principles can apply to precautions during the course of construction, if the building owner is going to invite a third party to bring valuable property on to the site during construction. Whilst it may well be that an architect employed by a building owner to supervise construction by a builder has no power under the building contract to dictate how the builder is to perform the contract or what temporary steps he should take during construction to guard against flooding, nevertheless advice from the architect to the builder may have the desired effect. Above all, however, if the architect is dissatisfied with such precautions and cannot persuade the builder to improve them, he will be able to inform the building owner of the position. The latter will then be able not to invite the third party on to the site, or postpone the invitation, or, possibly, obtain the third party's consent to entry at his own risk. I think, therefore, Magnet should have taken steps, before inviting and allowing A.M.F. to enter, to satisfy themselves that Trenthams had done their work properly including temporary anti-flood precautions, and there is no doubt they could have done this either by Mr. Bate or Mr. Smith.

So far on this point I accept the argument of counsel for A.M.F. and reject that of counsel for Magnet, who submitted, as I understood him, that Magnet only needed to rely on s. 2 (4) (b) in respect of damage to property if that was caused by some fault in the permanent design of the building by their architects. Counsel for A.M.F. continued, however, that if the architect employed to supervise the building was an independent contractor and was negligent, Magnet had not brought themselves within the words

"and had taken such steps (if any) as he reasonably ought in order to satisfy himself that . . . the work had been properly done."

The latter words, counsel submitted, imposed a personal and non-delegable obligation.

I cannot accept this argument as applying regardless of the circumstances. In my judgment, in cases like I have decided the present to be, where it is reasonable for the occupier to employ an independent contractor to perform technical work and he ought to see that the work has been properly done, then, if, as here, it was reasonable for him to perform the latter duty through a professional man as an independent contractor, he is not to be rendered liable because of negligence by the latter. This would revive what was thought, on one view of it, to be the anomaly in *Thomson v. Cremin* (18). It would also, in effect, in technical cases equate the "common duty of care" under the Act with the obligation of an underwriter under an all risks policy. The view which I have expressed derives by analogy some support from *Waulle v. Wallsend Shipping Co., Ltd.* (19). The contrary view involves "an almost unlimited retrogression" (20).

I must now deal with the argument of counsel for the plaintiffs at point (iii), namely, that if, in accordance with the conclusion which I have just reached,

(17) [1958] 2 All E.R. 521; [1958] 2 Q.B. 245.

(18) (1941), [1953] 2 All E.R. 1185; [1956] 1 W.L.R. 103 n.

(19) [1952] 2 Lloyd's Rep. 105.

(20) [1952] 2 Lloyd's Rep. at p. 130, per DEVLIN, J., citing WRIGHT, J., in *W. Angliss & Co. (Australia) Proprietary, Ltd. v. P. & O. Steam Navigation Co.*, [1927] 2 K.B. 456 at p. 461.



Magnet could escape liability for faulty supervision or lack of precautions (if any) taken by Mr. Bate on the grounds that he was an independent contractor, that defence is not available to them since they never instructed him or his firm properly on the relevant matter. I assume for this purpose that Mr. Bate, a qualified architect and partner in a firm of qualified architects, was vis-à-vis Magnet an independent contractor. There is no doubt that when a building owner employs a qualified architect in private practice in connexion with the construction of a building, unless there are some other quite unusual circumstances, the architect is an independent contractor: see per SALMON, J., in *Clayton v. Woodman & Son (Builders), Ltd.* (21). The decision was reversed on another point (22). That case, in both courts, further establishes that an architect has no right to instruct a builder how his work is to be done or the safety precautions to be taken. It is the function and right of the builder to carry out his own building operations as he thinks fit. The architect, on the other hand, is engaged as the agent of the owner for whom the building is being erected, and his function is (inter alia) to make sure that in the end, when the work has been completed, the owner will have a building properly constructed in accordance with the contract and any supplementary instructions which the architect may have given: per PEARSON, L.J. (23).

The flood in this case occurred when the building was far from complete and when no permanent drainage, save the north and south culvert had been completed. The lack of precautions which allowed the water into the building was of temporary steps necessary during the course of construction. I have already referred to the provision in the bill of quantities at item 1/8/B in relation to the diversion of storm water (24). There were other comparable provisions in the bill of quantities. Thus item 1/5/C reads "allow for protection of all work and materials from injury by weather or any other cause", and item 1/6/E "cover and ease up and protect all work whensoever as needed". Counsel for Trenthams argued that the "work" in those provisions is the work of construction: counsel for Magnet riposted that the "work" included work being undertaken by direct contractors like A.M.F.; see condition 23 of the building contract. I find it unnecessary to decide this point: "the work" clearly included the concrete floor of the unfinished building. In addition item 2/1/B provided that no water was to be allowed to accumulate on any part of the site. All these were obligations falling on Trenthams in the course of construction. They did not affect the safety, fitness or watertightness of the building once construction was completed. Accordingly, if Mr. Bate was not consulted by Trenthams about flood precautions and never gave them his advice on the subject, there is considerable difficulty on the facts as I have so far stated them, and on the statements as to the functions of an architect in *Clayton v. Woodman & Son (Builders), Ltd.* (25), which I have cited, in blaming Mr. Bate for what occurred. Unless he were asked by Magnet for his advice as to the fitness of the building to receive A.M.F.'s timber, or to ensure its safety, I do not think, on the authority of *Clayton v. Woodman & Son (Builders), Ltd.* (26), that I could hold him in law to blame for not warning Magnet to prevent A.M.F. coming in until the position had been secured and in not seeking to persuade Trenthams to do more than they did. However, the present question is whether Magnet ever instructed Mr. Bate on the problem, i.e. did they ask his professional advice whether it was or would be safe for them to invite A.M.F. to start installation on July 6, 1964, or give him instructions either to achieve safety from flood damage by that date or warn them if this was not achieved? In my view of the

(21) [1961] 3 All E.R. 249 at p. 253; [1962] 2 Q.B. 533 at pp. 539, 540.

(22) [1962] 2 All E.R. 33; [1962] 2 Q.B. at p. 546.

(23) [1962] 2 All E.R. at p. 39.

(24) See at p. 802, letter H, ante.

(25) [1962] 2 All E.R. at p. 39; [1961] 3 All E.R. at p. 253; [1962] 2 Q.B. at pp. 539, 540.

(26) [1962] 2 All E.R. 33; [1961] 3 All E.R. 249; [1962] 2 Q.B. 533.

- A** evidence the answers are in the negative. Mr. Smith admitted he never specifically told Clarke & Harper to make sure things were ready for A.M.F. Mr. Bate said he was never asked to express his opinion if the building was or would be ready for A.M.F. and that the decision to invite A.M.F. on to the site was not his; he said he regarded it as a definite instruction. The correspondence, on my reading of it, confirms this oral evidence. It is true that Mr. Smith had an assurance from
- B** Trenthams that they would be ready though they clearly thought it would be a tight fit. For the reasons which I have already given, however, I do not think Magnet were entitled to rely on that without checking on it, either by Mr. Bate or Mr. Smith or some other suitably qualified person, in relation to the safety of the valuable and sensitive property, which they were inviting A.M.F. to bring into the building.
- C** Counsel for Magnet sought to avoid the consequences of the above by arguing on the evidence that if Magnet had specifically consulted Mr. Bate on the question whether it was safe for A.M.F. to start their installation work on July 6, he would have answered in the affirmative. Having carefully considered Mr. Bate's evidence and the way he gave it, I am, however, not satisfied that this would have been the case. I am sure he would have devoted some real attention to the matter,
- D** which he did not in fact do, and he might well, as I am satisfied he should have, at least have given a warning. Accordingly, if Mr. Bate is properly to be regarded as an independent contractor vis-à-vis Magnet, I accept the argument of counsel for A.M.F. that this is of no assistance to them.

- In view of this, point (iv) in counsel's argument (27) does not strictly speaking arise for my decision. Nevertheless it was much debated both in argument and
- E** on the evidence. I think, therefore that I should express my view on the matter. I have already stated what is the general position in relation to the employment of an architect in private practice by reference to what was said by SALMON, J., in *Clayton v. Woodman & Son (Builders), Ltd.* (28). The special facts here were, however, at least strange. I have already read the letter of appointment by Mr. Jones of Clarke & Harper dated Sept. 20, 1963 (29). That letter refers to "certain
- F** architectural services" and "along the lines we discussed". Neither Mr. Harper nor Mr. Jones was called, so one is left in some doubt what those words were intended to cover. Mr. Jones was dismissed by P.M.T. on May 26, 1964. His place as head of P.M.T.'s architect's department was immediately taken by Mr. Smith. He, as well as Mr. Dravers, Magnet's general manager, was unaware of the letter of Sept. 20, 1963, until it was found, not on the appropriate file,
- G** in December, 1964. It is common practice for government departments, local authorities and large companies with much building or property maintenance work to employ qualified architects within their own organisations on a salaried basis (whom for convenience and without intending any offence I will call "tame architects") and also, for specific projects, to employ architects in private practice as "project" architects, who would undoubtedly for the purposes of the law of
- H** tort be regarded as independent contractors. However, I am quite unable, on the special and peculiar facts of this case and in the absence of any evidence from Mr. Harper and Mr. Jones, to hold that Clarke & Harper or the partners in that firm were independent contractors vis-à-vis Magnet. The letter (30) states that Mr. Jones is to retain overall professional responsibility, is to decide all matters of policy and to approve all drawings. Mr. Hammett (31) said these expressions
- I** were unusual as between a building owner with a tame architect and a project architect. Mr. Hodgkiss, who acted after Mr. Smith took over as a clerk of works, was appointed by Mr. Smith. Mr. Fairweather (32) said this was unusual in that

(27) Viz., that Clarke & Harper were not independent contractors (see at p. 804, letter A, ante).

(28) [1961] 3 All E.R. at p. 253; [1962] 2 Q.B. at pp. 539, 540.

(29) See at p. 796, letters B to F, ante.

(30) See at p. 796, letters B to F, ante.

(31) Architect expert witness.

(32) Architect expert witness.

in his experience the project architect appointed the clerk of works although the latter was paid by and acted for the building owner. In the experience of both these expert witnesses tame architects, when their names appeared on bills of quantities, etc., were usually called "associate architects" and not "consultants" as Mr. Jones was described in the letter in the preamble to the articles of the building contract and on the bill of quantities. Whilst Mr. Harper of Clarke & Harper is described in the articles to the building contract themselves as "the architect" referred to in the conditions of the contract and under condition 24 was to grant interim certificates, those certificates which have been produced show that in all cases save one Mr. Jones or Mr. Smith countersigned the certificates before payment, in addition to the signatures of Mr. Harper or Mr. Bate, but that in one case only Mr. Smith signed the certificate. Whilst some letters in the correspondence use the language one would expect if the relationship were the normal one of tame and project architects, others seem to depart strikingly from that norm. I refer to Mr. Smith's important letter of June 16, 1964, written directly to Trenthams; to his letter of July 31, 1964, to Trenthams, particularly the last two paragraphs; and to Mr. Dravers's letter of June 30, 1964, to Mr. Smith, though this is I think of less importance, both because Mr. Dravers was a layman and also because of the explanation he gave that he wrote as he did to give self-confidence to Mr. Smith, who had recently succeeded Mr. Jones as head of P.M.T.'s architect's department, but, although very experienced, had no professional architectural qualifications. None of the above matters is perhaps by itself conclusive, though the terminology of the letter (33) of Sept. 20, 1963, to my mind points strongly against the independent contractor relationship. It is, however, sufficient for me to hold as I do that that relationship has not been established on the evidence before me and, in consequence, Magnet are unable to rely on it for the purpose of escaping tortious liability.

I now come to counsel for the plaintiff's final point, point (v), which can be dealt with quite shortly (34). On my previous findings and decisions Magnet should have taken some steps, either through Mr. Smith or Mr. Bate or some other qualified person, to check on Trenthams' statements that they would be ready for A.M.F. to start installation on July 6, 1964. It is clear on the evidence that no proper steps were taken by either Mr. Smith or Mr. Bate. Mr. Bate was not asked or instructed to check and advise on the matter and made no attempt to do so. Mr. Smith admittedly carried out no inspection himself in relation to the suitability of anti-flooding precautions. No instructions were given to any other qualified person. Accordingly Magnet cannot escape liability in tort under the Occupiers' Liability Act. In view of this conclusion the question of Magnet's liability in tort under the *Donoghue v. Stevenson* (35) principle does not arise.

A final point was raised by counsel for Trenthams on behalf of the builders in their defence against the claim of A.M.F. against them in tort. If good, this point is equally available to Magnet in answer to A.M.F.'s claim against them in tort, so I deal with it here. In so far as A.M.F.'s claim rested on the Occupiers' Liability Act, 1957, the argument was that the sum recoverable must be limited as the result of the words "in respect of damage to property" in s. 1 (3) (b) of the Act of 1957, (36) to physical damage and that consequential financial loss was irrecoverable. Counsel for Trenthams expressly disclaimed any reliance on this point in answer to A.M.F.'s alternative tortious claim against the builders based on the principle in *Donoghue v. Stevenson* (35). As I have said, by agreement between all the parties I was not concerned at the trial with the quantum of A.M.F.'s claim, and, unless this can be agreed, the assessment of their damages must be referred to an official referee for determination. In consequence no evidence has been led about the particulars of the damages claimed amounting to a total of £21,453 12s. 10d.

(33) See at p.796, letters B to F, ante.

(34) Point (v) is set out at p. 802, letter D, ante.

(35) [1932] All E.R. Rep. 1; [1932] A.C. 562.

(36) Section 1 (3) (b) of the Act of 1957 is set out at p. 807, letter E, post.



A and I have given no consideration to the details pleaded. Counsel for the plaintiffs, however, admitted that the salvage expenses claimed, amounting as pleaded to £476 14s. 4d., might be considered as consequential financial loss flowing from the damage to the timber. It was agreed by all counsel concerned that I should decide the point of law raised by counsel for Trenthams as a matter of principle, leaving its application to the details of the claim, if not agreed, to be decided ultimately by the official referee. In dealing with the point I therefore express no view one way or the other as to which, if any, of the items making up the total claim can properly be considered as items of financial loss consequential on damage to the timber as distinct from items quantifying the physical damage caused to the timber itself.

Section 1 (1) of the Occupiers' Liability Act, 1957, provides that:

"The rules enacted by [s. 2 and s. 3] shall have effect, in place of the rules of the common law, to regulate the duty which an occupier of premises owes to his visitors in respect of dangers due to the state of the premises or to things done or omitted to be done on them."

If the Act of 1957 had stopped there, it would have been arguable that the rules in s. 2 and s. 3, which nowhere mention damage to property (37), had no application to such damage. Section 1 (3), however, provides that those rules

"... shall also apply, in like manner and to the like extent as the principles applicable at common law to an occupier of premises and his invitees or licensees would apply, to regulate— . . . (b) the obligations of a person occupying or having control over any premises or structure in respect of damage to property, including the property of persons who are not themselves his visitors."

Prior to the passing of the Act of 1957 there was some doubt as to the extent to which an invitor's duty was to prevent damage not only to the person of his invitee, but also to his property: see SALMOND ON LAW OF TORTS (14th Edn.), p. 379. It seems clear, however, from *Workington Harbour and Dock Board v. Owners of S.S. Towerfield* (38), particularly per LORD PORTER (39), LORD NORMAND (40) and LORD MORTON OF HENRYTON (41), that a duty to prevent damage to property did exist, though there was a difficult series of cases on the extent of such duty in the case of loss of property by theft (see the article by PROFESSOR GOODHART in 73 L.Q.R., p. 313). In my judgment the effect of the somewhat cautious provisions of s. 1 (3) (b) of the Act of 1957 was to recognise that the common law did have principles placing obligations on an invitor in relation to the prevention of damage to the property of his invitee and to substitute for those principles the rules in s. 2 and s. 3, but only to the extent to which such common law principles would have applied. In other words if the common law principles did not, rightly understood, apply, for example, to loss by theft, neither would the new rules in the Act of 1957. So much was not really disputed before me, but stress was laid on the apparently narrow wording used, i.e., "in respect of damage to property". Suppose for example, a visitor brought on to the occupier's premises a car used by him for hiring out and this was damaged by a dangerous wall falling on it. Could the visitor recover in damages not only the cost of repairing the car, but also his loss of earnings from hirings whilst the car was undergoing repair? In my judgment this question should be answered in the affirmative and the argument of counsel for Trenthams should be rejected. The rules in s. 2 and s. 3, which are substituted for the principles applicable at common law

(37) For s. 2 and s. 3 of the Occupiers' Liability Act, 1957, see 37 HALSBURY'S STATUTES (2nd Edn.) 834, 836.

(38) [1950] 2 All E.R. 414; [1951] A.C. 112.

(39) [1950] 2 All E.R. at pp. 416-426; [1951] A.C. at pp. 126-136.

(40) [1950] 2 All E.R. at pp. 426-435; [1951] A.C. at pp. 136-148.

(41) [1950] 2 All E.R. at pp. 437-440; [1951] A.C. at pp. 152-156.

(42), define a duty and make no attempt to quantify or limit the damages recoverable on proof of breach of that duty and damage caused thereby. If the duty extends to the prevention of damage to property, I can see no reason in principle why the damages flowing from a breach of such duty should be limited or restricted (in the absence of express contractual provisions to that effect) other than by the application of the ordinary rules as to the measure and remoteness of damage. It is true that when negligence, not amounting to breach of contract, causes financial loss but no physical injury to person or property, financial loss is apparently irrecoverable, except in the rare cases to which the principle in *Hedley Byrne & Co., Ltd. v. Heller & Partners, Ltd.* (43) applies; for the most recent case, see *Weller & Co., Ltd. v. Foot & Mouth Disease Research Institute* (44). Financial loss consequent, however, on personal injury is recovered every day in the courts and the same is frequently recovered in cases of damage to property; see, for example, *The Okchampton* (45) and various admiralty cases cited shortly and conveniently in WINFIELD ON TORT (8th Edn.), pp. 697-701. Financial loss of this kind is sometimes described as parasitic (see Mr. P. S. ATIYAH, NEGLIGENCE AND ECONOMIC LOSS, (1967), 83 L.Q.R. p. 248) since it would be irrecoverable unless the breach of duty had also caused physical damage to person or property. Accordingly I can find no justification for the interesting argument advanced by counsel for Trenthams. Indeed, if it were right, I think it would, notwithstanding his disclaimer, equally apply to restrict A.M.F.'s damages recoverable under the principle in *Donoghue v. Stevenson* (46). I would add that I have not overlooked that in the *Workington Harbour Board* case (47), the board's counterclaim under s. 74 of the Harbours, Docks and Piers Clauses Act, 1847, for "any damage done by such vessel to the harbour, dock or pier", was limited in the House of Lords to physical damage to the opera manufacta of the undertaking and was held not to cover consequential loss of revenue through inability to use the harbour. That limitation, however, arose on the construction of s. 74 on which the board's counterclaim was based. That section gave a statutory right of recovery for damage to the harbour works regardless of whether the damage had been occasioned by negligence. I do not therefore think that the limited interpretation placed on the words "any damage done by such vessel" in the statute there under consideration is of any assistance on the present point.

I now pass to A.M.F.'s claim against Trenthams in tort. This was based again on the Occupiers' Liability Act, 1957, and, alternatively, on the general law of negligence. Counsel for Trenthams argued that they were not occupiers. They had not themselves invited A.M.F. on to the premises. This was done by Magnet, who alone were in contractual relationship with A.M.F. Trenthams merely permitted the entry of A.M.F. pursuant to condition 23 of the building contract. Moreover the concrete slab part of the building was, when A.M.F. entered, cut off from the southern part by a large polythene screen, whilst the N.E. doorway was blocked by its polythene screen and the N.W. doorway closed by hardboard. Counsel for Trenthams further sought to rely on the fact that Trenthams were doing their work under the building contract under the supervision of an architect, Mr. Bate, who was himself working under the overall responsibility first of Mr. Jones and later of Mr. Smith. In my judgment it is clear from *Wheat v. E. Lacon & Co., Ltd.* (48) that Trenthams were occupiers, notwithstanding that Magnet were also. Under the old law, which is still applicable under the Act of 1957, an invitor did not need to have exclusive possession; see *Hartwell v. Grayson, Rollo & Clover Docks* (49). Although the concrete slab portion of the building was separated by the large polythene screen from the remainder of it, I am quite

(42) For s. 2 and s. 3 of the Act of 1957, see 37 HALSBURY'S STATUTES (2nd Edn.), 834, 836.

(43) [1963] 2 All E.R. 575; [1964] A.C. 465.

(44) [1965] 3 All E.R. 560; [1966] 1 Q.B. 569.

(45) [1913] P. 54, 173.

(46) [1932] All E.R. Rep. 1; [1932] A.C. 562.

(47) [1950] 2 All E.R. 414; [1951] A.C. 112.

(48) [1966] 1 All E.R. 582; [1966] A.C. 552.

(49) [1947] K.B. 901 at p. 913.

A unable to find that Trenthams were excluded from that portion for all purposes such as, for example, attention to lighting and heating. Nor do I think it material to the claim under the Act of 1957 or Trenthams' duty thereunder that they were working under the supervision of Mr. Bate and that he was working under Mr. Jones and, later, Mr. Smith. I do not think that the discharge of Trenthams' common duty of care was, in all the circumstances, lessened or qualified by what

B may be called the interposition between them and A.M.F. of Mr. Bate and Mr. Smith. What was lacking on July 6, 1964, and thereafter until the flood on July 21, was the exercise of reasonable care in the taking of temporary anti-flooding precautions in the course of construction. This duty fell peculiarly within Trenthams' province. This conclusion receives some support by analogy and parity of reasoning from *Clay v. A. J. Crump & Sons, Ltd.* (50). Moreover, it

C seems to me clear by virtue of condition 23 of the building contract and the fact that Trenthams knew of and agreed to A.M.F. starting their installation work on July 6, 1964, that A.M.F. were visitors of Trenthams within the meaning of that word in the Act of 1957, since they entered on the premises with Trenthams' permission. Accordingly on the facts as I have found them Trenthams are liable to A.M.F. under the Occupiers' Liability Act, 1957. Had I decided otherwise, I

D should have had no hesitation in holding Trenthams liable on the *Donoghue v. Stevenson* (51) principle, and on this aspect of the case *Clay v. A. J. Crump & Sons, Ltd.* (50) would have been directly in point. A.M.F. are, therefore, entitled to judgment against both defendants for a sum to be ascertained by an official referee if not agreed.

I can now deal with the interesting points raised in relation to Magnet's claims

E against Trenthams (a) for an indemnity under Condition 14 (b) of the building contract, (b) for damages under the provisions of the bill of quantities and, alternatively, (c) for contribution, which they put at one hundred per cent. under the Law Reform (Married Women and Tortfeasors) Act of 1935. As I have said, Trenthams argued that Magnet's claims failed under (a) and (b) and that accordingly the issues between the two defendants fell to be decided under the Act of

F 1935. On the facts they argued that at the worst for Trenthams I should find the two equally to blame and order that each should contribute to the other accordingly.

Before dealing with Magnet's claims in contract, it is convenient, for reasons which will emerge, to deal with the cross-claims for contribution between the defendants under the Act of 1935 as they would arise for decision were there no

G contractual provisions on which Magnet could rely. On this hypothesis I have to decide the amount of the contribution to the total liability to A.M.F. which should be made by each on the basis of what I find to be just and equitable having regard to the extent of the responsibility of each for the damage. The flooding took place during the course of the construction of the building and was not, on the facts, due to any permanent defect in the construction due to faulty

H design on the part of Magnet's architect. I have already cited from *Clayton & Son (Builders), Ltd. v. Woodman* (52) the general proposition that an architect has no right to instruct a builder how his work is to be done or the safety precautions to be taken. Moreover in general an architect owes no duty to a builder to tell him promptly during the course of construction, even as regards permanent work, when he is going wrong; he may, if he wishes, leave that to the final stages

I notwithstanding that the correction of a fault then may be much more costly to the builder than had his error been pointed out earlier; see HUDSON ON LAW OF BUILDING AND ENGINEER'S CONTRACTS (19th Edn.) pp. 280/281 and *East Ham Borough Council v. Bernard Sunley & Sons, Ltd.* (53). In addition the builder

(50) [1963] 3 All E.R. 687; [1964] 1 Q.B. 533.

(51) [1932] All E.R. Rep. 1; [1932] A.C. 562.

(52) [1962] 2 All E.R. 33; [1961] 3 All E.R. 249; [1962] 2 Q.B. 533. See at p. 804, letter C, ante.

(53) [1965] 3 All E.R. 619 at pp. 635, 636, 639; [1966] A.C. 406 at pp. 441-443, 448, 449.



by his site agent and other servants is on the site continuously whereas the building owner and his architect are not. The builder is by reason of this in a considerably better position than the building owner or his architect to assess the dangers of flooding during construction owing to the lie of the adjacent land and any water traps formed during the building work. Apart from the above, Trenthams and Magnet were equally well informed as to the value of A.M.F.'s timber and its susceptibility to damage from damp or water. A  
B

Despite all the foregoing points (save the last) pointing to a greater responsibility resting on Trenthams than on Magnet, I cannot take the view that the latter's share was either negligible or unsubstantial. They failed to direct the mind of Mr. Bate to the issue and ask his advice. Moreover Mr. Smith did not himself go and inspect the site to verify the position; Mr. Fairweather, Magnet's own immensely experienced expert architect witness, said he thought that he himself, had he been the "consultant" or associate architect, knowing that his employers were inviting A.M.F. to enter and instal material of great value, would probably have gone to the site to see what had been done. As things were left, Magnet in my view took an unjustifiable risk in leaving everything to Trenthams. My conclusion on this matter is that Trenthams' share of responsibility was sixty per cent. and Magnet's forty per cent. and under the Act of 1935 I would make the appropriate orders for mutual contribution accordingly. C  
D

I now turn to Magnet's claim in contract. They first of all claim a full indemnity under condition 14 (b) of the building contract. It is desirable to read both parts of condition 14:

"(a) Injury to persons. The contractor shall be solely liable for and shall indemnify the employer in respect of any liability, loss, claim or proceedings whatsoever arising under any statute or at common law in respect of personal injury to or the death of any person whomsoever arising out of or in the course of or caused by the execution of the works, unless due to any act or neglect of the employer or of any person for whom the employer is responsible E

"(b) Injury to property. Except for such loss or damage by fire as is at the risk of the employer under cl. 15 (b) (B) of these conditions the contractor shall be liable for and shall indemnify the employer against any loss, liability, claim or proceedings in respect of any injury or damage whatsoever to any property real or personal in so far as such injury or damage arises out of or in the course of or by reason of the execution of the works, and provided always that the same is due to any negligence, omission or default of the contractor, his servants or agents or of any sub-contractor." F  
G

It is hard to imagine anyone being proud of the draftsmanship of this condition. Nevertheless, counsel for Magnet, whilst being freely critical, claimed that sub-para. (b) clearly covered him. Magnet have been held liable in respect of damage to A.M.F.'s property. Such damage arose out of or in the course of or by reason of the execution of "the works" and was due to negligence, omission or default of Trenthams. The claim was *prima facie*, at any rate, unanswerable. H

Counsel for Trenthams advanced a number of arguments to the contrary. First "the works" in condition 14 (b) could not include the work undertaken by A.M.F. under the permission granted by condition 23. This may be so, but the provisions in items 1/5/C, 1/6/E, 1/8/B and 2/1/B of the bill of quantities, to which I have already referred (54) were in my judgment part of "the works". It is clear on the facts as I have found them that had these provisions been complied with water should not have entered the building. For these reasons I reject this argument. Secondly, counsel for Trenthams said that condition 10 prevented Magnet placing any reliance on any of these items in the bill of quantities so as to entitle them to indemnity under condition 14 (b). Condition 10 reads: I

(54) See at p. 802, letter H, and p. 804, letters E and F, ante.

A “The quality and quantity of the work included in the contract sum shall be deemed to be that which is set out in the bills of quantities mentioned in cl. 2 of these conditions which bills unless otherwise expressly stated shall be deemed to have been prepared in accordance with the principles of the standard method of measurement of building works last before issued by the Royal Institution of Chartered Surveyors and the National Federation of Building Trades Employers, but save as aforesaid nothing contained in the said bills of quantities shall override, modify or affect in any way whatsoever the application or interpretation of that which is contained in these conditions.”

I accept the answer of counsel for Magnet to this point. The items in question constituted part of the quantity of the work included in the contract sum within the opening words of that condition. There is therefore no conflict, as counsel for Trenthams argued, between the last part of condition 10 and condition 14 (b) to prevent Magnet from relying on the latter as they do.

Thirdly, counsel for Trenthams raised a point of law of general importance and some difficulty. Relying on my anticipated (and now actual) finding that the damage to A.M.F.'s property was partly caused by the negligence of Magnet, he submitted that on authority Magnet were unable to recover anything under the indemnity clause. He relied on *Rutter v. Palmer* (55), *Joseph Travers & Sons, Ltd. v. Cooper* (56), and similar well-known cases following on them, as establishing the general principle that an exception clause does not protect against negligence unless it expressly so provides on the true construction of the words used, or unless no content can be given to the words used unless they protect against negligence on the principle laid down in *Alderslade v. Hendon Laundry, Ltd.* (57). These points are nowhere more clearly stated than in *Canada Steamship Lines, Ltd. v. Regem* (58) in the well-known passage, which it is unnecessary for me to read. Condition 14 (b) could be given content to protect Magnet against liability to third parties arising through no negligence on their part. Counsel for Trenthams instanced *Hughes v. Percival* (59) as an example. In that case the building owner was held liable in tort for damage caused to his neighbour's house by bad work by his builder, notwithstanding that he had employed a competent architect and builder. Another example relied on was *Balfour v. Barty-King* (60). On this point I think counsel for Trenthams was undoubtedly right. He further argued that these principles applied as much to claims by persons suing on indemnity clauses as to defendants seeking to escape liability under exception clauses. This undoubtedly seems to have been accepted by the Privy Council in *Canada Steamship Lines, Ltd. v. Regem* (61). It seems to have been assumed, at least as a possibility, in *A. E. Farr, Ltd. v. The Admiralty* (62) and *Westcott v. J. H. Jenner (Plasterers), Ltd. and Bovis, Ltd.* (63), though in both those cases the person relying on the indemnity succeeded by reason of the language used being held to have been sufficiently clear to have covered his own negligence.

The most relevant and powerful authority relied on by counsel for Trenthams was *Walters v. Whessoe, Ltd. and Shell Refining Co., Ltd.* decided by the Court of Appeal on Nov. 18, 1960, but unfortunately not hitherto reported (64). In that case a widow sued Whessoe and Shell under the Fatal Accidents and Law Reform Acts in respect of the death of her husband. Mr. Walters had been an employee of Whessoe, who were constructing a tank for Shell at their Stanlow Refinery at

(55) [1922] All E.R. Rep. 367; [1922] 2 K.B. 87.

(56) [1914-15] All E.R. Rep. 104; [1915] 1 K.B. 73.

(57) [1945] 1 All E.R. at p. 245; [1945] K.B. at p. 192, per LORD GREENE, M.R.

(58) [1952] 1 All E.R. 305 at p. 310; [1952] A.C. 192 at p. 208.

(59) [1881-85] All E.R. Rep. 44; (1883), 8 App. Cas. 443.

(60) [1957] 1 All E.R. 156; [1957] 1 Q.B. 496.

(61) [1952] 1 All E.R. at p. 313; [1952] A.C. at p. 213.

(62) [1953] 2 All E.R. 512.

(63) [1962] 1 Lloyd's Rep. 309.

(64) (1960), see now p. 816, post.

Ellesmere Port. The construction involved electric welding. Owing to the negligence of contractors for whom Shell were responsible, an oil drum with dangerous vapour within was, between the cessation of work on a Saturday and its resumption on a Sunday, placed near the construction work and in contact with steel railway lines which themselves were in contact with some steel plates with which the tank was being constructed. The earthing of the welding equipment was defective, but this would have been relatively harmless but for the contact with the drum. Electric current used in the welding caused the vapour to explode, and the lid of the drum struck Mr. Walters on the head, and he later died. The trial judge and the Court of Appeal held Shell eighty per cent. and Whessoe twenty per cent. responsible. Shell, however, sought a complete indemnity from Whessoe in reliance on an indemnity contained in condition 3 of their contract with Whessoe. This read:

"Injury and Damage: The contractor shall indemnify and hold Shell their servants and agents free and harmless against all claim (sic) arising out of the operations being undertaken by the contractor in pursuance of this contract or order or incidental thereto in respect of: (a) personal injury, including death and industrial disease, sustained by any employee of the contractor or of a sub-contractor; (b) loss or damage to the property and personal injury, including death, to the person of any third party; and (c) loss or damage to the property, equipment or tools of the contractor, a sub-contractor or any of their employees."

The Court of Appeal unanimously rejected this claim of Shell. **SELLERS, L.J.**, said:

"It is well established that indemnity will not lie in respect of loss due to a person's own negligence or that of his servants unless adequate and clear words are used or unless the indemnity could have no reasonable meaning or application unless so applied. The words used in this contract do not in terms refer to negligence on the part of Shell or their servants but to all claims arising out of the operations. 'All claims' gives a wide cover, but I am satisfied that claims might arise creating liability on Shell quite apart from liability for their own or their servants' carelessness. In the course of Whessoe's work on Shell's site there might arise a direct liability of Shell to a contractor's servant or to a third party due to acts of Whessoe putting Shell either into a breach of a statutory duty which fell on them or of a common law duty."

**SELLERS, L.J.**, concluded:

"Therefore applying the law which the learned judge invoked I would uphold the view that the indemnity under cl. 3 is inadequate to embrace the claim which Shell make in this case where their liability has been brought about by their own failure in respect of the claim."

**DEVLIN, L.J.**, said:

"It is now well established that if a person obtains an indemnity against the consequences of certain acts, the indemnity is not to be construed so as to include the consequences of his own negligence unless those consequences are covered either expressly or by necessary implication. They are covered by necessary implication if there is no other subject-matter on which the indemnity could operate. Like most rules of construction, this one depends upon the presumed intention of the parties. It is thought to be so unlikely that one man would agree to indemnify another man for the consequences of that other's own negligence that he is presumed not to intend to do so unless it is done by express words or by necessary implication. The reason for the rule is illustrated by one of the earliest cases in which it was enforced — *Phillips v. Clark* (65). In that case the question was whether a shipowner



A who had inserted in a bill of lading the stipulation, 'not accountable for leakage or breakage', was exempted from responsibility for a loss by leakage and breakage if it arose from his own negligence. In the course of the argument, COCKBURN, C.J., said (66): 'I think it can hardly be permitted to him to contend that he inserted the clause for the purpose of protecting himself against negligence . . . Can we in a court of justice put so

B absurd a construction upon language that is susceptible of another and a more rational construction?' CROWDER, J., delivering judgment said (67): 'The simple question is, what did the parties intend by the contract they have entered into: and this we must gather from the words they have used. It could hardly have been contemplated by the plaintiff that the defendant should be utterly absolved from the obligation of taking any care of the goods'. The law therefore presumes that a man will not readily be granted

C an indemnity against a loss caused by his own negligence. Such a loss is due to his own fault. No similar presumption can be made if he is made responsible for the negligence of others over whose acts he has no control. A responsibility of this sort may arise in law in the case of an employer and his workmen or an occupier and persons whom he invites to the premises. Similarly a man may be responsible without negligence on his part for breach of

D statutory duty committed either by himself or by his servants or by someone for whom he was vicariously liable. In none of these cases is there any negligence on his part and there is therefore no reason to presume an intention to exclude them from the indemnity. The indemnity which we have to construe does not contain any express words covering negligence. Its terms are wide enough to cover breaches of statutory duty and acts of independent contractors which may impose a liability on Shell without any fault on the part of themselves or their servants. It is not therefore necessary, in order to give the clause subject-matter, to construe it as covering negligence and so the indemnity does not cover the consequences of a negligent act committed by Shell's servants."

F After having referred to the statement by LORD WRIGHT in *Lochgelly Iron & Coal Co., Ltd. v. M'Mullan* (68) that breach of statutory duty is negligence "in strict legal analysis", DEVLIN, L.J., continued:

"It can also be said, no doubt, that a person who is vicariously liable for the negligent acts of an independent contractor is in strict legal analysis himself negligent. But in the application of this rule of construction what we have to consider is not what negligence means in strict legal analysis but what sort of conduct the parties intended to exclude from the scope of the indemnity. That is why I have looked to the reason for the rule. The sort of conduct which the parties must be taken to have had in mind is that which LORD WRIGHT describes in the same passage of his speech, and by way of contrast with negligence in strict legal analysis, as 'heedless or careless conduct'. There is good ground for presuming an intention not to grant a man an indemnity against his own heedless or careless conduct; there is no ground for such a presumption in the case of conduct which, whatever it may be called in law, is not blameworthy in that sense."

I SLADE, J., the third member of the court, gave a short judgment to the same effect in which he specifically quoted the passage to which I have referred in *Canada Steamship Lines, Ltd. v. Regem* (69) and said that it was the duty of the court to apply it to an indemnity clause.

Counsel for Trenthams naturally relied strongly on this case, which as far as I can ascertain, is the only authority in the English courts applying these well-known principles to an indemnity as distinct from an exception clause. Counsel

(66) (1857), 2 C.B.N.S. at p. 159.

(67) (1857), 2 C.B.N.S. at p. 163.

(68) [1934] A.C. 1 at p. 25.

(69) [1952] 1 All E.R. at p. 310; [1952] A.C. at p. 208.

further said that unless clear words were used, which he submitted were absent here, an indemnity clause could not be relied on by a proferens seeking to recover for what he called his own culpa or heedless or careless conduct, which he submitted covered breach of contract. Here I have held that Magnet were in breach of contract (70) and were also negligent themselves (71) in the person of Mr. Smith in not by himself or Mr. Bate or a suitably qualified person checking that reasonable steps had been taken to make the site safe for A.M.F. In addition counsel for Trenthams naturally stressed that in the *Whessoe* case (72) Shell were not wholly to blame, but Whessoe were also partly responsible.

Counsel for Magnet sought to distinguish the present case in a variety of ways. First of all he submitted that the (73) words of condition 14 (b) were wide enough to include Magnet's negligence and breach of contract. He pointed out that the word "solely", present (74) in sub-para. (a), is absent from sub-para. (b). As against this counsel for Trenthams suggested that the effect must be the same by reason of the words "in so far as" in sub-para. (b). Further, counsel for Magnet urged that condition 14 was a sweeping-up clause and that sub-para. (b) significantly lacked the words at the end of sub-para. (a) "unless due to any act or neglect of the employer", etc. I have already said that the phraseology of the condition as a whole leaves much to be desired; I do not think any real assistance is to be derived from comparing the language of the two sub-paragraphs. If a party relying on an indemnity is to escape the effect of the principle laid down in the *Whessoe* case (72) the language he relies on must be clear. In my judgment the language used in 14 (b) is not clear enough to take Magnet out of the principle.

Counsel for Magnet then argued that I must distinguish between *causa causans* and *causa sine qua non*, that in the *Whessoe* case (72) Whessoe's negligence was only a *causa sine qua non* and that the *causa causans* or real or effective cause was the negligence of Shell. Here he equated Magnet with Whessoe and Trenthams with Shell. Moreover, the passages which I have read from the judgments of SELLERS and DEVLIN, L.J.J., in dealing with the principle, did not mention the partial responsibility in negligence of Whessoe. Unless one interpreted the reasoning of the Court of Appeal in this way, counsel submitted there was an insoluble logical conflict between the *Whessoe* case (72) and a line of authorities holding that a plaintiff can recover as damages for breach of contract the damages, flowing therefrom that he has had to pay a third party for liability in tort. He referred to the well-known line of cases starting with *Mowbray v. Merryweather* (75), continuing with *Scott v. Foley Aikman & Co.* (76) and *The Kate* (77), and most recently exemplified by *Sims v. Foster Wheeler, Ltd.* (78). In each of these cases the plaintiff succeeded in contract because his liability in tort to a third party was due to a breach of duty owed to that third party and not to the defendant. He further relied for his interpretation of the *Whessoe* case (72) on what was said by DEVLIN, J., in *Compania Naviera Maropan S.A. v. Bowaters Lloyd Pulp and Paper Mills, Ltd.* (79).

I am unable to see how I can distinguish the reasoning and decision in the *Whessoe* case (72) on the lines suggested. What fraction of responsibility greater than twenty per cent. is required before the other party's negligence ceases to be the effective cause? The question has only to be asked to be seen to be

(70) See at p. 799, letter F, to p. 800, letter H, ante.

(71) See at p. 806, letters F to H, ante.

(72) (1960), see p. 816, post.

(73) Condition 14 (b) of the building contract is set out at p. 810, letter G, ante.

(74) See at p. 810, letter E, ante.

(75) [1895-99] All E.R. Rep. 941; [1895] 2 Q.B. 640.

(76) (1899), 5 Com. Cas. 53.

(77) [1935] All E.R. Rep. 912; [1935] P. 100.

(78) [1966] 2 All E.R. 313.

(79) [1954] 3 All E.R. 563 at pp. 566-569; [1955] 2 Q.B. 68 at pp. 73-79.

**A** answerable. If it can be answered, I can see no grounds for holding sixty per cent. responsibility to be the effective cause and forty per cent. only a sine qua non. Further I think that there is a real distinction in principle between the indemnity cases and the line of contract cases cited. In the latter the defendant is under a contractual obligation to provide reasonably safe tackle, or a berth or scaffolding, etc., or warrants that what he has provided is reasonably safe to use. In the indemnity cases the party giving the indemnity merely undertakes to pay the other party money in certain circumstances. If, as a matter of construction, the event that has occurred falls outside those circumstances, no liability to indemnify arises. For these reasons and considering myself bound by the *Whessoe* case (80), even if not strictly bound by the *Canada Steamship* case (81), I reject Magnet's claim to be indemnified under condition 14 (b).

**C** In doing so, however, I base my decision on my earlier finding of Magnet's liability to A.M.F. in tort and express no view whether, had I only held them liable in contract, the claim under the indemnity clause would have failed.

This leads me to the final point. Can Magnet recover, to the extent of their liability to A.M.F., as damages for breach of contract by Trenthams, the terms of the contract relied on being items 1/5/C, 1/6/E, 1/8/B and 2/1/B in the bill of quantities? (82) It is clear on the facts that, albeit wrongly, in discharge of their obligations in contract and tort to A.M.F., Magnet did rely exclusively on Trenthams. Their negligence vis-à-vis A.M.F. is irrelevant as an answer to their claim in contract against Trenthams on the authority of *Mowbray v. Merryweather* (83) and the later cases cited following that decision (84). I am satisfied that this is not a case in which on the facts it would be proper to hold that Magnet's acts or omissions broke the chain of causation between the breaches of contract by Trenthams and the loss suffered by Magnet in the shape of their liability to A.M.F., although on the appropriate facts this may of course be the right conclusion as envisaged by DEVLIN, J., and the Court of Appeal in *Compania Naviera Maropan S.A. v. Bowaters Lloyd Pulp & Paper Mills, Ltd.* (85). Having rejected earlier in this judgment the arguments of counsel for Trenthams

**F** in relation to those items in the bill of quantities based on condition 10 of the contract and the construction of the phraseology of the items themselves and having found as facts that Trenthams were in breach of the provisions of these four items, I can see no answer to this way of putting Magnet's claim. I agree with Magnet's counsel that condition 14 (b) cannot be construed as a kind of exception clause in favour of Trenthams, so as to prevent Magnet from being

**G** able to recover damages for breach of a contractual obligation by Trenthams if the indemnity provisions in that clause do not, on their true construction, apply to that breach.

Accordingly I hold that Magnet are entitled to recover from Trenthams as damages for breach of contract the sum for which A.M.F. will be entitled, under the earlier part of this judgment, to enter judgment against Magnet in respect of the damage to the timber. In so saying I leave open for decision all questions of costs until after I have heard counsel.

**H** Before ending I must again express my gratitude to all counsel involved for their very great assistance throughout this long and complex case. If I have not dealt with every argument advanced, I hope that I have not omitted any of real importance. Any omissions have not been due, I believe, to oversight, but in order not further to prolong this judgment.

(80) (1960), see p. 816, post.

(81) [1952] 1 All E.R. 305; [1952] A.C. 192.

(82) For these items in the bill of quantities, see at p. 802, letter H, and p. 804, letters E and F, ante.

(83) [1895-99] All E.R. Rep. 941; [1895] 2 Q.B. 640.

(84) See the cases cited at p. 814, letter G, ante.

(85) [1954] 3 All E.R. 563; [1955] 2 All E.R. 241; [1955] 2 Q.B. 68.



*Judgment for the plaintiffs against the first and second defendants for damages to be assessed by an official referee if not agreed.* **A**

Solicitors: *L. Bingham & Co.* (for the plaintiffs); *Sydney Morse & Co.* (for the first defendants); *Ward, Bowie & Co.* (for the second defendants).

[Reported by K. DIANA PHILLIPS, Barrister-at-Law.] **B**

### NOTE.

In *Walters v. Whessoe Ltd. and Shell Refining Co., Ltd.*, the widow and administratrix of John Walters deceased appealed to the Court of Appeal (SELLERS and DEVLIN, L.JJ., and SLADE, J.) from a judgment of WINN, J., at Liverpool Autumn Assizes in 1959, awarding the plaintiff £2,400 damages for financial loss sustained by her husband's death as the result of an accident on Nov. 18, 1956, when working as a labourer in the employment of the first defendants ("Whessoe") on work of erection of a new oil storage tank for the second defendants ("Shell"), and for his pain and suffering and loss of expectation of life. The dispute on appeal was between the two defendants, the plaintiff not being a party to the appeal. Each defendant claimed against the other indemnity or contribution under the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6, and Shell sought complete indemnity under the contract for the work which Whessoe were undertaking. WINN, J., had apportioned liability as to one-fifth to Whessoe and four-fifths to Shell, and the Court of Appeal found no ground for altering that apportionment. He had held also that the contractual indemnity did not entitle Shell to any relief. The deceased had been killed by a lid of a petrol oil drum flying through the air and striking him on the head. The drum, which was being used as a barrier or protection, had not been cleaned and contained explosive vapour. Electric welding, required by the contract, was being carried out and, in the circumstances prevailing, the electric current for this caused explosion of the vapour, which blew the lid off the drum. Whessoe were negligent in that the earth that was provided for the electric current used in the welding was defective. Negligence was attributable to Shell in having left the drum where it lay overnight uncleared. The contract between Shell and Whessoe contained among other provisions, this—"3. *Injury and damage*: The contractor shall indemnify and hold Shell and their servants and agents free and harmless against all claim arising out of the operations being undertaken by [Whessoe] in pursuance of this contract or order or incidental thereto in respect of: (a) personal injury, including death . . . sustained by any employee of [Whessoe] . . ." Clause 3 was the provision material for this report since, no breach of statutory duty by Shell being alleged, the Court of Appeal did not find it necessary to deal with the construction of another clause, cl. 6, which might otherwise have been relevant. Shell alleged that cl. 3 gave them an indemnity in respect of loss which had befallen them by reason of their own negligence, including the negligence of their servants. SELLERS, L.J., giving the reasons stated at p. 812, letters E to H, ante, concluded "I would uphold the view that the indemnity under cl. 3 is inadequate to embrace the claim which Shell made in this case where their liability has been brought about by their own failure in respect of the claim". DEVLIN, L.J., giving reasons quoted at p. 812, letter H, to p. 813, letter F, ante, said that subject matter could be given to cl. 3 without construing it so as to cover negligence, for the clause was wide enough to extend to breaches of statutory duty and acts of independent contractors which might impose liability on Shell without any fault on the part of themselves or their servants. The clause contained no language expressly excepting Shell from the consequences of their negligence or that of their servants. Moreover there was, DEVLIN, L.J., said, a possible head of damage based on some ground other than that of negligence on the part of Shell or their servants, as Shell might desire protection in the case of an unsuccessful claim against them based on negligence, as the result of which, but for the indemnity clause, they would be left with a barren judgment for costs against the unsuccessful plaintiff. Accordingly cl. 3 did not cover the consequences of negligence of Shell by their servants. The appeal was dismissed (Nov. 18, 1960). **C**  
**D**  
**E**  
**F**  
**G**  
**H**  
**I**

CARBERRY (formerly an infant but now of full age)  
v. DAVIES AND ANOTHER.

[COURT OF APPEAL, CIVIL DIVISION (Harman, Diplock and Fenton Atkinson, L.JJ.), April 9, 1968.]

**B** *Practice Parties Infant—Proceeding by next friend—Adoption of action on attaining majority—Title to subsequent proceedings.*

*Road Traffic—Negligence Driving of motor vehicle—Liability of owner—Car driven for purposes of car-owner's son—Test of whether car-owner's liability—Request by car-owner to drive car for son's purposes as distinct from permission by car-owner for use by son.*

**C** A coal-merchant who owned three lorries, used in his business, and a motor-car which he regarded as the family car, allowed his sixteen year old son to go out in the evening for his own purposes in the car on condition that H., one of the lorry drivers employed by the coal-merchant, drove. The car-owner (the coal merchant) asked H. if he would drive the son about in the evenings, and H. agreed. While H. was driving the son, for the son's own purposes one evening, he drove negligently, causing the car to collide with a motor-cycle and injure the motor-cyclist. In an action by the motor-cyclist for damages,

**Held:** on these facts H. was driving on the car-owner's behalf and with his authority, and so the car-owner was liable in damages to the motor-cyclist for H.'s negligent driving (see p. 819, letter G, and p. 820, letter B, post).

**E** *Hewitt v. Bonvin* ([1940] 1 K.B. 188) and *Ormrod v. Crosville Motor Services, Ltd.* ([1953] 2 All E.R. 753) applied.

SEMBLE: if the son, and not the car-owner, had made the arrangement with H. for H. to drive, and the car-owner had merely permitted this, the car-owner would not have been liable for H.'s negligent driving (see p. 819, letters F and I, post).

**F** **POT HARMAN, L.J.:** where an infant plaintiff comes of full age and adopts an action in which he has been plaintiff by his next friend, the proceedings should thereafter be entitled "... (formerly an infant but now of full age) ... Plaintiff" (see p. 818, letter D, post).

Appeal dismissed.

**G** [ **Editorial Note.** On the position of owners whose vehicles are used by persons not being their employees but rendering by means of the vehicles services which the owners want to ensure are available, see *Norton v. Canadian Pacific Steamships, Ltd.* ([1961] 2 All E.R. 785).

As to the liability of a vehicle owner for negligent driving by another person, see 28 HALSBURY'S LAWS (3rd Edn.) 71, para. 71; and for cases on the subject, see 36 DIGEST (Repl.) 104, 512-524.

**H** As to an infant plaintiff attaining full age and adopting proceedings, see 21 HALSBURY'S LAWS (3rd Edn.) 318, 319, para. 670; and for cases on the subject, see 28 DIGEST (Repl.) 676, 677, 1780-1799.]

Cases referred to:

*Hewitt v. Bonvin*, [1940] 1 K.B. 188; 109 L.J.K.B. 223; 161 L.T. 360; 34 Digest (Repl.) 173, 1231.

**I** *Ormrod v. Crosville Motor Services, Ltd. (Murphie, Third Party)*, [1953] 2 All E.R. 753; [1953] 1 W.L.R. 1120; *affg.*, [1953] 1 All E.R. 711; [1953] 1 W.L.R. 409; Digest (Cont. Vol. A) 1166, 522a.

### Appeal.

The first defendant, Douglas Oliver Davies, the owner of a motor-car which, while being driven by the second defendant, Samuel Hawkins, had collided with a motor-cycle ridden by the plaintiff, Mervyn George Carberry, then an infant, who attained full age before the hearing of the appeal, appealed against so much of the

judgment of LATEY, J., given at Birmingham Assizes on Nov. 15, 1967 as held him liable in damages to the plaintiff for the negligent driving of the car-driver. A

*P. J. Cox, Q.C.*, for the car-owner.

*I. J. Black* for the plaintiff.

The car-driver did not appeal and was not a party to the appeal.

**HARMAN, L.J.:** Almost five years ago the plaintiff, then an infant, driving a motor-bicycle, was involved in an accident with a motor-car driven by the defendant car-driver and owned by the defendant car-owner. The judge has held that the car-driver was to a major degree responsible for the accident and has awarded a sum of around £3,000 damages. He gave that judgment not only against the second defendant, the car-driver, but also against the first defendant, the owner of the car, on the footing that the car-driver was driving as agent of the car-owner. B

This case has taken an unconscionable time to come on, like many of these cases do, and recollections may or may not be all that they should be. The infant plaintiff has come of age and has adopted the proceedings, and this should be reflected when the order is drawn up by entitling the action "*Mervyn George Carberry* (formerly an infant but now of full age) Plaintiff", because he no longer sues by his next friend. That is the correct way of heading the order which will be drawn. C

The car-driver does not appeal. The car-owner does: he says that there was no agency. D

It is not alleged that the judge has erred in his statement of the law but the argument said is that there was no justification for the inferences of fact which he drew and on which his conclusion was based. He said: E

"The question I have to decide is whether or not [the car-driver] was [the car-owner's] agent."

In *Hewitt v. Bonvin* (1) MACKINNON, L.J., regarded the case as dependent on the question whether the driver was or was not the servant of the owner. *DU PARCQ, L.J.*, dealing with agency summarised the principles in this way (2): F

"The driver of a car may not be the owner's servant, and the owner will be nevertheless liable for his negligent driving if it be proved that at the material time he had authority, express or implied, to drive on the owner's behalf. Such liability depends not on ownership but on the delegation of a task or duty." G

That seems to me to describe the same test or dividing line as that described by SINGLETON and DENNING, L.J.J., in *Ormrod v. Crosville Motor Services, Ltd. (Murphie, Third Party)* (3). SINGLETON, L.J., said (4):

"... the driver of a motor-car must be doing something for the owner of the car in order to become an agent of the owner." H

DENNING, L.J., said (5):

"If it is being used wholly or partly on the owner's business or for the owner's purposes, the owner is liable for any negligence on the part of the driver. The owner only escapes liability when he lends it or hires it to a third person to be used for purposes in which the owner has no interest or concern..." I

That admittedly is an adequate summing-up of the law. I would only add to it the illuminating judgment of DEVLIN, J., in that same case, *Ormrod v. Crosville Motor Services, Ltd.* (6), which is reported.

(1) [1940] 1 K.B. 188.

(3) [1953] 2 All E.R. 753.

(5) [1953] 2 All E.R. at p. 755.

(2) [1940] 1 K.B. at pp. 194, 195.

(4) [1953] 2 All E.R. at p. 754.

(6) [1953] 1 All E.R. 711.



A Having correctly laid the basis of his judgment, the judge went on to findings of fact, and he said this:

B “On the evidence of [the car-owner] and [the car-driver] and looking at the probabilities I have little doubt that [the car-driver] was asked by [the car-owner] to drive John [the car-owner's son] about for him. He wanted John to have reasonable use and enjoyment of the family car during the evenings and John could not drive. [The car-owner] was only prepared to allow the car to be driven either by himself or [the car-driver], and [the car-driver], who was employed by [the car-owner] and was related to him by marriage, agreed to take it on as a favour. Why otherwise should [the car-driver] leave his wife and home on these many evenings? This is not to say, of course, that [the car-driver] did not enjoy the evenings out, no doubt he did, but his real role was that of an unpaid chauffeur.”

C If those inferences (for that is what they are) are justified, there can be no quarrel with the conclusion which the judge reached. Counsel in his very persuasive address on behalf of the car-owner has urged that there was no justification for such findings and that in truth there was a mere permission by the owner to the car-driver to use his car if he liked and that is the highest that the facts of the case ought to be put.

D The facts, very shortly, are that the car-owner was a coal-merchant who had three lorries engaged in delivery of coal in his business: one of them was driven by his employee the defendant car-driver, who was a servant at a wage; but the car-owner also had a Ford motor-car which he regarded as the family car and of which, as the judge found, he wished all the family to have the use so far as practicable. He however was careful about the car and would let no-one but himself drive it except the defendant car-driver, who was his employee and in whom, no doubt, he had confidence: the car-driver drove one of the lorries. Thus it came about that when the car-owner's son, who was then about sixteen, wished to go out in the evenings and to have the car for that purpose, he was allowed by his father to have it if the car-driver drove it; and the accident happened on some such occasion. The car-driver had driven the son out on a jaunt; they picked up the son's girl friend. Where they were going does not quite appear; but they ran into this trouble. The whole case turns, I suppose, and I think this is true (as DIPLOCK, L.J., first pointed out), on how the arrangement was made. Did the defendant car-owner make the arrangement so that his son could have the use of the car, or was it the other way about, that the son made the arrangement and simply asked his father's permission? Who originated the arrangement? The judge has come to the conclusion—and he says that he has little doubt about it—that it was the father's arrangement, and the question is whether we can reject that conclusion. It is very near the line. The judge might well have decided the other way: if he had done so I should not have felt I could contradict him, but as he has seen the witnesses and we have not, and as he arrived without any doubt at the conclusion which I have read, I do not feel that we are at liberty to quarrel with it, and I would therefore dismiss the appeal.

H DIPLOCK, L.J.: I agree. The relevant law as to the liability of an owner of a vehicle for negligence on the part of someone else who is driving it has been well settled since *Hewitt v. Bonvin* (7) and *Ormrod v. Crossville Motor Services, Ltd.* (8) (*Murphy, Third Party*) (8), to which HARMAN, L.J., has referred; and I would only add that for my part I find it most helpfully stated in the judgment of DEVLIN, J. (9) who tried the latter case at first instance. As it seems to me, on the facts of this case, the question really turns on whether the proposal that Mr. Hawkins, the car-driver, should drive the son about originated from the car-owner (the father) or from the son himself. I agree with HARMAN, L.J., that

(7) [1940] 1 K.B. 188.

(8) [1953] 2 All E.R. 753.

(9) [1953] 1 All E.R. 711.

the case is a border-line case; but, that being what the judge had to make up his mind about, it does seem to me that he would be bound to be influenced by the impression that he had formed of the personalities of those three witnesses in the box; and while on the transcript of the shorthand note the words used in answer to questions may perhaps be equivocal, I do not think that this court can possibly say that the judge was wrong in drawing the inference that he did—that the proposal originated from the car-owner, or, as the judge himself put it, “looking at the probabilities I have little doubt that [the car-driver] was asked by [the car-owner] to drive John about for him.”

I agree that this appeal should be dismissed.

**FENTON ATKINSON, L.J.:** I also agree with both judgments which have been delivered, and there is nothing that I can usefully add.

*Appeal dismissed.*

Solicitors: *Sharpe, Pritchard & Co.*, agents for *Newsome & Co.*, Coventry (for the car-owner); *Skillington & Brown*, Coventry (for the plaintiff).

[*Reported by* HENRY SUMMERFIELD, Esq., *Barrister-at-Law.*]

## GALLAHER, LTD. v. COMMISSIONERS OF CUSTOMS AND EXCISE.

[COURT OF APPEAL, CIVIL DIVISION (Lord Denning, M.R., Salmon and Edmund Davies, L.JJ.), March 4, 5, 6, April 30, 1968.]

*Customs—Commonwealth preference—Southern Rhodesia—Tobacco—Southern Rhodesia ceasing to be in Commonwealth preference area from midnight Nov. 18/19, 1965—Tobacco grown in Southern Rhodesia and consigned to United Kingdom before Nov. 19, 1965—Whether full duty payable—Import Duties Act, 1958 (6 & 7 Eliz. 2 c. 6), s. 2 (2), (3) (c), s. 12 (1)—Southern Rhodesia (Withdrawal of Commonwealth Preference) Order 1965 (S.I. 1965 No. 1954), art. 1—Southern Rhodesia (Withdrawal of Commonwealth Preference) (No. 2) Order 1965 (S.I. 1965 No. 1987).*

In November, 1965, the plaintiffs had large quantities of tobacco which had been grown in Southern Rhodesia. By art. 1 of the Southern Rhodesia (Withdrawal of Commonwealth Preference) Order 1965, Southern Rhodesia was excluded from the Commonwealth preference area as from midnight on Nov. 18/19, 1965. The plaintiffs then had over five million pounds of tobacco in transit from Salisbury in Southern Rhodesia to the United Kingdom. Some of it was on rail at Salisbury, some was on the train from Salisbury to Beira, in Portuguese East Africa, and the rest was in warehouses at Beira awaiting shipment to the United Kingdom for which all arrangements had been made. Through contracts or successive contracts of carriage had not been arranged at that date. By s. 2 (2)\* of the Import Duties Act, 1958, in conjunction with s. 12 (1)† of that Act, goods qualified for Commonwealth preference if they were grown in the Commonwealth preference area and consigned from a place in such area to the United Kingdom. By virtue of s. 2 (3) (c)‡ of the Act of 1958 any country not named§, in sub-s. (4)

\* Section 2 (2) is set out at p. 825, letter G, post.

† Section 12 (1), so far as material is set out at p. 823, letter C, post.

‡ Section 2 (3), so far as material, is set out at p. 826, letter D, post.

§ In the Import Duties Act, 1958, s. 2, as originally enacted, the Federation of Rhodesia and Nyasaland was named in sub-s. (4), and thus was brought within the Commonwealth preference area by virtue of sub-s. (3) (b). The Federation was constituted by the Federation of Rhodesia and Nyasaland Order in Council, 1953 (S.I. 1953 No. 1199).

A was in the Commonwealth preference area if “ for the time being ” it formed part of Her Majesty’s dominions. By s. 88 (1)\* of the Customs and Excise Act, 1952, the duties of customs or excise and the rates thereof chargeable on warehoused goods were to be those enforced at the date of the removal of the goods from the warehouse. On appeal by the plaintiffs from an order that they were not entitled to the benefit of Commonwealth preference in respect of the five million pounds of tobacco, as a consequence of which order their liability to import duty would be increased by some £450,000,

B **Held:** (i) on the facts the tobacco had been consigned to the United Kingdom before Nov. 19, 1965, within the meaning of s. 2 (2) of the Act of 1958 at a time when Southern Rhodesia was still within the Commonwealth preference area (see p. 823, letter I, p. 828, letter H, and p. 831, letter I, post).

C (ii) (SALMON, L.J., dissenting) the plaintiffs were entitled to the benefit of Commonwealth preference in respect of the tobacco (see p. 825, letter A, and p. 831, letter I, post), because—

D (a) (per LORD DENNING, M.R.) the tobacco having qualified for Commonwealth preference before Nov. 19, 1965, did not lose that qualification when removed from the warehouse in the United Kingdom, but remained, in effect franked goods, there being nothing in the Act of 1958 to remove the benefit of Commonwealth preference once goods had qualified for it (see p. 824, letters E and G, post); and

E (b) (per EDMUND DAVIES, L.J.) having regard to s. 2 (3) (c) of the Act of 1958, the phrase “ goods of the area ” in s. 2 (2) extended to goods grown in the country which for the time being formed part of the preference area, and the phrase “ consigned . . . from a place in that area ” bore a similar connotation, with the consequence that, as the tobacco was grown in and was consigned from Southern Rhodesia when within the preference area, it had the benefit of Commonwealth preference; and there was nothing in the Orders in Council to deprive the tobacco of any preferential right that it otherwise possessed (see p. 829, letter I, to p. 830, letter A, and p. 830, letter I, post).

F Appeal allowed.

[As to the Commonwealth preference area and goods qualifying for Commonwealth preference, see 33 HALSBURY’S LAWS (3rd Edn.) 67, 68, paras. 131, 132.

For the Import Duties Act, 1958, s. 2, s. 12, see 38 HALSBURY’S STATUTES (2nd Edn.) 970, 982.]

G **Appeal.**

This was an appeal by the plaintiffs, Gallaher, Ltd., from a judgment of

[Continued from foot of p. 820.]

H and it included the colony of Southern Rhodesia. The reference to the Federation was deleted from sub-s. (4) by the Federation of Rhodesia and Nyasaland (Dissolution) Order in Council 1963 (S.I. 1963 No. 2085) s. 75 and Sch. 3, para. 7 (a). Thereafter Southern Rhodesia, being no longer included in a country named in sub-s. (4) of s. 2 of the Act of 1958, seems to have qualified as a Commonwealth preference area by virtue of s. 2 (3) (c) of the Act of 1958, until it was excluded from the scope of s. 2 (3) (c) by the Southern Rhodesia (Withdrawal of Commonwealth Preference) Order 1965 art. 1, which came into operation at the beginning of Nov. 19, 1965, and is the subject of the decision in the present appeal. The terms of s. 2 (3), so far as immediately relevant, are

I “ (3) . . . the Commonwealth preference area shall consist of . . . (b) the countries named as parts of that area in sub-s. (4) of this section; and (c) any country not named (nor included in a country named) in . . . sub-s. (4) which for the time being forms part of Her Majesty’s dominions outside the United Kingdom ”. By the amending order of 1965, the Southern Rhodesia (Withdrawal of Commonwealth Preference) (No. 2) Order 1965 (S.I. 1965 No. 1987), which was directed to s. 2 (9) of the Act of 1958, goods of Southern Rhodesia consigned from Lourenço Marques or Beira were withdrawn from preference, but there was an exception for goods shown to have been shipped in a ship which sailed from either port, or from any port in the Commonwealth preference area, before Nov. 19, 1965.

\* Section 88 (1), so far as material, is set out at p. 824, letter B, post.



ROSKILL, J., dated May 31, 1967, in three actions by the plaintiffs seeking declarations that, by virtue of s. 260 (1) of the Customs and Excise Act, 1952, the plaintiffs were entitled to the benefit of Commonwealth preference on five cases of Rhodesian tobacco shipped from Beira in Portuguese East Africa to the United Kingdom after midnight of the night of Nov. 18/19, 1965. The actions were, by consent, tried concurrently. ROSKILL, J., gave judgment for the defendants, the Commissioners of Customs and Excise, holding that the plaintiffs were not entitled to the benefit of Commonwealth preference. The facts are set out in the judgment of LORD DENNING, M.R.

*Michael Kerr, Q.C., and M. J. Mustill, Q.C., for the plaintiffs.*

*R. A. MacCrindle, Q.C., Nigel Bridge and A. B. Hidden for the Commissioners of Customs and Excise.*

*Cur. adv. vult.*

Apr. 30. The following judgments were read.

**LORD DENNING, M.R.:** The plaintiffs, Gallaher, Ltd., have for some years held large stocks of tobacco at Salisbury in Rhodesia. Before November, 1965, they used to send consignments of tobacco from warehouse in Salisbury by rail down to Beira in Portuguese East Africa. Thence it was carried by ship to London, or sometimes to Belfast. It was discharged into bonded warehouse at the port and remained in bond until the plaintiffs removed it. On removal they paid duty on it, but they did not pay at the full rate. They were entitled to receive, and did receive, Commonwealth preference. That means that they paid 1s. 6½d. a pound less duty than they would have paid if the tobacco had been from a country outside the Commonwealth. In November, 1965, the men in control of Southern Rhodesia made a unilateral declaration of independence. In consequence, the United Kingdom government thought it right to deprive Southern Rhodesia of Commonwealth preference. On Nov. 16, 1965, Parliament passed the Southern Rhodesia Act 1965. It enabled Her Majesty by Order in Council to modify, extend or suspend any enactment relating to or connected with Southern Rhodesia. On the same day, Her Majesty made an Order in Council (1). It came into operation at midnight of Nov. 18/19, 1965. It provided that:

“Southern Rhodesia shall, while this order is in force, be excluded from . . . the Commonwealth preference area . . .”

That meant that the plaintiffs thenceforward had no longer the advantage of Commonwealth preference on the tobacco which they imported into the United Kingdom from Rhodesia. As from midnight of Nov. 18/19, 1965, they had to pay the full duty on any tobacco they consigned to the United Kingdom from Southern Rhodesia.

At midnight on Nov. 18/19, 1965, the plaintiffs had 5½ million pounds of tobacco in transit. Some of it was on rail at Salisbury. Some of it was on the train on the way down from Salisbury to Beira. The rest of it was in warehouses at Beira awaiting shipment to the United Kingdom. The question in this case is what duty is payable on those 5½ million pounds of tobacco which was in transit at midnight on Nov. 18/19, 1965? Is it subject to full duty? Or are the plaintiffs entitled to Commonwealth preference on it? If they are not entitled to Commonwealth preference, it means that they will have to pay £450,000 more by way of customs duty than they bargained for. So the sum of £450,000 depends on the answer. In addition to the 5½ million pounds in transit, the plaintiffs had another 5½ million pounds of tobacco in Salisbury which had not been put on rail. That is clearly subject to the full duty with no Commonwealth preference. So the plaintiffs have been very badly hit by the steps taken against the men in Rhodesia; but the question is whether they can save the £450,000

(1) The Southern Rhodesia (Withdrawal of Commonwealth Preference) Order 1965. (S.I. 1965 No. 1954).

A on the tobacco in transit. In order to determine this question, it is necessary to distinguish between the time when a consignment *qualifies* for Commonwealth preference and the time when it is chargeable with duty.

1. *The qualifications for Commonwealth preference.* Section 2 (2) of the Import Duties Act, 1958, provides that:

B “The goods *qualifying* for Commonwealth preference shall be any goods of the area referred to in this Act as the Commonwealth preference area which are consigned to the United Kingdom from a place in that area.”

Section 12 (1) provides that:

“... goods shall be deemed to be goods of a country if they are grown, produced or manufactured in that country.”

C Those sections show clearly that, in order to *qualify* for Commonwealth preference, the goods have to satisfy two conditions. First, they must have been *grown*, produced or manufactured in a country in the Commonwealth preference area. Secondly, they must have been *consigned* to the United Kingdom from a place in that area. Both those conditions involve looking into the past history of the goods before they left the country of origin.

D In this case, the first condition was clearly satisfied. All the tobacco was undoubtedly grown in Southern Rhodesia whilst that country was still in the Commonwealth preference area. It was grown long before midnight on Nov. 18/19, 1965. The question is whether the second condition was satisfied. Was this tobacco “consigned to” the United Kingdom from Southern Rhodesia before midnight on Nov. 18/19, 1965? We had much discussion on the word  
E “consigned”. It is a commercial term, not a legal term; and it should be given its commercial meaning. The SHORT OXFORD DICTIONARY gives the commercial meaning of “consign” as

“to deliver or transmit (goods) for sale or custody, usually implying their transit by ship, railway, etc.”

F I would adopt a similar meaning in the Act of 1958. I think that goods are “consigned to the United Kingdom” from a place in the Commonwealth preference area when they are delivered to a carrier in that place for continuous transit to the United Kingdom. It is not necessary that there should be a through contract of carriage. Nor is it necessary that there should be successive contracts of carriage already arranged. There must, however, be an intention  
G that the transit should be continuous. The sender from the place in the Commonwealth preference area must intend that they should go direct to the United Kingdom and not be taken into the commerce of any other country; and arrangements must have been planned to that end. The transit will, of course, be continuous, notwithstanding that the goods are taken from rail to ocean-going ship, or transshipped from ocean-going ship to coaster, or held up pending arrival  
H of an onward carrier; but it is broken by being taken en route into the commerce of another country.

I Were these goods “consigned to” the United Kingdom before midnight on Nov. 18/19, 1965? The parties took five different cases of tobacco so as to test the position. It appears that, before midnight on Nov. 18/19, 1965, all five cases had been packed, marked and documented in Southern Rhodesia as destined for the United Kingdom. All were on rail to Beira, or at Beira awaiting shipment. They were in transit to the United Kingdom and nowhere else. It is true that there were no through contracts of carriage, and no succession of contracts concluded for the carriage. But all arrangements had been made; shipping space had been booked; and the intention of the senders was unmistakably to send through by continuous transit to the United Kingdom. And they were so sent. On those facts, I hold that all five cases had been consigned to the United Kingdom from Southern Rhodesia before midnight on Nov. 18/19, 1965. The second condition was, therefore, satisfied.

In my opinion, therefore, these consignments were goods which *qualified* for Commonwealth preference before Southern Rhodesia was expunged from the Commonwealth preference area. A

2. *The chargeability with duty.* In order to see when these goods became chargeable with duty, we have to look at s. 4 (1) and s. 26 (3) of the Finance Act 1964, which incorporates s. 88 (1) and s. 86 (4) of the Customs and Excise Act, 1952. Section 88 (1) provides that: B

“ . . . the duties of customs or excise and the rates thereof chargeable on warehoused goods shall be those in force . . . at the date of the removal of the goods from the warehouse.”

Section 86 (4) provides that: “ . . . no goods shall be removed from a warehouse until any duty chargeable thereon has been paid.” Those sections show that the duties do not become chargeable until the goods are removed from warehouse. That means that the goods must have reached England, must have been placed in the warehouse, and removed before the duties are chargeable. In this present case, the tobacco, I believe, is still in warehouse. The duties have not yet become chargeable. The question is whether, on their removal, they will be entitled to commonwealth preference? C

3. *Resolving the difficulty.* It is clear, therefore, that the consignment in this case qualified for Commonwealth preference before midnight on Nov. 18/19, 1965 (i.e., whilst Southern Rhodesia was still in the Commonwealth preference area); but the duties only became *chargeable* after Nov. 18/19, 1965 (i.e., after Southern Rhodesia had been expunged from the Commonwealth preference area). Such being the distinction drawn by the Act of 1958, I think that this case can and should be decided on a short point of construction. Once goods have *qualified* for Commonwealth preference, they are, so to speak, “franked”, that is, made free of the full customs duty. They are “franked” just as a letter is franked when it is stamped “official paid” and put into the postbox. Once franked, they should not be disqualified and unfranked, unless Parliament says so explicitly in clear words. I have never heard of a letter being unfranked after it has been put in the post. Any other view would lead to the most unjust situations. A merchant may have gone to all the expense of consigning goods to England on the footing that they were entitled to Commonwealth preference. He has been told by Parliament that they are goods which *qualify* for Commonwealth preference. It would be shocking that he should be deprived of this Commonwealth preference by matters arising afterwards. It would be a piece of retroactive legislation, which is never regarded with favour. D

I can find no words in the Act of 1958 which would justify us in giving retroactive effect to this statute. There was much discussion on the words “for the time being” in s. 2 (3) (c); but, after consideration, I do not think that those words help either way. They only refer to the time at which a country comes into, or goes out of, the Commonwealth preference area. They show that Southern Rhodesia went out of the Commonwealth preference area at midnight on Nov. 18/19, 1965. They leave untouched the fact that, at that time, these consignments were goods which *qualified* for Commonwealth preference. The qualification had attached before midnight. E

4. *The Order in Council.* The draftsman of the Order in Council seems to have interpreted the Act of 1958 differently. He seems to have thought that goods only qualified for preference at the time when they were removed from the bonded warehouse here; with the result that, once Southern Rhodesia was excluded from the Commonwealth preference area, then none of the goods in transit, and none of those which were here in bonded warehouse, would qualify for Commonwealth preference. Being of that frame of mind, the draftsman inserted special provisions so as to give Commonwealth preference to “goods entered for warehousing” before Nov. 19, 1965, and to goods “shipped on a ship F



A which sailed from Lourenço Marques or Beira" before that date (2). I think that that is a mistaken view. The mistaken view of the draftsman cannot influence our construction of the Act of 1958. If he had construed the Act of 1958 rightly, it would have been quite unnecessary for him to put in those special provisions; for the simple reason that all goods grown in Southern Rhodesia qualify for Commonwealth preference as soon as they are consigned from Southern Rhodesia to the United Kingdom.

B 5. *Conclusion.* In my opinion, those goods *qualified* for Commonwealth preference when they were consigned from Southern Rhodesia before midnight on Nov. 18/19, 1965; and there is nothing in the Act of 1958 to disqualify them. On removal from warehouse, the duties must be charged on the basis that the goods qualify for Commonwealth preference. I would allow the appeal accordingly.

C **SALMON, L.J.:** The duty chargeable on tobacco imported into the United Kingdom is regulated by the Finance Act 1964, s. 4 (1) (a), which provides:

"There shall be charged—(a) on tobacco imported into the United Kingdom duties of customs at the rates shown in Table I in Sch. 5 to this Act . . ."

D That table sets out the rates of duty per pound under three separate columns headed "Full", "Commonwealth" and "Convention". The Commonwealth rate is substantially less than the others. The "Commonwealth" rate applies to tobacco qualifying for Commonwealth preference (s. 4 (3) of the Act of 1964). Section 26 (2) and (3) of the Act of 1964 provide (a) that the test whether or not tobacco qualifies for Commonwealth preference shall be the test laid down in s. 2 (2) to (9) of the Import Duties Act, 1958, and (b) that Part 1 of the Act of 1964 (which includes s. 4 of that Act) shall be construed as one with the Customs and Excise Act, 1952. For the purpose of this appeal, the only relevant section of the Act of 1952 is s. 88 (1), which provides that the rate of duty chargeable on warehoused goods is that in force at the date when the goods are removed from the warehouse.

F The question raised by this appeal is whether the rate of duty chargeable on the plaintiffs' tobacco at the date when it was removed from the warehouse was the full rate or the Commonwealth rate. The true answer to this question depends on whether or not at that date the goods qualified for Commonwealth preference. Southern Rhodesia had by then long ceased to be within the Commonwealth preference area. Section 2 (2) of the Act of 1958 provides:

G "... goods qualifying for Commonwealth preference shall be any goods of the area referred to in this Act as the Commonwealth preference area which are consigned to the United Kingdom from a place in that area."

H "Goods of the area" are goods grown, produced or manufactured in the area (see s. 12 of the Act of 1958). Accordingly, the question whether duty is to be charged at the full rate or at the Commonwealth rate depends on whether the goods qualify for Commonwealth preference at the date when the duty is chargeable. Certainly you must look to the past in order to ascertain the country in which the goods were grown, produced or manufactured and from which they were consigned. Must that country be in the Commonwealth preference area at the time when the duty is chargeable, or is it enough that that country had been in that area at the time of the growth, production or manufacture and consignment of the goods although it is not in that area at the time when the duty is chargeable? This question is by no means easy of solution.

I Counsel for the plaintiffs has argued that the tobacco acquires its qualification when it is consigned from a place then in the Commonwealth area after having been grown, produced or manufactured in that area. It is, so to speak, then franked with its Commonwealth preference qualification. He contends that it is wholly irrelevant that the place in which it was grown, produced or manufactured

(2) Added by the Southern Rhodesia (Withdrawal of Commonwealth Preference) (No. 2) Order 1965 (S.I. 1965 No. 1987).

and from which it was consigned is no longer in the Commonwealth area at the date when the duty is chargeable. I am afraid that I cannot accept this "franking" argument, attractive as counsel for the plaintiffs made it sound. It leads to strange results. Imagine a town in which there is a municipal theatre. The prices of admission are regulated by bye-laws, which, of course, may be changed from time to time. One bye-law provides that all children under fifteen years of age who qualify for a reduction in the price of their admission to the theatre shall be admitted at half price. Another bye-law provides that all children born in the town or within a radius of five miles from it qualify for a reduction in the price of admission. I cannot think that every little boy and girl born within the specified area is franked from the date of his or her birth with the qualification to be admitted to the theatre at half price until he or she reaches the age of fifteen. If the bye-laws are changed so that the five-mile radius is reduced to three miles, no child seeking admission thereafter would qualify for admission at half price unless born within the three-mile radius. It would be quite irrelevant that, at the time of the child's birth four miles from the city, the old bye-law was in force.

Then there is counsel for the plaintiffs' very skilful argument founded on the words "for the time being". Section 2 (3) of the Act of 1958 provides that the Commonwealth preference area shall consist of

"... (b) the countries named as parts of that area in sub-s. (4) of this section; and (c) any country not named ... in the said sub-s. (4) which *for the time being* forms part of Her Majesty's dominions outside the United Kingdom ..."

Subsection (4) names many countries including Australia, Canada and the Federation of Rhodesia and Nyasaland, but not Southern Rhodesia, because, at the time when the Act of 1958 was passed, Southern Rhodesia formed part of that Federation. After the Federation was dissolved, Southern Rhodesia remained within the Commonwealth area only by reason of the provisions of sub-s. (3) (c). Counsel for the plaintiffs argues that the words "for the time being" in sub-s. (3) (c) refer to the time when the goods chargeable with duty were grown, produced or manufactured and consigned. I cannot accept that argument. First, the time of growth, production or manufacture and the time of consignment are different. A country might form part of Her Majesty's dominions at one of these times but not at the other. The use of the words "for the time being" to cover them both would be inept. Moreover, the construction for which counsel contends is, in my view, inconsistent with what follows sub-s. (3) (c). The proviso to sub-s. (4) provides that Her Majesty may by Order in Council direct that the name of any country shall be added to that subsection. Then sub-s. (5) provides that

"Her Majesty may by Order in Council direct that any country *for the time being* named in sub-s. (4) ... shall not form part of the Commonwealth preference area."

Manifestly the words "for the time being" in sub-s. (5) have nothing to do with the time when goods are grown, produced or manufactured and consigned. I think that these words are used in the same sense in sub-s. (3) as that in which they are used in sub-s. (5). In my view, the words "for the time being" mean at any relevant time during which the Act is in force. The relevant time for the purposes of sub-s. (5) is the time when Her Majesty makes a direction under that subsection. In my judgment, the relevant time for the purpose of sub-s. (3) (c) is the time when the duty is chargeable. The question then to be asked in order to decide whether the goods then qualify for Commonwealth preference is "were the goods grown, produced or manufactured in and consigned from a country or countries now in the Commonwealth preference area?"

No doubt this view has harsh consequences for persons engaged in trade between the United Kingdom and any country struck out of or deserting the Commonwealth preference area; it also has happy consequences for persons engaged in trade between the United Kingdom and any country immediately on that

- A country's admission to the Commonwealth preference area. I can find no reason, however, to suppose that these results would be in any way contrary to the intention of Parliament. Parliament no doubt contemplated that a country would not be banished from the Commonwealth preference area unless it was intended for good cause—as in the case of Southern Rhodesia—to damage that country's economy by damaging its trade with the United Kingdom. Parliament would also no doubt wish there to be a strong disincentive against any country deserting the Commonwealth preference area. It would also probably wish to confer the full benefits of Commonwealth preference immediately on any country's admission to that area. When a statutory power is exercised in relation to any place so as to exclude it from, or include it in, the Commonwealth preference area, special provisions may be made to mitigate some of the hardships incurred by the exclusion or to cut down some of the immediate benefits conferred by the inclusion. For example, Southern Rhodesia was excluded from the Commonwealth preference area as from midnight on Nov. 18, 1965, by the Southern Rhodesia (Withdrawal of Commonwealth Preference) Order 1965, (3), as amended (4). If the construction of the Acts of 1958 and 1964 which I favour is correct, and if it was so understood by those responsible for the Orders in Council to which I have referred, then they mitigated some of the hardship caused through Southern Rhodesia's exclusion by providing that it should not affect the rate of customs duty chargeable on any goods entered for warehousing or which had been shipped in a ship which sailed from Lourenço Marques or Beira or any port in the Commonwealth preference area before Nov. 19, 1965. Whichever construction of s. 2 of the Act of 1958, as incorporated in the Act of 1964, is correct, real hardship for persons engaged in trade between the United Kingdom and a country struck out of the Commonwealth preference area is unavoidable. The plaintiffs suffer just as much hardship in respect of their tobacco in store in Rhodesia as they do in respect of their tobacco in transit from that country on Nov. 18, 1965. It is also hard on them, that, no doubt relying on Southern Rhodesia being in the Commonwealth preference area, they invested large sums of money in tobacco plantations and in factories there. It seems to me that people engaged in trade between the United Kingdom and a country in the Commonwealth preference area take the risk, small though it is, that the preference may be withdrawn at any time, just as any importer into the United Kingdom takes the risk that import duty may be increased between the time when he ships the goods and the time when the duty becomes chargeable.
- G According to counsel for the plaintiffs' submission, those responsible for the relevant Orders in Council mistakenly adopted the same construction of the Acts of 1958 and 1964 as the learned judge and I have done. Counsel says that, in such circumstances, it must follow that the provisions in those Orders in Council purporting to mitigate their hardship are merely otiose since goods grown, produced or manufactured in Rhodesia and consigned from one of the appropriate places before Nov. 19, 1965, would be automatically franked with a qualification for Commonwealth preference as from the date of their consignment and would necessarily qualify for such preference when they come to be charged with duty. If my construction of the Acts of 1958 and 1964 is wrong and was adopted by those responsible for the Orders in Council, then I agree that the exempting articles in the Orders in Council are otiose. I would pause here to say that the Orders in Council were, of course, laid before Parliament, if only for a very short time, before coming into operation. Assuming that they are based on the same construction of the 1958 and the 1964 Acts as that which I adopt, then if there is any ambiguity about these statutes, the fact that the Orders in Council were laid before Parliament before coming into operation may, perhaps, lend some slight further support to the conclusion which I have reached.

(3) S.I. 1965 No. 1954.

(4) By the Southern Rhodesia (Withdrawal of Commonwealth Preference) (No. 2) Order 1965 (S.I. 1965 No. 1987).



Even if the learned judge and I are wrong on this difficult point of construction, it does not necessarily follow that those responsible for the Orders in Council have fallen into the same error as we have done. They may, although, I confess, I doubt it, have read the Acts in the same way as counsel for the plaintiffs invited us to read them. Counsel for the commissioners contends that, if that be the case, their intention must have been to withdraw Commonwealth preference from Southern Rhodesian goods even after they were franked in the sense for which counsel for the plaintiffs contends. Accordingly, says counsel for the commissioners, they are saved by the first Order in Council (5). Article 1 of that order reads as follows:

"Southern Rhodesia shall, while this order is in force, be excluded from the . . . Commonwealth preference area, and accordingly while this order is in force—(a) the countries described in s. 2 (2) (c) of [the Act of 1958] . . . shall be taken not to include Southern Rhodesia . . ."

This may mean that, whenever you look at the Act of 1958 for any purpose after Nov. 18, 1965, you read it as if it has no application and never had any application to Southern Rhodesia. Accordingly, since you must look at it at the time when duty is chargeable, i.e., in this case long after Nov. 18, 1965, in order to ascertain whether the tobacco bears the full or the Commonwealth rate of duty, you must take it that Southern Rhodesia is not and never was referred to in the Act of 1958. Therefore, the tobacco bears the full rate of duty. Counsel for the commissioners, I think, concedes that art. 1 is not very elegantly drafted if that is its meaning, but contends, nevertheless, that that is a possible meaning for it to bear. Its meaning, he says, is at any rate ambiguous. Accordingly, in order to discover its true meaning, you must look at the article in the context of the other provisions of the first Order in Council (5) and of the amending Order in Council (6). These provisions would be quite unnecessary unless art. 1 bears the meaning for which the commissioners contend. Accordingly, it does bear that meaning. This argument may be sound if one assumes that those responsible for the first Order in Council understood the Acts of 1958 and 1964 in the sense for which counsel for the plaintiffs contends. I find this a difficult assumption, because, in my judgment, those Acts do not bear that meaning. I therefore, base my decision in favour of the commissioners on what I regard as the true meaning of the Acts of 1958 and 1964 rather than on what seems to me to be a somewhat strained meaning of art. 1 of the first Order in Council.

Since I am in favour of the commissioners on the first point that arises in this appeal, namely, the true construction of the Acts of 1958 and 1964, it is unnecessary for me to express any concluded view on the second point, namely, whether or not the tobacco was consigned to the United Kingdom from Southern Rhodesia. Since this case may, however, go further, I would add that I am broadly in agreement with the learned judge and with the views expressed by LORD DENNING, M.R., on the second point. Had I agreed with LORD DENNING, M.R., on the first point, which unhappily I am unable to do, I would have been in favour of allowing the appeal. As it is, I would dismiss it.

**EDMUND DAVIES, L.J.:** The essence of the submission of counsel for the Commissioners, which prevailed before the learned trial judge, is that, in order to qualify for Commonwealth preference under s. 2 of the Import Duties Act, 1958, the only relevant date is that on which the five cases of tobacco were removed from bond. He submits that the sole question is whether at *that* date they qualified for Commonwealth preference, and, so far, counsel for the plaintiffs does not contend otherwise. The difference between the contending views arises when one asks the further question: what tests are to be applied in determining whether at that date the goods so qualify? Counsel for the commissioners has urged that a clear working rule is called for, and that one is in fact supplied by the

**A** Act of 1958. According to him, all the customs officer (having ready to hand a list of the countries which are currently within the Commonwealth preference area) has to do on the day when the goods are sought to be removed, is to ask himself two questions: (i) Adverting to s. 12 (1), "Where were these goods grown, produced or manufactured?" If the answer to that question is that they were grown, produced or manufactured in one of the countries appearing on his list, **B** he should then proceed to ask himself: (ii) Adverting to s. 2 (2), "From what place were these goods consigned to the United Kingdom?" If the answer to that question is that they were consigned from one of the countries on his current list, the importer has cleared all hurdles and is entitled to preference. As, however the list of countries within the Commonwealth preference area may from time to time be added to (see the proviso to s. 2 (4)), or curtailed (see s. 2 (5)), it follows that, **C** although the countries where the goods were grown or whence they were consigned were Commonwealth preference countries when *those* events occurred, they may have ceased so to be by the time the customs officer looks at his list. If so, says counsel for the commissioners, the goods must bear the full import duty.

It may be that, whatever tests one applies, curious results will follow in the odd case; but the tests urged on the court by counsel for the commissioners do not **D** appear to me to be those best calculated to promote the obvious intention of Parliament in promoting its Commonwealth preference legislation. On the contrary, they could well result in preference being gained in respect of goods grown in a country which at the time of being grown was outside the preference area, and gained simply because at the time the importer seeks to withdraw them from bond that country has meanwhile come within the preference area. Conversely, **E** as in the present case, goods grown and consigned with a view to Commonwealth preference are to be deprived thereof if, by the time the importer seeks to remove them from bond the country or countries of growth and consignment have become outside the area. I should not be prepared to adopt an interpretation of the statute which led to such odd consequences unless its wording admitted of no other course. Although the matter is by no means free from difficulty, counsel **F** for the plaintiffs has satisfied me that such other course is open to the court. The key to the problem is to be found in s. 2 (3) (c) of the Act of 1958, with its provision that the Commonwealth preference area shall consist of

"any country not named (nor included in a country named) in the said sub-s. (4) which *for the time being* forms part of Her Majesty's dominions outside the United Kingdom."

**G** What is contemplated by the phrase "for the time being"? Neither s. 1 (1) (the charging section) nor s. 2 (1) (the exempting or relieving section) makes any reference to time. The inquiry being whether the goods qualify for Commonwealth preference, *ex hypothesi* they must already be in the United Kingdom and the question arises only when the importer seeks to withdraw them from bond. To ascertain whether he is then entitled to the preferential rate, he has to show **H** that they come within s. 2 (2) as being:

"... any goods of the area referred to in this Act as the Commonwealth preference area which are consigned to the United Kingdom from a place in that area."

**I** He must, in other words, show that they are "goods of the area" and this, in the light of s. 12 (1), means that he must show that they were goods "grown, produced or manufactured" in a country within the Commonwealth preference area. Furthermore, he must show that they were consigned here from a place in that area. We being concerned with goods both grown in and consigned from Southern Rhodesia, a country which undoubtedly was within s. 2 (3) (c) before the Southern Rhodesia Act 1965, we may (as counsel for the plaintiffs rightly submitted) expand the reference in s. 2 (2) to "goods of the area" as comprising, for present purposes, goods grown, produced or manufactured in a country which *for the time being* formed part of the preference area, and its reference to goods

“ consigned to the United Kingdom from a place in that area ” as having, *mutatis mutandis*, a similar connotation. A

Section 2 (2) being so read, “ the time being ” adverted to must surely, in the one case, refer to the time when the goods in question were grown, produced or manufactured, and, in the other, to the time when they were consigned to the United Kingdom. Such a reference seems not only right as a piece of interpretation, but it also serves to advance the object aimed at by the legislature. It focuses attention on the time at which actions material to Commonwealth preference were performed, i.e., were the goods grown in the Commonwealth preference area and were they consigned to the United Kingdom from a place in that area? If so, Commonwealth trade is promoted and the benefit of Commonwealth preference earned. Accordingly, when the customs officer has to ascertain the duty payable, on request made by the importer for his goods, he must not refer simply to a list which shows what countries at *that* date fall within the Commonwealth preference area. He must have regard to the anterior history of the dutiable goods and ascertain what was the status or the place or places of growth and consignment when the process of growth or the act of consignment occurred. At one time I was impressed by counsel for the commissioners’ observation that to do this would impose a task of great complexity on the customs officers, but, on further reflection, I do not think that the test which he advocated would be one whit less onerous than many of those with which they are already charged. B C D

Did the two Orders in Council (7) affect the legal position? Counsel for the commissioners submitted that they compel the rejection of preference in the present case, and that importers removing them from bond on or after Nov. 19, 1965, would be entitled to no preference unless they could show (pursuant to art. 2 of the first order) that the goods had been “ entered for warehousing ” before that date or (pursuant to the second order) that they had been shipped before that date from one of the specified ports. This appears to confer on the orders a retrospective operation which, *prima facie*, they do not possess. If goods en route for the United Kingdom were already assured of their Commonwealth preference on their arrival here, are they deprived of that preference unless before Nov. 19, 1965, they were shipped or entered for warehousing? In my judgment, they are not. I adopt counsel for the plaintiffs’ view that, in applying the first order to s. 2 (3) (c) of the Act of 1958, one should read the latter as supplemented by some such words as “ excluding Southern Rhodesia as from Nov. 19, 1965 ”. Read in this way, it would follow that the present consignments are entitled to preference. It is, however, clear, that, on this reading, art. 2 of the first order and the entire second order become otiose since, if that reading be right, the dates when the goods were shipped or entered for warehousing are irrelevant. It is not unknown, however, for draftsmen to embark on their task with a mistaken view as to the effect of the existing law. I think that that is what has happened here, it being considered that the question of entitlement to preference fell to be determined solely by preference to the status of the country of growth or of consignment at the date when the goods were being withdrawn from bond. For the reasons which I have already indicated, in my judgment, that is not the law. In the result, the Orders in Council did not operate to deprive these particular consignments of any preferential right they would otherwise possess. E F G H

That, however, is not the end of the matter. Counsel for the commissioners contends that, even if he be wrong in his main submission, nevertheless this tobacco must bear the full rate of import duty. His argument proceeds in this way. Even on the test of counsel for the plaintiffs, the goods must have been consigned to the United Kingdom from a place which *at the date when they were so consigned* was within the Commonwealth preference area. Goods are “ consigned to the United Kingdom ” when there have been completed by or on behalf of the consignor all arrangements necessary to procure a continuum of carriage (or, to I



- A use another phrase of counsel for the plaintiffs, a continuous transit) from the place of consignment to the destination called for or nominated by him without further directions by him or on his behalf *and* the goods have actually been launched on that continuous transit. Counsel for the commissioners submits that, unless all this had been done by midnight on Nov. 18, 1965, none of these goods grown in and sent from Southern Rhodesia qualified for preference. He
- B does not insist that the arrangements for continuous transit to the United Kingdom must have been completed before the goods started off on their journey from a place within the Commonwealth preference area or even whilst they were still within such an area, but he does insist that such completion shall have been effected before the time-limit expired. If this be the right test to apply, it follows that none of these goods are entitled to preference, for, by midnight on Nov. 18,
- C 1965, although some of them were already at Beira and shipping space had been booked some days previously, final shipping arrangements to the United Kingdom were effected later than Nov. 19, 1965, and this was then done not by the plaintiffs but by the forwarding agents.

In my view, counsel for the commissioners seeks to attach too narrow a meaning to the term "consigned". I prefer the test propounded by the learned

- D judge in the following words:

"First, I think there must be an *intention* on the part of the consignor to send the goods from the one place to the other. It is not, of course, enough that there should be an intention which he keeps to himself, an intention which is wholly unmanifested by any overt act . . . It is not enough that the consignor at that stage should have sent the goods off to an intermediate

E port with perhaps a half-formed intention that the goods might, if market conditions were suitable, end in the United Kingdom. Nothing of that kind will, I think, suffice. There has always to be a state of facts . . . relating to the goods which, coupled with the intention of the consignor, shows that those goods are in the course of being transmitted from a place in the Commonwealth preference area to the United Kingdom for importation into the United

F Kingdom and not elsewhere."

In the light of that test, let us consider the facts of the present case: Before Nov. 19, 1965, all five cases of tobacco had been packed, marked and documented for the United Kingdom; all five were on rail to Beira en route to the United Kingdom or were at Beira awaiting shipment to the United Kingdom; all the circumstances indicate that they were in transit to the United Kingdom and to

G nowhere else; four out of the five cases had left Salisbury, three of them had left Southern Rhodesia; in all except one case, instructions had been given to the forwarding agents in Beira; and shipping space for the United Kingdom had been booked in relation to the consignment of which all five cases formed part. Had they been "consigned to the United Kingdom" by Nov. 19, 1965? No, says

H counsel for the commissioners, for by that date there had been completed by or on behalf of the consignor no through contract of carriage from Southern Rhodesia to the United Kingdom. But a through bill of lading is not very common, and to insist on such having been arranged is, in my judgment, to attach to the word "consigned" an unduly narrow and legalistic connotation. Applying the test enunciated by the learned judge, I agree with him in holding that, before Nov. 19,

I 1965, all five cases of tobacco in the present case had been "consigned to the United Kingdom" from Salisbury. On the dates when they were so consigned that was "a place within" the Commonwealth preference area, and they were, therefore, entitled to preference.

For these reasons, I would allow the appeal in respect of all five cases and make the declarations sought. *Appeal allowed. Leave to appeal to the House of Lords.*

Solicitors: *Herbert Smith & Co.* (for the plaintiffs); *Solicitor, Customs & Excise.*

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

# J. & J. COLMAN, LTD. v. COMMISSIONERS OF CUSTOMS AND EXCISE.

[COURT OF APPEAL, CIVIL DIVISION (Lord Denning, M.R., Salmon and Edmund Davies, L.J.J.), March 4, 5, 6, 7, April 30, 1968.]

*Customs—Commonwealth preference—Consignment of goods to the United Kingdom—No through bill of lading—Mustard seed grown in Canada and shipped to United Kingdom via Holland—Whether consigned from Commonwealth preference area to United Kingdom—Import Duties Act, 1958 (6 & 7 Eliz. 2 c. 6), s. 2 (2).*

*Customs—Imported goods—Interest—Deposit by way of security for unpaid duty made by importers in 1964—Notice specifying correct amount of duty payable given by commissioners in 1966—Repayment of security to importers ordered by court—Whether interest on security runs from date of deposit or date of notice—Customs and Excise Act, 1952 (15 & 16 Geo. 6 and 1 Eliz. 2 c. 44), s. 255 (3), s. 260 (2).*

Up till the end of 1962, the plaintiffs purchased mustard seed grown in Canada which was shipped direct from Canada to London and thence by coaster to Norwich, thus qualifying for Commonwealth preference. In 1963, being unable to arrange for direct shipment to England, the plaintiffs entered into a contract with Canadian growers for four parcels of mustard seed c.i.f. Antwerp/Rotterdam. Before the mustard seed was shipped, the plaintiffs arranged for the seed to be transhipped into coasters at Rotterdam or Antwerp for transportation to Norwich, and they also arranged for insurance to cover the risk from free alongside Vancouver to London and thence by rail or coasters to Norwich, including, if necessary, transshipment at a continental port. Each of the parcels arrived at Norwich via Rotterdam or Antwerp. The plaintiffs claimed Commonwealth preference on the mustard seed, but the customs claimed that the full rate of duty would be payable since the parcels had not been consigned from a Commonwealth preference area (Canada) to the United Kingdom within the meaning of s. 2 (2)\* of the Import Duties Act, 1958. Early in 1964, the plaintiffs deposited £10,000 with the customs under s. 255 of the Customs and Excise Act, 1952, as security for having the parcels of mustard seed released to them. On Mar. 15, 1966, the customs gave notice to the plaintiffs under s. 255 (3)† of the Act of 1952 specifying £9,006 14s. 6d. as the correct amount of duty, and returned the balance of £993 5s. 6d. to the plaintiffs, who claimed interest on the £9,006 14s. 6d. from the date of the deposit in 1964. By the proviso to s. 255 (3), no interest was to be paid under s. 260 (2)‡ in respect of any period before any further sum was paid as duty over and above the amount deposited as security; and by s. 260 (2), interest was payable on any amount of duty found by the court to be overpaid from the date of the overpayment.

**Held:** (i) the parcels of mustard seed qualified for Commonwealth preference because, on the facts, they had been consigned to the United Kingdom from Canada within the meaning of s. 2 (2) of the Act of 1958, since they had come to the United Kingdom by one continuous journey and had not entered the commerce of any other country (see p. 834, letter I, p. 837, letter I, to p. 838, letter A, and p. 840, letters G and I, post).

(ii) interest was payable on the £9,006 14s. 6d. from Mar. 15, 1966, when the customs gave notice to the plaintiffs specifying that sum as the correct amount of duty, because the effect of the proviso to s. 255 (3) of the Act of

\* Section 2 (2), so far as material, is set out at p. 837, letter B, post.

† Section 255 (3), so far as material, is set out at p. 838, letter H, post.

‡ Section 260 (2), so far as material, is set out at p. 836, letter D, post.

A 1952 on s. 260 (2) of that Act meant that interest was only payable on overpaid duty and no duty had been overpaid until Mar. 15, 1966, there being a distinction between a sum being in payment of duty (which did not happen until the notice was given) and being deposited as security for future payment of duty (see p. 836, letter D, p. 838, letter G, p. 839, letter G, p. 840, letter I, to p. 841, letter A, post).

B Appeal dismissed as to (i), allowed as to (ii).

[Editorial Note. It was conceded before ROSKILL, J., by counsel for the commissioners that such interest as ran on the money repayable would run until the date of repayment; it should be noted that interest was awarded by ROSKILL, J., at six per cent. per annum, not four per cent. per annum.

C As to goods qualifying for Commonwealth preference, see 33 HALSBURY'S LAWS (3rd Edn.) 67, 68, para. 132.

As to payment of interest on overpaid customs duty, see *ibid.*, pp. 150, 151, para. 255.

For the Customs and Excise Act, 1952, s. 255, s. 260, see 32 HALSBURY'S STATUTES (2nd Edn.) 853, 857.

D For the Import Duties Act, 1958, s. 2, see 38 HALSBURY'S STATUTES (2nd Edn.) 970.]

Case referred to:

*Gallaher, Ltd. v. Comrs. of Customs and Excise*, ante p. 820.

### Appeal.

E This was an appeal by the defendants, the Commissioners of Customs and Excise, in proceedings begun by J. & J. Colman, Ltd., by originating summons issued on May 25, 1966, claiming a declaration, and an order for repayment of £9,006 14s. 6d., part of a sum of £10,000 deposited as security for import duty. By his judgment given on July 21, 1967, ROSKILL, J., declared (as asked by the originating summons) that (i) no import duty was payable on any of the goods specified in the defendants' determination dated Mar. 15, 1966, under s. 255 of

F the Customs and Excise Act, 1952, in respect of four consignments of brown mustard seed from Vancouver, British Columbia, on the ground that the goods qualified for Commonwealth preference under the provisions of s. 2 of the Import Duties Act, 1958; (ii) the plaintiffs were entitled to repayment of the £9,006 14s. 6d. together with interest at six per cent. per annum on sums deposited as security under s. 255 of the Act of 1952 from the date of the deposit until repayment. The facts are set out in the judgment of LORD DENNING, M.R.

G *R. A. MacCrindle, Q.C., Nigel Bridge and A. B. Hidden* for the defendants, the Commissioners of Customs and Excise.

*R. J. Parker, Q.C., and Adrian Hamilton* for the plaintiffs.

*Cur. adv. vult.*

H Apr. 30. The following judgments were read.

LORD DENNING, M.R.: The plaintiffs, J. & J. Colman, Ltd., are the well-known makers of mustard. They get their mustard seed from Canada. This has the great advantage that, coming from Canada, it qualifies for Commonwealth preference; so that the plaintiffs pay less customs duty on it. Up till the end of 1962 all went well. The mustard seed was grown in Canada. It was sold by the Canadian growers to the plaintiffs and shipped direct by ocean-going vessel from Vancouver in British Columbia to London, whence it was shipped by coaster to Norwich. Clearly it qualified for Commonwealth preference. But early in 1963 most of the ships were busily engaged in carrying grain from Canada and had no room for mustard seed; with the result that the plaintiffs could not arrange for direct shipment of their mustard seed from Vancouver to England. So they arranged for it to come via Rotterdam or Antwerp. It was taken by ocean-going vessel from Vancouver to Rotterdam

I



or Antwerp. Then it was transhipped into a coaster for transport to England. The question is whether, on the parcels so transhipped, the plaintiffs are still entitled to Commonwealth preference. The relevant section is s. 2 (2) of the Import Duties Act, 1958, which, in conjunction with s. 12 (1), provides that the goods qualifying for Commonwealth preference shall be any goods grown, produced or manufactured in the Commonwealth preference area which are consigned to the United Kingdom from a place in that area. The mustard seed was undoubtedly grown in the Commonwealth preference area, so there is no difficulty on that score. The only question is whether it was "consigned to the United Kingdom" from Canada. On this point I will take a typical parcel. A

On Mar. 11, 1963, the Canadian growers agreed to sell to the plaintiffs 2,500 long tons of brown mustard seed. Shipment after harvest. Price 122.00 dollars per long ton, *c.i.f. Antwerp/Rotterdam*. Payment net cash against documents, including on-board bill of lading. At the time of that contract, it was the intention of the plaintiffs (of which the Canadian growers were aware) that the mustard seed should be transported from Canada to Norwich for use by the plaintiffs in their factory at Norwich. On Sept. 19, 1963, before the goods were shipped, the plaintiffs got a quotation from the owners of coastal vessels for the carriage of mustard seed from Rotterdam to England. On Oct. 31, 1963, the Canadian growers shipped five hundred tons of mustard seed on board an ocean-going vessel at Vancouver under a bill of lading under which they were *consigned to Rotterdam to the order of the Canadian growers*. The bill of lading contained a note "Freight assessed to Rotterdam only. Goods destined Norwich, England via Rotterdam, Holland". After the goods were loaded, but before the vessel sailed, the plaintiffs insured the goods B

"From free alongside Vancouver to London and thence by rail or coasters to Carrow Works, Norwich. Including, if required, transshipment at continental port." C

After the vessel left Vancouver, but before it arrived at Rotterdam, the plaintiffs made contract with the owners of the coasters for the onward carriage to Norwich. On Jan. 15, 1964, the vessel arrived at Rotterdam. The goods were transhipped into coasters and arrived at Norwich on Jan. 17, 1964. There were three other lots of five hundred tons each, similarly dealt with. On arrival, the plaintiffs claimed Commonwealth preference on the mustard seed; but the customs authorities did not accept it. They would not release the goods until the plaintiffs gave security. They asked £2,500 on each parcel by way of security, that is, £10,000 on the four parcels. The plaintiffs paid that sum early in 1964, and got delivery of the mustard seed. Two years later, on Mar. 15, 1966, the customs authorities gave notice to the plaintiffs specifying the sum of £9,006 14s. 6d. as the correct amount of duty. They retained that sum out of the deposit of £10,000 and returned the balance of £993 5s. 6d. to the plaintiffs on Mar. 15, 1966. D

1. *Were the parcels entitled to Commonwealth preference?* The mustard seed was from Canada. It qualifies for Commonwealth preference if it was "consigned to the United Kingdom from Canada". What is the meaning of the words "consigned to"? That is the question. I endeavoured to answer it in *Gallagher, Ltd. v. Comrs. of Customs and Excise* (1). Applying what I there said, I think that goods are "consigned to the United Kingdom from Canada" when they are delivered to a carrier in Canada for continuous transit to the United Kingdom. The sender must intend that they should go direct to the United Kingdom and not be taken into the commerce of any other country; and that intention must be realised. In my opinion, these parcels of mustard E

A seed fulfil that test. The Canadian growers delivered them to the ship at Vancouver, intending that they should go by continuous transit to England. It is true that, at that time, the contract of carriage was only concluded so far as Rotterdam. There was no through contract to England and the onwards contracts from Rotterdam had not at that time been concluded; but that does not matter. The intention was plain. The goods were to be transshipped at Rotterdam into a coaster for transit to England. They were so transshipped; and they reached England in one continuous transit without being taken into the commerce of any other country. They qualify, therefore, for Commonwealth preference.

At one time the customs authorities would have accepted this view. We were shown notices which they issue telling importers what evidence is required to show that the goods were "consigned to" the United Kingdom from a Commonwealth port. According to the notices from 1959 to 1962, all these parcels would have qualified for Commonwealth preference; but in May, 1963, the customs authorities issued a new notice imposing more stringent requirements. The plaintiffs were unaware of these new requirements when these particular parcels were shipped; and so did not comply with them. When they did become aware of them, they tried hastily to amend the bills of lading of two of the parcels so as to comply with the new requirements; but that was too late. The matter has to be tested as at the time the goods were shipped from Canada. So none of the parcels satisfied the new requirements. Nevertheless, although the new notice was not satisfied, I think that the parcels qualify for Commonwealth preference. The customs authorities cannot, by these notices, make the law or alter it. Their notices afford valuable guidance to commercial men, because they show what evidence will satisfy the customs authorities. Parcels which conform to them will pass without question. But the notices are not conclusive. It is open to the owner to dispute the matter before a referee or the court under s. 260 of the Customs and Excise Act, 1952. And that is what the plaintiffs have done here.

I am satisfied that these parcels were consigned to the United Kingdom from Canada and qualify for Commonwealth preference. I would, therefore, dismiss the appeal on this point.

2. *Are the plaintiffs entitled to interest on their money?* Early in 1964, the plaintiffs deposited £10,000 with the customs as security. Two years later the customs said that the correct amount due was £9,006 14s. 6d. and returned £993 5s. 6d. They must now return the £9,006 14s. 6d. The plaintiffs say that the customs have had the use of the money all this time and should pay interest on it from the beginning of 1964. The commissioners say that interest is not payable. The right to interest depends on the wording of the statute. The relevant sections are s. 255 and s. 260 of the Customs and Excise Act, 1952. They are most confusing. So much so that I will not attempt to analyse them, but will simply state the effect of them:

*First:* If the customs officer demands a definite sum, say £10,000, as duty, and the importer disputes it—he must pay the sum demanded in order to get the goods. If he appeals to the court and gets the sum reduced or extinguished, he gets back the amount overpaid with interest thereon from the date of the overpayment (see s. 260 (2) of the Act of 1952).

*Secondly:* If the customs officer cannot say what is the correct sum, he can ask the importer to put down a sum of money as security in order to get the goods. Let us say it is £10,000. The commissioners then look into the matter and decided that, in their opinion, the correct sum is £11,000. They give notice a to the importer specifying £11,000 as the correct sum. They require him to pay the extra £1,000. If he disputes their ruling, he can appeal to the court, but he first must pay the extra £1,000. If he succeeds in getting the £11,000 reduced or extinguished, he gets back the amount which he has overpaid with interest.

But from what date does the interest run? The last words of s. 255 (3) provide that "no interest shall be paid . . . in respect of any period before" the extra £1,000 was paid. That makes it clear that interest does not run from the time when the £10,000 was deposited, but only from the time that the extra £1,000 was paid. A

*Thirdly:* Take the second case but with this difference. Suppose the commissioners decide not that £11,000 is the correct sum but that £9,000 is correct. B They give a notice to the importer specifying £9,000 as the correct sum. As he has already paid £10,000 as security, they must repay him the £1,000 that he has overpaid. If he accepts their ruling as correct, he cannot recover interest on that £10,000, because there is no provision in the statute for it. If he disputes their ruling, he can appeal to the court. If he succeeds in getting the £9,000 reduced or extinguished, he gets back so much of the £9,000 as he has overpaid, C with interest; but from what date does the interest run? From the date when he lodged the money as security, or from the date when the commissioners gave their notice specifying £9,000 as the correct sum? The Act of 1952 is not clear on this point. Section 255 (3) provides that s. 260 "shall have effect accordingly". Section 260 (2) provides that the "amount overpaid shall be repaid by the commissioners, together with interest thereon from the date of the overpayment . . ." D What is the date of the overpayment? I think that it is the date when the commissioners specified £9,000 as the correct sum. Before that date there was no overpayment, but only a sum deposited as security. After that date, there was an overpayment, because the deposited sum was then appropriated as payment. I am confirmed in this view by the consideration that, in the *second* and *third* cases taken above, interest must run from the same date. E It must either be from the date when the £10,000 is deposited or from the date when the commissioners specify what, in their opinion, is the correct sum (£11,000 or £9,000, as the case may be). If in the one case interest is not payable from the date of deposit (but only from the date of overpayment), so also in the other case.

Applying these considerations, I think that interest is payable on the £9,000 14s. 6d. from the date when the customs gave a notice specifying that sum as the correct sum, i.e., from Mar. 15, 1966. I am afraid that the judge was in error in giving interest from the date of the deposit in 1964. I would allow the appeal on this point. F

**SALMON, L.J.:** All the mustard seed in the four parcels with which this appeal is concerned was grown in and consigned from Canada. Canada is and always has been in the Commonwealth preference area. Each parcel (as everyone well know) was destined for the United Kingdom when it left Vancouver. It had been bought from the Canadian suppliers for use in the plaintiffs' factory in Norwich. The contract with the suppliers was c.i.f. Antwerp/Rotterdam. Before the four parcels left Canada, the plaintiffs arranged for them to be transhipped into coasters at Rotterdam or Antwerp for onward transportation to Norwich. Before, however, the first parcel left Canada, the plaintiffs, in spite of the fact that this was a c.i.f. contract, had arranged for insurance to cover the risk. G

"From free alongside Vancouver to London and thence by rail or coasters to . . . Norwich. Including, if required, transshipment at continental port." H I

Each parcel arrived at Norwich via Rotterdam or Antwerp. It was because of shortage of shipping space in vessels sailing direct from Vancouver to the United Kingdom that these parcels were shipped to Rotterdam or Antwerp and then transferred into coasters for Norwich.

Formerly, mustard seed bought by the plaintiffs in Canada (which was an important source of supply) had been shipped from Vancouver direct to London



A and thence to Norwich. The seed bought by the plaintiffs in Canada had always in the past been accepted by the customs as qualifying for Commonwealth preference. It obviously did so. The customs, however, sought to charge the four parcels with which we are now concerned with the full rate of duty, contending that they had not been consigned from Canada to the United Kingdom. On the brief facts which I have recited, this seems a curious contention and the  
 B learned judge rejected it. I agree with him. Section 2 (2) of the Import Duties Act, 1958, provides that

“... goods qualifying for Commonwealth preference shall be any goods of the . . . Commonwealth preference area which are consigned to the United Kingdom from a place in that area.”

C The mustard seed was clearly of the Commonwealth area inasmuch as it was grown in Canada (s. 12 (1) of the Act of 1958). Was it, however, consigned for the purposes of the Act from that area to the United Kingdom? I have no hesitation in answering this question in the affirmative. I do not propose to attempt any elaborate definition of the word “consign”. It has been argued on behalf of the commissioners that goods cannot be truly said, for the purpose of the  
 D Act of 1958, to be consigned from a Commonwealth preference area unless before they leave that area either there exists a single contract of transportation to the United Kingdom or a series of such contracts. This argument seems to me to read a great deal too much into the single word “consign”—certainly much more than its dictionary meaning which primarily is “to transmit”. Moreover, the elaborate meaning which the customs seek to attach to the word “consign”  
 E seems to me contrary to the manifest intention of the Act of 1958. The Act of 1958 was intended to promote trade between the United Kingdom and the Commonwealth area. For this purpose in the present case, the identity of the the persons who made the transportation arrangements and the precise date or dates on which these arrangements were made are quite irrelevant. It does not matter, for example, whether the Canadian sellers arranged transport as far as  
 F Rotterdam or Antwerp and the English buyers arranged onward transport to the United Kingdom, nor whether the arrangements for onward transport were made before or after the goods left Canada. There can be no doubt on the facts of this case that the transactions with which it is concerned clearly constituted trade between the United Kingdom and Canada. It has been argued that it would have been possible for the buyers, once the goods arrived in Antwerp or  
 G Rotterdam, to have arranged for them to be sent somewhere other than to the United Kingdom. No doubt this is theoretically possible; but the same would be true if the whole of the transportation had been arranged before the goods left Canada.

In my view, the question whether or not goods are “consigned” from the Commonwealth preference area to the United Kingdom within the meaning of that word in s. 2 (2) of the Act of 1958 is essentially a question of fact. Suppose a  
 H Canadian grower sold to a continental buyer and consigned the goods to him say in Holland, and then the continental buyer resold the goods to an English manufacturer and consigned the goods to him in the United Kingdom. It would clearly be impossible in such circumstances to hold that the goods were consigned from Canada to the United Kingdom for the purpose of s. 2 (2), or  
 I indeed for any other purpose. The transaction certainly would not constitute trade between Canada and the United Kingdom. In the present case, however, no sensible commercial man could entertain any doubt but that these goods were consigned or transmitted from Vancouver to Norwich via Antwerp or Rotterdam, and I can see no good reason why a lawyer should decide the point differently. I can imagine cases in which the point might not be so easy to decide. In such cases, as indeed in the present case, the tests suggested by counsel for the plaintiffs offer a useful guide. Were the goods landed or intended to be landed otherwise than in England? Did the goods enter, or was it ever contemplated that they

should enter, the commerce of any country other than England? However one looks at the facts of this case and whatever test one applies, I have no doubt but that the learned judge was quite right in deciding that these four parcels of mustard seed qualified for Commonwealth preference, and I accordingly agree with LORD DENNING, M.R., that the appeal should be dismissed on this point. A

I must now deal with a much more difficult point. Early in 1964, the plaintiffs deposited £10,000 in all with the customs as security for having their parcels of mustard seed released to them. Two years later, in March, 1966, the customs notified them that the duty payable was £9,006 14s. 6d. and returned the balance of £993 5s. 6d. Clearly, as counsel for the plaintiffs concedes, no interest is payable on this latter sum, nor do I think that the learned judge intended to hold that it was. Equally clearly, interest is payable on the sum of £9,006 14s. 6d. which, as a result of these proceedings, must now be returned. The real question is does the interest run from early in 1964 or only from March, 1966? The customs have had the use of the money since early in 1964. The plaintiffs gained nothing by this £10,000 being exacted as security rather than as duty. Had the customs chosen to take it as duty, clearly interest would have run from early in 1964. Ordinary justice seems to demand that interest should be payable from then. The right to interest, however, depends entirely on statute—see s. 255 and s. 260 of the Customs and Excise Act, 1952. Hard as I have tried, I confess that I have been quite unable to read these statutory provisions so as to give the plaintiffs any right to interest before March, 1966. Clearly, if the customs had returned the sum of £9,006 14s. 6d. to the plaintiffs voluntarily in March, 1966, the plaintiffs could not have claimed any interest. It seems odd that, if interest runs from the date of the deposit of the security, Parliament could have intended the right to interest to depend on whether the customs return an amount deposited as security voluntarily or by order of an arbitrator or the court. Section 255 (3) clearly contemplates that the amount deposited as security may be greater or smaller than the amount later specified in the notice as being the amount of duty payable. The difference has to be “paid or repaid”. If there is any more duty to be paid by the importer (a rare occurrence, I imagine), the customs receive no interest on that sum, yet the importer has had the use of it ever since his goods were released to him by the customs. It is for this reason, I think, that the customs have no obligation to pay interest on any deposit by way of security which they voluntarily return to the importer. B C D E F

In my view, s. 255 regards the deposit or payment of money by way of security as something quite different from payment of duty. The language of the section is significant. Subsection (1) gives the customs power to allow the importer to take his goods G

“upon . . . giving security by deposit of money . . . for the payment of any amount unpaid which may be payable by way of duty.”

This seems to me to contemplate (i) a present deposit of money as security for unpaid duty, and then (ii) a future payment of duty out of that money. Subsection (3) provides that the customs H

“shall, when they have determined the amount of duty which . . . is payable, give the importer a notice specifying that amount . . .”

I do not think that the payment of duty is deemed to relate back to the date of the payment of the deposit but to the date of the notice. It is at that date that the amount held as security, or part of it, is appropriated to the payment of duty. This construction would also make some sense of the provision that no interest is payable on any money voluntarily returned by the customs at the time they serve the notice under sub-s. (3) and is only payable on any part of the deposit recovered thereafter by proceedings. Before the notice, no duty is deemed to have been paid. The customs and the importer are theoretically in the same position in respect of interest on money to be paid or repaid. Neither gets I

**A** any. If the customs do not return any or any sufficient money with the notice and the importer has to recover it by proceedings, he gets his interest, but only from the date of the notice, i.e., the date on which he is deemed to have overpaid the duty. Moreover, the construction which I adopt with considerable reluctance is the only one which seems to me to make any sense of the last part of the proviso to sub-s. (3). This contemplates the case of an importer who has given

**B** security bringing proceedings to challenge that any duty is payable when the notice served by the customs under sub-s. (3) demands a further sum to be paid as duty over and above the amount deposited as security. The last few lines of the proviso read

“and where any [further] sum so falls to be paid no interest shall be paid under sub-s. (2) of [s. 260] in respect of any period before that sum is paid.”

**C** It seems unlikely that, even in a modern statute, the draftsmen could have thought it necessary to provide that no interest should be payable by the customs on money before they receive it. However this may be, the words of the proviso are “no interest shall be paid under sub-s. (2) [of s. 260]”.

**D** The interest under that subsection is the interest on the amount, clearly the whole amount, overpaid. I think that the effect of the last part of the proviso is that it postpones the date from which interest runs from the date of the notice served under sub-s. (3) to the date on which the importer complies with the notice—as he is bound to do. This, again, seems to be sensible. The statutory obligation on the importer to pay the amount (if any) demanded by the notice could and should be complied with within a few days. The loss of interest for these few days would be negligible. If the importer delays in making the payment, the consequent loss of interest is his own fault. If, on the other hand, contrary to my view, interest normally runs from the date of the deposit of the security, the customs could, in every case, by the simple expedient of slightly underestimating the amount required as security and claiming payment in their

**E** notice of a further sum, however small, postpone the date from which interest runs not for days but perhaps for years. I cannot adopt a construction which leads to so strange a result.

**F** Accordingly, in my judgment, no interest was payable on the sum of £9,006 14s. 6d. prior to the date of the notice of March, 1966. To this extent only I would allow the appeal.

**G** EDMUND DAVIES, L.J.: Two questions are raised by this appeal: (i) Do the four parcels of mustard seed consigned to the United Kingdom from Vancouver fall within s. 2 (2) of the Import Duties Act, 1958? (ii) If they do, are the plaintiffs, the importers, entitled to interest on the entire sum deposited by them pursuant to s. 255 of the Customs and Excise Act, 1952?

**H** As to question (i) I can be brief, the relevant facts having already been stated. The essence of the commissioners' case is that these parcels had not been “consigned to the United Kingdom” from Vancouver by Montana, the consignors. It is accepted that they *expected* all four parcels to be consigned to the United Kingdom, but it is said that all they did was to consign to continental ports; they never gave any instructions affecting the control or destination of the goods

**I** beyond those ports, and at the time when these goods were despatched from Vancouver through-carriage contracts from Canada to the United Kingdom had not been concluded. It is submitted that the plaintiffs' intention is immaterial, and that the only material consideration is: what was the intention of Montana, the consignors? It is said that the only intention of the latter was to ship from Vancouver to a continental port and that, accordingly, they did not “consign to the United Kingdom” even though they fully anticipated that, at that continental port, there would be prompt transshipment to the United Kingdom. Their anticipation or expectation is, it is submitted, insufficient unless it has



led to their having arranged everything commercially necessary to ensure the continuous and complete transit of the goods from Vancouver to the United Kingdom and until, in consequence, the goods have been sent off pursuant to that arrangement. A

As the bill of lading provided that the goods were "consigned to order of Montana Mustard Seed Co., Ltd., Rotterdam", it is said that, when the goods were delivered to the plaintiffs at that port, nothing thereafter remained to be done by the consignors and it was entirely up to the plaintiffs to arrange the onward transmission to the United Kingdom of what had by such delivery become their own property. That, so it is submitted, means that at no time did Montana consign to the United Kingdom. Is that correct? In my judgment, these goods were "consigned to the United Kingdom" from Vancouver within the meaning of s. 2 (2) of the Act of 1958. I do not propose to repeat here the passage in the judgment of ROSKILL, J., in *Gallaher, Ltd. v. Comrs. of Customs and Excise* (2) as to the meaning of the word "consigned" which I have already indicated seems to me correct. Applying that same test to the facts of the present case, the learned judge added: B C

"When one looks at the totality of the evidence, notwithstanding the form of the contract and the form of the documents, it was always the intention both of Montana as seller, shipper and consignor, and of the plaintiffs as buyer, consignee and importer, that those goods should go from Vancouver to Rotterdam or Antwerp, and never be landed at Rotterdam or Antwerp, but there directly transhipped by coaster to Norwich. It seems to me plain, therefore, that not only did the plaintiffs have the relevant intention, but that Montana who were making the shipping arrangements as c.i.f. sellers to suit the wishes of their c.i.f. buyer, always intended to comply with the plaintiffs' wishes." D E

That all this was indeed the case emerges clearly from the agreed facts. Why, then, is it to be said that these goods were not "consigned to the United Kingdom" from Vancouver? Whence comes the requirement insisted on by the commissioners that the consignors must have themselves completed the through arrangements? It is said that this requirement is inextricably involved in the very word "consigned", but I do not see why this should be so. The wording of the Act of 1958 propounds no inquiry as to *by whom*, but simply as to "from" and "to" what *places* they were consigned. Provided that the goods were grown, produced or manufactured in the Commonwealth preference area and launched forth from a place in that area, then, provided also that, when they arrive in the United Kingdom, it can be said that they have come here by one continuous journey, in my judgment, they are entitled to Commonwealth preference no matter how many contracts of carriage made up the journey or by whom they were made. On the other hand, goods which may be said to have entered the commerce or industry of another country between the time they left the preference area and the time they reached the United Kingdom could not be said to have made one continuous journey between the two places, and so would be disentitled to preference. Such, in effect, were the submissions presented to this court by counsel for the plaintiffs. In my judgment, they are well founded. Applying them to the agreed facts, it follows that I concur with the learned trial judge in holding that these four parcels of seed attracted to themselves the preferential provisions of the Act of 1958, and that the plaintiffs were, accordingly, entitled to the declarations which the learned judge made. F G H I

As to question (ii), I had prepared an elaborate judgment which, happily, is now rendered superfluous because of the detailed treatment which the point involved has already received from my lords. In these circumstances, it is sufficient for me to say that I find myself reluctantly obliged to concur in holding, contrary to the finding of the learned judge, that the proper date from which

A interest became payable was Mar. 15, 1966, and not March, 1964, and it is common ground that it falls to be calculated on the sum of £9,006 14s. 6d. instead of £10,000.

*Appeal dismissed in part, allowed in part.*

Solicitors: *Solicitor, Customs & Excise; McKenna & Co. (for the plaintiffs).*

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

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## PRACTICE DIRECTION.

### PROBATE, DIVORCE AND ADMIRALTY DIVISION (DIVORCE).

*Divorce—Practice—Agreement or arrangement between parties—Reservation of trial to judge considering agreement or arrangement—Judge's direction noted on file—Regard to be had to direction when transfer of cause considered—Matrimonial Causes Act 1965 (c. 72) s. 5.*

Where, in a cause proceeding in the divorce registry, an agreement or arrangement is considered by a High Court judge under s. 5 of the Matrimonial Causes Act 1965 (1), the associate attending on the judge should ask the judge to indicate whether he reserves the trial of the cause to himself, and should note the file with the judge's direction. If the cause is, or becomes, undefended because of the agreement or arrangement or otherwise, the registrar who subsequently considers whether the cause should be transferred to the county court or retained in the High Court under the Matrimonial Causes Rules 1968 (2), r. 27 (1) or r. 124 (2) should have regard to any directions given by the judge who considered the agreement or arrangement. If the judge gives no direction, he should be deemed to have reserved the trial to himself.

Where, in a cause proceeding in the divorce registry, but treated as proceeding in a divorce county court, an agreement or arrangement is considered by a county court judge, the associate should ask the judge whether he reserves the trial of the cause to himself and note the file with the judge's direction. If an answer is likely to be filed, the judge may prefer not to deal with the agreement or arrangement but to leave it to be considered by a High Court judge after the cause has been transferred to the High Court.

By direction of the President with the concurrence of the Lord Chancellor.

COMPTON MILLER,  
Senior Registrar.

June 11, 1968.

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(1) 45 HALSBURY'S STATUTES (2nd Edn.) 451.  
(2) S.I. 1968 No. 219.

## WHITE v. WESTON.

[COURT OF APPEAL, CIVIL DIVISION (Russell and Sachs, L.J.J.), February 8, 9, 12, March 8, 1968.]

*County Court—Practice—Service of summons—Service by post—Sending to address originally supplied by defendant at time of accident—Defendant no longer resident there at time of service—Summons did not reach defendant—No service—C.C.R. Ord. 8, r. 8 (3)—Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 26.*

*County Court—Costs—Hearing—Want of service of summons—Order made at hearing set aside—Costs of hearing made costs in cause—Defendant entitled to have order set aside ex debito justitiae without any terms being imposed as to costs of hearing.*

In April, 1966, following a car accident which the plaintiff claimed was the defendant's fault, the parties exchanged addresses, the defendant giving an address at Ilford where he lived. In May the defendant moved to Romford. He informed his insurance brokers with whom he had got in touch in connexion with the accident. Correspondence followed between the plaintiff's solicitors and the defendant's insurers, and in October the plaintiff's solicitors wrote that they had commenced proceedings on behalf of the plaintiff against the defendant in West London County Court and enclosed a copy of the particulars of claim. The proceedings had been begun by the solicitors filling in a praecipe for an ordinary summons against a defendant out of the district, and entering the Ilford address as that of the defendant. The summons was sent to the Ilford County Court to effect service and was there stamped with a rubber stamp dated Oct. 28, 1966, and signed by the Ilford bailiff with the words: "Unable to meet defendant. He resides at address given and would get summons by post". The summons was stamped by the Ilford registrar "send summons by post" and was posted by another official to the defendant at the Ilford address on Oct. 28, 1966. The summons was not received by the defendant but was returned to Ilford County Court late in June, 1967, and was sent to West London County Court. Meanwhile that court in the absence of the defendant and without his knowledge had heard the plaintiff's action against him, had found negligence on his part established and had given judgment against him for £134 damages and £86 costs. The defendant, having heard of the judgment by chance applied for it to be set aside, and the county court judge ordered it to be set aside and ordered a new trial but also that the costs of the original hearing should be costs in the cause (i.e., potentially payable by the defendant if costs were given against him at a new trial). On appeal by the defendant,

**Held:** there had been no service of the summons for the purposes of C.C.R. Ord. 8, r. 8, and s. 26\* of the Interpretation Act, 1889, because the summons was posted to an address which at the relevant time was not the defendant's residence or place of business and did not reach him; the defect was so fundamental as to entitle him *ex debito justitiae* to have the judgment set aside without terms being imposed and accordingly the order that costs of the original hearing should be costs in the cause should be set aside (see p. 845, letter G, p. 846, letters A, C and F, p. 847, letter G, and p. 848, letter E, post).

Appeal allowed.

[As to substituted service of a summons in the county court, see 9 HALSBURY'S LAWS (3rd Edn.) 186, para. 387.

As to exercise of the county court's discretion as to costs, see *ibid.*, 302, 303, para. 731; and for cases on the subject, see 13 DIGEST (Repl.) 455-459, 784-821.

For the Interpretation Act, 1889, s. 26, see 24 HALSBURY'S STATUTES (2nd Edn.) 224.]

\* Section 26 is set out at p. 845, letter F, post.



## A Cases referred to:

*Anlaby v. Practorius*, (1888), 20 Q.B.D. 764; 57 L.J.Q.B. 287; 58 L.T. 671; 50 Digest (Repl.) 251, 55.

*Burt v. Kirkealdy*, [1965] 1 All E.R. 741; [1965] 1 W.L.R. 474; 129 J.P. 190; Digest (Cont. Vol. B) 677, 376a.

## B

*Craig v. Kanscon*, [1943] 1 All E.R. 108; [1943] K.B. 256; 112 L.J.K.B. 228; 168 L.T. 38; 50 Digest (Repl.) 252, 63.

*Pritchard (decd.) Re*, [1963] 1 All E.R. 873; [1963] Ch. 502; [1963] 2 W.L.R. 685; 50 Digest (Repl.) 252, 62.

*R. v. Appeal Committee of County of London Quarter Sessions, Ex parte Rossi*, [1956] 1 All E.R. 670; [1956] 1 Q.B. 682; [1956] 2 W.L.R. 800; 120 J.P. 239; 33 Digest (Repl.) 302, 1280.

## C

## Appeal.

The defendant appealed to the Court of Appeal against so much of an order of His Honour JUDGE BAXTER made in West London County Court on July 26, 1967, on the hearing of the defendant's application that the judgment in the action given on Nov. 25, 1966, be set aside, as ordered that the costs of that hearing be costs in the cause. He sought an order that there should be no order as to the costs of that hearing. The grounds of appeal were as follows: (i) that the judge was wrong in holding that the defendant had been served with the summons in the action at the time of the hearing, and that he was therefore wrong to make an order under which the defendant might be liable to pay costs in respect of proceedings to which he was not a party; and (ii) that, even if the judge were right in holding that the defendant had been served at the time of the trial, he was wrong to make an order under which the defendant might be liable to pay the costs of proceedings which took place in his absence and of which he had no notice and that through no default on his part.

## E

*R. I. Kidwell* for the defendant.

*Tudor Evans, Q.C.*, and *J. R. Playford* for the plaintiff.

## F

*Cur. adv. vult.*

Mar. 8. The following judgments were read.

**RUSSELL, L.J.:** On Apr. 23, 1966, the plaintiff and the defendant were involved in a car collision. The plaintiff says that it was the defendant's fault. The defendant denies this. They exchanged names and addresses. The defendant gave his address as 46, Northbrook Road, Ilford, Essex, where he then lived. The defendant filled in a claim form for his insurers, the National Motor & Accident Insurance Union, Ltd., via the broker, and the plaintiff got in touch with a Royal Automobile Club solicitor, Mr. Izod. Correspondence about liability followed, between the defendant's insurers and Mr. Izod; we have not seen it, but on one side liability of the defendant was asserted, and on the other denied. On Oct. 17, 1966, the plaintiff's present solicitors wrote to the insurers as follows:

## H

"Dear Sirs, Your letter of June 22 addressed to Mr. J. B. Izod has now been passed to us for attention as we are instructed in place of Mr. Izod on behalf of [the plaintiff]. Our instructions are to commence proceedings, which we have accordingly done in the West London County Court, and as a matter of courtesy we enclose herewith a copy of the particulars of claim."

## I

It seems from this that the matter had gone to sleep since June. This letter was not answered by the insurers, who took no action on it. In the meantime, in May, 1966, the defendant had changed his job and had moved his residence to Romford. He informed the insurance brokers of his new address in September, 1966. He was not in touch with the plaintiff or her solicitors.

The plaintiff's solicitors, as indicated in their letter, started proceedings in the West London County Court in the normal way by filling in a praecipe for an ordinary summons against a defendant out of the district, filling in as the defendant's address the Ilford address. The claim was for £200. The court prepared

and issued the summons and sent it to the Ilford court for that court to effect service. Here mystery begins. The summons bears a rubber stamp dated Oct. 28, 1966, signed by the Ilford bailiff in these terms: "Unable to meet defendant. He resides at address given and would get summons by post". How this can have come about, I cannot imagine, since he had left six months before. Pursuant to C.C.R., Ord. 8, r. 8 (3), the Ilford registrar put another rubber stamp on the summons, "Send summons by post", and another Ilford official posted it to the defendant at the Ilford address on Oct. 28, 1966, filling in a form on the summons to that effect. From then on there is something of a mystery about what happened to the summons and two other letters sent to the defendant by the county court at the Ilford address. I have tried to reconstruct the course of events by a study of the various postmarks, rubber stamps and other notations on these envelopes, but have arrived at no sure conclusion. Fortunately this does not matter. What does matter is that the summons (and the other two communications) never reached the defendant, came back to the Ilford County Court some time late in June, 1967, and found their way into the West London County Court file of the case. In the meantime the case was heard at West London County Court on Nov. 25, 1966, and the judge, being satisfied that negligence was established, gave judgment for the plaintiff for £134 damages and costs on scale 4, which ultimately were taxed at £86. Of all this the defendant knew nothing.

Ultimately the defendant got wind of this by meeting the plaintiff at a magistrates' court where he was charged with some offence connected with the incident. The defendant on June 16, 1967, applied to the county court for the judgment to be set aside under C.C.R. Ord. 37, r. 2 (1) on the ground that he had not been served. It would appear that he failed to persuade the judge of his ignorance of the proceedings, and his application was dismissed with costs. Armed with better evidence, the defendant applied again on July 18, 1967, to set aside the November, 1966, judgment. There was a difficulty in renewing an application under the same rule which had already been refused. This time no reference was made to any rule, and the application was to set aside the November judgment on the ground that the summons was sent by post to an address that the defendant had long since vacated. According to the county court judge, this application was made under C.C.R. Ord. 37, r. 1. At this further hearing the county court judge believed the defendant's evidence, and this belief was fortified by the discovery by the judge in the court file of the envelopes already mentioned and the summons. He accordingly on July 26, 1967, ordered that the November order be set aside, and a new trial be had. He made no order as to costs of that application; but he did not merely set aside the November judgment; he ordered that the costs of the November hearing should be costs in the cause.

The question in this appeal is whether the county court judge was right according to established practice to put the defendant at risk of having to pay the plaintiff's costs of the November hearing, of which the defendant had in fact no notice. The defendant says that the county court judge should have done no more than set aside the November judgment in toto, leaving the plaintiff to bear her own costs of that hearing in any event. For the defendant it is said that there was never any service of the proceedings, and that he never heard of them, and that consequently it cannot possibly be right that in any circumstances he should pay any costs of the November hearing. Whether there was service involves consideration of the County Court Rules.

Service of a summons such as this is dealt with by C.C.R., Ord. 8, r. 8, in cases in which the plaintiff does not want to take on himself the task of effecting personal service. If the plaintiff completes form (6) on the back of the praecipe requesting postal service (which was not done here) that course is taken unless the registrar otherwise directs; r. 8 (2). Form (6) reads as follows:

"I hereby request that the defendant (blank) be served with the summons in this action by post and I hereby certify that (a) I have reason to believe that the summons, if sent to the defendant at the address stated in the

A praeceipe, will come to his knowledge within seven days after the day on which the summons would be delivered in the ordinary course of post. (b) I understand that if judgment is obtained as a result of postal service and is afterwards set aside on the ground that the service did not give the said defendant adequate notice of the proceedings, I may be ordered to pay the costs of setting aside the judgment."

B Otherwise service is effected under r. 8 (1) which reads, so far as at present material:

C "Subject to the provisions of any Act and the following paragraphs of this rule . . . service of an ordinary summons shall be effected (a) by delivering the summons to the defendant personally; or (b) by a bailiff of the court delivering the summons . . . at the residence of the defendant or, where the defendant is the proprietor of a business, at his place of business."

Such service was not effected here, and r. 8 (3) was operated. That reads:

D "Where the certificate is not given but the registrar for the district in which the summons is to be served is satisfied by a report of the bailiff or otherwise that there is a reasonable probability that the summons, if sent to the defendant by ordinary post, will come to his knowledge in sufficient time for him to appear at the hearing, the said registrar may cause the summons to be served by an officer of the court sending it to the defendant by ordinary post."

E It was submitted that on its true construction, sub-r. (3), together with s. 26 of the Interpretation Act, 1889 (incorporated by C.C.R., Ord. 49, r. 1) showed that service was effected by the posting of the summons on Oct. 28 and effective on Oct. 29. That section reads as follows:

F "Where an Act passed after the commencement of this Act authorises or requires any document to be served by post, whether the expression 'serve', or the expression 'give' or 'send', or any other expression is used, then, unless the contrary intention appears, the service shall be deemed to be effected by properly addressing, prepaying, and posting a letter containing the document, and unless the contrary is proved to have been effected at the time at which the letter would be delivered in the ordinary course of post."

G A summons addressed to an address with which the defendant has had no connexion for five months or more, however, cannot be said to be properly addressed. Rule 8 (3) does not refer to any particular address.

H I observe further that if "delivered" in s. 26 means delivered to the person, it never was at any time. If it means only delivered by the Post Office to the address, it was in fact returned through the dead letter office, and may have been rejected at the address; the various markings on this and other envelopes in the case make their history most obscure; but in any event it was the wrong address.

I The function of service is primarily to bring to the attention of the person to be served the fact that he is being sued, and particular language is in my judgment required if something short of that is to constitute service. C.C.R., Ord. 8, r. 6, is an example of the selection of language to achieve in law service, though notice may not in fact reach the defendant. It provides inter alia for an order for substituted service by sending by post to the last known residence of the defendant, and by sub-r. (2) provides that:

"Where any such order has been carried out, the steps taken may be called substituted service, and such service shall have the same effect as service of the document in the manner prescribed otherwise than by this rule."

Moreover, under C.C.R., Ord. 8, r. 28 (2), in cases where a summons which has been sent by post under r. 8 (3) is returned to the court office undelivered, the notice to be sent to the plaintiff is stated in terms to be a notice of "non-service".



Nor is C.C.R., Ord. 37, r. 6, without any significance in this connexion. In my judgment, therefore, there was, contrary to the view of the county court judge, no service of the summons in this case. I would refer by way of analogy to *R. v. Appeal Committee of County of London Quarter Sessions, Ex p. Rossi* (1), not cited to the county court judge. A

There has in the past been much discussion whether a judgment is a nullity or a mere irregularity, and for the cases on the subject I may perhaps refer to *Re Pritchard (decd.)* (2) where they were discussed. UPJOHN, L.J., in that case expressly stated (3) to be a nullity proceedings which ought to have been served, but have never come to the notice of the defendant at all, excluding, of course, cases of substituted service, service by filing in default, or cases where service has properly been dispensed with. DANCKWERTS, L.J., adopted that judgment. I do not myself attach importance to the question whether it is proper to label a judgment obtained in circumstances such as this as "irregular" or "a nullity". The defect is in my judgment so fundamental as to entitle the defendant as of right, *ex debito justitiae*, to have the judgment avoided and set aside. If as a technical matter it is a matter of discretion to set aside the judgment, B

"... in accordance with settled practice, the court can exercise its discretion in one way, namely, by granting the order sought," D

to quote UPJOHN, L.J., in *Re Pritchard (decd.)* (4).

In cases where a defendant has applied to set aside a judgment and is entitled to such an order as of right, the court has exercised its discretion in respect of the defendant's costs of the application if the defendant declines to agree to terms suggested by the court, recognising that the court cannot impose terms on a defendant who does not agree. But here the court, by making an order that the plaintiff's costs of the November, 1966, hearing should be costs in the cause, has in effect imposed a term on the defendant, and has qualified or subtracted from his absolute right to have the judgment set aside. In my view the county court judge misdirected himself in considering that he had any power to visit, even contingently, on the defendant the plaintiff's costs of a hearing that, as against this defendant, should never have taken place at all, and to which he was a stranger. E

Accordingly, in my judgment, that part of the order below that ordered the costs of the November, 1966, hearing be costs in the cause should be set aside. F

SACHS, L.J.: Before turning to the issues raised in the course of this highly technical but by no means uninteresting appeal, it is as well first to remind oneself of the fundamental objective of rules relating to service of process as emphasised by each member of this court in *R. v. Appeal Committee of County of London Quarter Sessions, Ex p. Rossi* (1), an authority to which the attention of the learned county court judge was not drawn. DENNING, L.J., stated in relation to s. 3 (1) of the Summary Jurisdiction (Appeals) Act, 1933, and the notices which it requires to be given of the hearing of an appeal (5): G

"When construing this section, it is to be remembered that it is a fundamental principle of our law that no one is to be found guilty or made liable by an order of any tribunal unless he has been given fair notice of the proceedings so as to enable him to appear and defend them. The common law has always been very careful to see that the defendant is fully apprised of the proceedings before it makes any order against him." H

MORRIS, L.J., in his judgment first said (6) "It is fundamental in our system of administration of justice that a party should have the right and opportunity to I

(1) [1956] 1 All E.R. 670; [1956] 1 Q.B. 682.

(2) [1963] 1 All E.R. 873; [1963] Ch. 502.

(3) [1963] 1 All E.R. at pp. 882, 883; [1963] Ch. at pp. 523, 524.

(4) [1963] 1 All E.R. at p. 881, letter D; [1963] Ch. at p. 521.

(5) [1956] 1 All E.R. at p. 674; [1956] 1 Q.B. at p. 691.

(6) [1956] 1 All E.R. at p. 678; [1956] 1 Q.B. at p. 696.

A be heard . . . and then cited a well-known passage in BROOM'S LEGAL MAXIMS (10th Edn.), p. 65, on this point, whilst PARKER, L.J., referred (7) to the above principle in precisely the same words as MORRIS, L.J., and then refused to construe the particular section under consideration in a narrow sense. Those passages reflect a number of earlier statements in well-known authorities, including that of LORD GREENE, M.R., who in *Craig v. Kanseen* (8) said:

B "In my opinion, it is beyond question that the failure to serve process where service of process is required is a failure which goes to the root of our conceptions of the proper procedure in litigation."

It follows that only an explicit and clear provision in a statute, or in rules having statutory force, can operate to deprive a citizen of his right to receive notice of the commencement of the process against him; and to permit service other than personal at an address which is not in fact his abode (to use the word employed, for instance, in r. 19 (b) of the Magistrates Courts Rules, 1952 (9)) nor his residence, nor his business address, would be a provision clearly calculated to deprive him of that right. If ever it was intended to deprive a defendant of that right, this could, of course, be done by using language such as was used when, in consequence of *Rossi's case* (10) (see *Burt v. Kirkcaldy* (11)) an amendment was made in the Road Traffic Act, 1962, s. 51 (1) to s. 241 (2) (c) of the Road Traffic Act, 1960, which deals not with service of any process, but only with notice of an intended prosecution. That amendment provided that:

E "... the notice shall be deemed . . . to have been served on any person if it was sent by registered post or recorded delivery addressed to him at his last known address, notwithstanding that the notice was returned as undelivered or was for any other reason not received by him."

The County Court Rules as to service have not been amended since the judgment of this court in *Rossi's case* (10), nor am I aware of any rules of any court relating to ordinary service on a defendant of a summons or other process that initiates proceedings which have any provision parallel to that in the amendment to s. 241 (2) (c) of the Act of 1960. Indeed, any such amendment would run counter to the principles of natural justice in relation to such service in cases in which there is no reason for the application of rules necessary to meet special circumstances, for example, rules for substituted service.

Turning now to the first issue in the appeal, I have no hesitation, having regard to the above cited principles, in rejecting the strenuously pressed submission that there had in fact been good service of the proceedings in the present case. I can find no warrant in any of the County Court Rules or in s. 26 of the Interpretation Act, 1889, for holding that service in purported pursuance of C.C.R., Ord. 8, r. 3, at an address which at the relevant time was not the abode, residence, or place of business of a defendant, is good service should the relevant document not in fact reach him. It would indeed to my mind be contrary to natural justice so to construe r. 8 that such a service at a wrong address, which might even be in a totally different town from that in which the defendant lived or worked, could be good service; and it is not in point whether the use of a wrong address is due to the court proceeding under C.C.R., Ord. 8, r. 8 (2) on information inserted in error in the praecipe by a solicitor, who also (as may well happen in some other case) signs a form (6) request for postal service with its acknowledgment as to the potential effect of the defendant not being in fact given adequate notice of the proceedings, or to the court acting (as happened in the present case) under C.C.R., Ord. 8, r. 8 (3), on an erroneous rubber stamped report of its bailiff. I would incidentally reject the suggestion that it has become

(7) [1956] 1 All E.R. at p. 680; [1956] 1 Q.B. at p. 699.

(8) [1943] 1 All E.R. 108 at p. 113; [1943] K.B. 256 at p. 262.

(9) S.I. 1952 No. 2190.

(10) [1956] 1 All E.R. 670; [1956] 1 Q.B. 682.

(11) [1965] 1 All E.R. 741 at p. 743.

any part of the law that, once a man is told that a claim may be at some future date made against him in one of the courts of this country, he thereupon becomes under an obligation for the indefinite future to notify the potential claimant of each change in his address, either temporary or permanent. A

My above broad view of the County Court Rules could also be supported on a narrower basis by citing in detail the provisions of rules such as C.C.R., Ord. 8, r. 28, which relates to "non-service", and by examining the wording of form (36) ("Notice of non-service (general)") which refers specifically to cases where "the summons has been returned to the registrar of the home court"; but I am content to rest my opinion that there has here been no good service on the broader grounds. It is perhaps as well to add that the position where, despite a wholly wrong address having been used, a document sent by ordinary post in purported pursuance of C.C.R., Ord. 8, r. 8 (3), is shown to have reached the defendant fourteen clear days before the return day, is not under consideration in the present case, and could present difficulties (see cases cited (12) in notes to R.S.C., Ord. 65, r. 1). B C

Once the county court judge had disabused himself of his suspicions, and had come to the conclusion (which seems to have surprised him) that the summons had been sent by post to the wrong address and had not been received by the defendant, it followed that he was dealing with a case in which the plaintiff had obtained judgment despite the fact that there had been no service of process on the defendant. I agree, for the reasons given by my lord, that the latter was then quite plainly entitled to have the judgment set aside *ex debito justitiae*; and to my mind also it is in the present case (where no execution was levied) academic to discuss whether technically it is set aside as being a nullity, or on account of irregularity. Once the right to set aside is found to be *ex debito justitiae*, the reasoning behind the judgments in *Anlaby v. Praetorius* (13) remains good, and should have been applied in the way that RUSSELL, L.J., has stated. D E

Although in this particular case the distinction between a nullity and an irregularity can have no practical consequences, I should perhaps add that to my mind cases may well arise where that difference could be of importance, and the point may have to be considered when execution has been levied, or bankruptcy proceedings initiated against a defendant who, through no fault of his own, knows nothing of the proceedings owing, for instance, to being for a period overseas. I agree with the order proposed by RUSSELL, L.J. F

*Appeal allowed.* G

Solicitors: *Stevensons* (for the defendant); *Hextall, Erskine & Co.* (for the plaintiff).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.] H

I

(12) See THE SUPREME COURT PRACTICE 1967, Vol. 1, p. 937.

(13) (1888), 20 Q.B.D. 764.



# A WOOD PRESERVATION, LTD. v. PRIOR (Inspector of Taxes).

[CHANCERY DIVISION (Goff, J.), March 5, 6, 7, 1968.]

*Contract—Conditional contract—Passing of property—Contract for sale of a holding of shares subject to a condition precedent—Condition solely for benefit of purchaser—Waiver of condition open to purchaser at any time—Whether beneficial interest in shares passed to purchaser before condition was in fact waived or fulfilled.*

*Income Tax—Deduction in computing profits—Loss—Carrying forward of loss—Change of ownership of trade—Transfer of trade by parent to subsidiary company—Parent company previously contracted to sell its holding of subsidiary company's shares to purchaser—Contract subject to condition precedent solely for benefit of purchaser—Waiver of condition by purchaser after transfer of trade to subsidiary—Whether beneficial ownership of shares had passed to purchaser before transfer of trade to subsidiary (viz., while contract remained conditional)—If so, terms of s. 17 of Act of 1954 not satisfied—Income Tax Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 10), s. 342—Finance Act, 1954 (2 & 3 Eliz. 2 c. 44), s. 17.*

Since June, 1959, the taxpayer company had carried on, as agent for a paint company, the marketing of products of a German company, which the paint company had handled since 1956. On or about Apr. 1, 1960, the paint company accepted for itself an offer for the purchase of all the shares of its subsidiary, the taxpayer company. The paint company owned more than three-quarters of the shares of the taxpayer company. The offer required that the taxpayer company should carry on business as theretofore and was subject to conditions, one of which (here referred to as "condition 2") was that within one month of the acceptance of the offer a letter should be produced from the German company that the German company would not consider the purchase of the shares in the subsidiary company as an "important reason" that would entitle it under the terms of its agreement to terminate the taxpayer company's United Kingdom distributing agency. On May 9, 1960, the paint company assigned to the taxpayer company the "right title and benefit . . . in the good will of the business and the beneficial interest in the trade" of marketing the German company's products, so that the taxpayer company should market them in future in its own right, no longer as agent for the paint company. On May 18, 1960, condition 2 was waived by the purchaser. The taxpayer company claimed that there should be deducted from or set-off against its profits or gains as successor to the trade or business of marketing the German company's products certain losses, by virtue of s. 342 of the Income Tax Act, 1952, and s. 17 of the Finance Act, 1954. These losses were those sustained by the paint company in that trade up to May 9, 1960, relief not having been then obtained under those enactments. A basis of the claim was that the paint company remained the beneficial owner of more than three-quarters of the taxpayer company's share capital until May 9, 1960, and indeed up to the time of waiver of condition 2 on May 18, 1960.

**Held:** on the true construction of the letters embodying the contract the obligation to buy and to sell the paint company's shares in the taxpayer company, though not that contract as a whole, was conditional on the fulfilment of condition 2, which was a condition precedent; and, although according to general principle the beneficial interest in those shares would not have passed to the purchaser until the condition was fulfilled or waived, viz., until May 18, 1960, yet, as the condition was solely for the benefit of the purchaser, who accordingly could waive it at any time, the purchaser would have been entitled to obtain specific performance of the contract for the sale of the shares at any time, and thus the beneficial interest in the

shares had passed to the purchaser before May 9, 1960, with the consequence that the claim to set off losses could not be maintained (see p. 858, letter I, to p. 859, letter C, post).

Classification of conditional contracts based on judgment of DIPLOCK, L.J., in *United Dominions Trust (Commercial), Ltd. v. Eagle Aircraft Services, Ltd.* ([1968] 1 All E.R. at p. 108) applied.

*Re Sandwell Park Colliery Co.* ([1928] All E.R. Rep. 651) and *Aberfoyle Plantations, Ltd. v. Cheng* ([1959] 3 All E.R. 910) and *Curtis and Williams (Africa), Ltd. v. E. G. Maas* ([1957] 2 Lloyd's Rep. 223) considered.

[As to treatment of a change of ownership of a trade for income tax purposes, see 20 HALSBURY'S LAWS (3rd Edn.) 135, 136, para. 238; and as to carry forward of loss on change of ownership, see *ibid.*, p. 470, para. 894.

As to contracts for the sale of shares, see 6 HALSBURY'S LAWS (3rd Edn.) 248, 249, para. 520; and for cases on the subject, see 9 DIGEST (Repl.) 360-372, 2304-2391.

As to conditions precedent to a contract, see 8 HALSBURY'S LAWS (3rd Edn.) 194-200, paras. 328-338; and for cases on the subject, see 12 DIGEST (Repl.) 466-495, 3483-3713.

For the Income Tax Act, 1952, s. 342, see 31 HALSBURY'S STATUTES (2nd Edn.) 328; and for the Finance Act, 1954, s. 17, see 34 *ibid.*, p. 296.]

Cases referred to:

*Aberfoyle Plantations, Ltd. v. Cheng*, [1959] 3 All E.R. 910; [1960] A.C. 115; [1959] 3 W.L.R. 1011; Digest (Cont. Vol. A) 1309, 909a.

*Curtis and Williams (Africa), Ltd. v. E. G. Maas*, [1957] 2 Lloyd's Rep. 223.

*De Beers Consolidated Mines, Ltd. v. British South Africa Co.*, [1911-13] All E.R. Rep. 882; [1912] A.C. 52; 81 L.J.Ch. 137; 105 L.T. 683; 10 Digest (Repl.) 805, 5226.

*Long v. Bowzing*, (1864), 33 Beav. 585; 10 L.T. 683; 55 E.R. 496; 30 Digest (Repl.) 422, 650.

*Parway Estates, Ltd. v. Inland Revenue Comrs.*, (1958), SERGEANT ON STAMP DUTIES (4th Edn.) 428.

*Sandwell Park Colliery Co., Re, Field v. The Co.*, [1928] All E.R. Rep. 651; [1929] 1 Ch. 277; 98 L.J.Ch. 229; 140 L.T. 612; 10 Digest (Repl.) 824, 5389.

*Smith v. Butler*, [1900] 1 Q.B. 694; 69 L.J.Q.B. 521; 82 L.T. 281; 40 Digest (Repl.) 266, 2232.

*United Dominions Trust (Commercial), Ltd. v. Eagle Aircraft Services, Ltd.*, *Same v. Eagle Aviation, Ltd.*, [1968] 1 All E.R. 104; [1968] 1 W.L.R. 74.

### Case Stated.

The taxpayer company, Wood Preservation, Ltd., appealed to the Commissioners for the Special Purposes of the Income Tax Acts against the following assessments to income tax made on them: 1960-61, paint dealers £3,806 less £20 capital allowances; 1961-62, paint manufacturers £4,000 less £1,500 capital allowances; 1962-63, paint manufacturers £4,509 less £1,162 capital allowances; 1963-64, paint manufacturers £2,798 less £1,303 capital allowances; 1963-64, balancing charge £933. The grounds of appeal were that under s. 342 of the Income Tax Act, 1952, and s. 17 of the Finance Act, 1954, certain losses sustained by Silixine Paints, Ltd., a company which at relevant times owned not less than three-quarters of the taxpayer company's share capital, fell to be deducted from or set off against the amount of the profits or gains assessed. The relevant passages from the Case Stated summarising the facts are set out in the judgment.

The taxpayer company contended before the commissioners as follows: (i) that an offer made by The British Ratin Co., Ltd. ("Ratin") to purchase the shares of the taxpayer company, including those beneficially owned by Silixine Paints, Ltd. ("Silixine") which offer was contained in a letter of Mar. 25, 1960, was a conditional offer subject to the express conditions stated in

- A it, and in particular to a condition ("condition 2") and that such offer did not become unconditional until the withdrawal of condition 2 by Ratin, on May 18, 1960; (ii) that at the date of the assignment, May 9, 1960, not less than three-quarters of the taxpayer company's shares remained in the beneficial ownership of Silexine; (iii) that losses incurred by Silexine before the date of the assignment fell to be deducted from or set off against the profits or gains of the taxpayer company as successors to the trade or business formerly carried on by the Silexine, under the provisions of the Income Tax Act, 1952, s. 342, and the Finance Act, 1954, s. 17; and (iv) that the appeal should therefore be allowed and the assessments adjusted accordingly. The Crown contended before the commissioners as follows: (i) that on or about Apr. 1, 1960, Silexine, entered into a binding contract to sell to Ratin, the taxpayer company's shares which it beneficially owned; (ii) that at the date of the assignment none of the taxpayer company's shares remained in the beneficial ownership of Silexine; (iii) that losses incurred by Silexine, before the assignment of its trade or business, did not fall to be deducted from or set-off against the profits or gains of the taxpayer company under the provisions of the Income Tax Act, 1952, s. 342, and the Finance Act, 1954, s. 17; and (iv) that the appeal should be dismissed. The commissioners held that a binding contract between Silexine and Ratin was entered into on or about Apr. 1, 1960, whereby the whole of the interest of Silexine in the taxpayer company was transferred to Ratin. Their decision, as set out in the Case Stated, is at p. 854, letters G to I, post. They, therefore, decided that the appeal failed.

E The commissioners determined the appeal as follows: 1960-61, assessment increased to £3,869 (agreed capital allowances £1,999); 1961-62, assessment increased to £4,081 (agreed capital allowances £829); 1962-63, assessment reduced to £2,469 (agreed capital allowances £2,023); 1963-64, assessment confirmed in £2,798 (agreed capital allowances £471); 1963-64, balancing charge discharged. The taxpayer company appealed by way of Case Stated to the High Court.

- F *Hubert H. Monroe, Q.C.*, and *E. M. Drake* for the taxpayer company.  
*E. I. Goulding, Q.C.*, *J. R. Phillips* and *J. P. Warner* for the Crown.

G **GOFF, J.:** I now pass to the case of *Wood Preservation, Ltd. v. Prior (Inspector of Taxes)*. This case also arises under s. 17 of the Finance Act, 1954, but here there is no dispute what the parties agreed, but only as to its effect in law. Silexine Paints, Ltd., were United Kingdom distributing agents of a German company called Desowag, who manufacture wood preservation products, and by an agreement dated July 1, 1959, their subsidiary, the taxpayer company, was substituted for them. By art. 6 (2) that agreement, which was to be governed by German law, was made terminable by Desowag without notice in certain events. That article reads as follows:

- H "The agreement may furthermore be dissolved by either contracting party for important reason without any preliminary notice (extraordinary termination). An important reason shall mean any circumstance which makes it unreasonable to expect a party to continue the agreement until it is terminated by notice in the ordinary way. Important reasons for extraordinary notice of termination of the agreement by Desowag shall be, for instance: (c) If the management of the contractual dealers is not or ceases to be conducted by persons ensuring the requirements for the distribution of the contract products."
- I

The Special Commissioners found that:

"At all material times up to and including Mar. 25, 1960, Silexine owned not less than three-quarters of the share capital of the [taxpayer company]," and that:

"In accounting periods up to and including May 9, 1960, Silexine incurred



losses in carrying on its trade, in respect of which relief had not been obtained under the provisions of the Income Tax Act 1952, s. 342. On or about May 9, 1960, Silexine and the [taxpayer company] executed the assignment which provided, inter alia, as follows,"

and then, after setting out the recitals in the assignment the Case Stated sets out the operative part whereby the parent company, Silexine Paints, Ltd., assigned to the taxpayer company:

"(a) All that the right title and benefit of Silexine of and in the goodwill of the said business. (b) The beneficial interest in the said trade. To hold the same unto the [taxpayer company] absolutely."

The question is whether the taxpayer company is entitled to set off the losses incurred by Silexine Paints, Ltd., against future profits, and it arises because Silexine also parted with its shares in the following circumstances. The Case Stated continued:

"On Mar. 25, 1960, P. L. Burgin (hereinafter referred to as 'Mr. Burgin') the chairman of the British Ratin Co., Ltd. (hereinafter referred to as 'British Ratin') wrote to the directors of the [taxpayer company] in the following terms, inter alia: 'We hereby offer to purchase the whole of the issued share capital of Wood Preservation, Ltd. [the taxpayer company] consisting of 8,875 fully paid ordinary shares of £1 each for the sum of 27s. per share. This offer is made on the following terms and subject to the following conditions:—1. That satisfactory evidence is produced to us to show that prior to completion [the taxpayer company] is or has become the only person entitled to or interested in the rights granted by the German manufacturers of the wood preservative Xylamon for the sale of Xylamon in Great Britain and the Commonwealth.

"2. That within one month from the date of the acceptance of this offer a letter is produced to us signed on behalf of Desowag-Chemie GmbH. confirming that they would not consider the purchase of the whole of the issued share capital of [the taxpayer company] by the British Ratin Co., Ltd. as an 'important reason' entitling them to terminate the agreement made between themselves Silexine Paints, Ltd. and [the taxpayer company] and expressed to come into force as from July 1, 1959, pursuant to art. 6 (2) thereof'."

Paragraph 3 of the letter dealt with the usual type of warranty as to long term commitments and so forth, and provided further that:

"until completion [the taxpayer company] will carry on business in the same manner as heretofore and will not otherwise than in the ordinary course of business enter into any contract,"

and other matters.

Paragraph 4 of the letter dealt with the resignation of the directors on completion. Paragraph 5 of the letter stated:

"That completion shall take place within seven days from the production of the letter referred to in condition 2."

Paragraph 6 of the letter stated a further condition:

"That this offer is accepted within seven days of today's date by one hundred per cent. of the registered proprietors of the issued share capital of the company."

The letter continued:

"We should be obliged if you would communicate the terms of this offer to all the shareholders who are, we believe, the following persons in respect of the number of shares set opposite their names:—T. E. L. Allbeury

A —1,876; Silixine Paints, Ltd.—6,998; Silixine Colours and Chemicals, Ltd.—1. For the sake of simplicity we enclose herewith three spare copies of this offer which can be accepted by completion of the certificate set out at the foot hereof.”

B By agreement between the parties the figure of 27s. per share was subsequently altered to 28s. and the area was confined to the United Kingdom, but nothing turns on that. At the foot of the letter which I have read, was the following statement:

C “We Silixine Paints, Ltd., hereby accept the above written offer dated Mar. 25, 1960, made by The British Ratin Co., Ltd., to purchase from us our fully paid ordinary shares of £1 each in [the taxpayer company] on the terms and subject to the conditions therein set out.”

The Special Commissioners made a finding that:

“This statement was signed over a sixpenny stamp by Mr. Allbeury, a director, for and on behalf of Silixine.

D “Similar letters were extant in respect of the shares owned by Mr. Allbeury and Silixine Colours and Chemicals, Ltd., bearing acceptances signed by or on their behalf respectively.”

The Case Stated continues:

E “On Mar. 31, 1960, S. P. Pyke (hereinafter referred to as ‘Mr. Pyke’) one of the partners of Staddon, Pyke and Barnes of 58, Finsbury Pavement, London, E.C.2, the solicitors acting for Silixine, wrote to Mr. Burgin in the following terms, inter alia:

“As arranged on the telephone yesterday I enclose herewith qualified acceptances of British Ratin’s offer, signed by the three shareholders of [the taxpayer company].”

They were qualified only in respect of the area and that qualification was accepted by British Ratin Co., Ltd., and is irrelevant for present purposes.

F Subsequently the Case Stated continues:

“On Apr. 27, 1960, Mr. Burgin wrote to W. H. Westphal of British Ratin in the following terms, inter alia: ‘I had a long talk with Pyke again today. He is seeing [the taxpayer company’s] accountants on Friday and will at that time discuss the question of the formal assignment of the Xylamon business from Silixine Paints to [the taxpayer company].’”

G That, of course, is an internal memorandum, but it does refer to talks with Mr. Pyke. The significance of it is that it is within the month allowed for obtaining the letter from Desowag and shows that the parties still contemplated proceeding with their contract. The second paragraph of that letter states:

H “As I told you over the telephone the other day, it is quite vital to the case for taking advantage of the tax losses that that assignment is made before the letter from Desowag for which I have asked is produced.”

On May 10, 1960, Mr. Pyke wrote to Mr. Burgin telling him that Silixine Paints, Ltd., had executed the assignment to the taxpayer company and said:

I “I understand from Mr. Allbeury that he is experiencing a certain amount of difficulty inducing Messrs. Desowag to give the letter, which Silixine Paints will require to obtain under the terms of the agreement for the sale of the shares, and which is a condition precedent to such contract becoming binding. However, I will communicate with you further about this matter in the course of a few days.”

In fact no such letter was forthcoming and on May 18, 1960, Mr. Burgin wrote to Mr. Pyke in the following terms, inter alia:

“I now learn that it will be possible for British Ratin to make satisfactory arrangements direct with Messrs. Desowag. I am, therefore, instructed by

British Ratin that they can now withdraw condition 2 set out in their letter of offer of Mar. 25. In these circumstances the contract between the two companies has now become unconditional. No doubt you will let me know on what date it would be convenient for you for completion to take place."

It will be seen that the offer to purchase was accepted on Mar. 31, or possibly Apr. 1, when Mr. Burgin accepted the qualifications, but it was conditional in some sense under para. 2 of the terms and conditions. The "month" described in that paragraph expired before the transfer of the business and Mr. Burgin's letter waiving, or purporting to waive, the condition was after the transfer of the business, as, indeed, was the actual transfer of the shares. It has been suggested that, whatever view one takes of the position during the month, as the letter was not obtained within the specified period, nor was the requirement waived in that time, the whole agreement came to an end at the expiration of a month, in which case clearly at the date of the transfer on May 9, the beneficial ownership of the shares could not have passed from the taxpayer company to the purchasers, or if it had, it would have been revested in it.

There is some authority for that view, in *Re Sandwell Park Colliery Co., Field v. The Co.* (1) and also *Aberfoyle Plantations, Ltd. v. Cheng* (2), though the actual point there was not precisely whether the contract automatically came to an end, but whether the condition not having been fulfilled in due time the vendors could enforce the contract against a purchaser who had refuted it. I do not think, however, it is necessary for me to resolve that point, because I am satisfied that the proper inference from Mr. Burgin's letter to Mr. Westphal and the subsequent conduct of the parties was that they agreed during the month to extend the time or that they made a new agreement to continue the conditional arrangements between them, and even if that be the true view that they made such new agreement before May 9, so that the conditional arrangements were subsisting at the material time. It is necessary to consider, however, whether those conditional arrangements were such as to cause Silexine Paints, Ltd., forthwith to cease to be the beneficial owner of the shares in the taxpayer company, or whether they continued as the owners down to and after the transfer of the business, and that depends on the true construction and legal effect of the offer and acceptance.

The commissioners gave their decision in principle in the following terms:

"... 3. The second question which arises is whether or not Silexine retained its interest amounting to not less than three-quarters of the equity of the [taxpayer company] until May 9, 1960, or whether the beneficial interest had passed to the British Ratin Co., Ltd. (hereinafter referred to as 'British Ratin') by virtue of a contract made on or about Apr. 1, 1960, for the sale by Silexine to British Ratin of the whole of its interest. The said contract is said to be contained in letters dated Mar. 25, 1960, Mar. 31, 1960, and Apr. 1, 1960, which passed between Silexine and British Ratin and the question is whether there was a binding contract under which the shares owned by Silexine were transferred to British Ratin or whether the letters merely set out certain proposals which remained executory until at any rate May 9, 1960. In our opinion upon consideration of the evidence adduced and the arguments addressed to us on behalf of the parties and the cases cited [and they then set out the cases] there was a binding contract between Silexine and British Ratin entered into on or about Apr. 1, 1960, whereby the whole of the interest of Silexine in the [taxpayer company] was transferred to British Ratin. The appeal therefore fails."

The taxpayer company now appeal against that decision and counsel on their

(1) [1928] All E.R. Rep. 651; [1929] 1 Ch. 277.

(2) [1959] 3 All E.R. 910; [1960] A.C. 115.



**A** behalf says that the sale under the agreement was subject to a condition precedent and that, therefore, the beneficial ownership did not pass out of the taxpayer company's hand until the condition was waived. He has classified the possible situations under four heads. The first is where the arrangement between the parties, which would otherwise be a contract, is subject to a condition precedent to the making of any agreement at all. I do not think that he suggests that

**B** the present case falls within that category, but in any case, in my judgment, it clearly could not be so construed, as the terms of the offer imposed obligations on the taxpayer company which would be operative as from the making of the conditional agreement and not merely from the performance of the condition. I refer to the express contract in cl. 3 that they will carry on business in the same manner as heretofore and not enter into particular contracts and so forth, and

**C** also what I think is necessarily implied in this contract, an obligation on their part to use their best endeavours to obtain the desired letter from Desowag.

The second class of case is where there is a contract under which one party assumes a unilateral obligation to purchase from another in a certain event and there is no obligation on the other to bring that event about. In that class of case there is a contract from the start imposing a unilateral obligation, but no

**D** bilateral obligation arises and no contract of sale until the condition has been discharged. That type of case covers options and analogous agreements.

His third class is where there is a bilateral contract of sale subject to a condition precedent with an immediate obligation on one of the parties to perform the condition or to use his best endeavours to perform it. There he says there is an immediate obligation, but the bilateral obligations of the contract of sale are

**E** nonetheless subject to a condition precedent, and there is no sale until the condition is performed.

His fourth class is where there is an immediate contract of sale but on the basis or term that one of the parties, say the vendor, will obtain some particular information or assurance or something of that sort. In such a case the contract of sale is immediate—it is not subject to a condition precedent—but if the

**F** vendor fails to discharge his obligation he will be liable in damages for the breach, and if the breach goes to the root of the contract then the purchaser may be discharged from further performance, but the contract of sale is nonetheless immediate and not subject to any condition precedent.

I think that that classification is justified by the most careful and detailed analysis which was undertaken by DIPLOCK, L.J., in *United Dominions Trust*

**G** *(Commercial), Ltd. v. Eagle Aircraft Services, Ltd.* (3). Counsel for the taxpayer company concedes that if the case falls within his fourth class then the decision of the Special Commissioners was right. He submits, however, that the present case falls within the second class, and, even if it be in the third class, the sale was conditional, and that, therefore, the property could not pass at the earliest until Mr. Burgin, on behalf of British Ratin Co., Ltd., waived the condition on

**H** May 18, 1960.

Counsel for the Crown, I think, really denied the existence of any distinction between the third and fourth classes which, in my judgment, I cannot accept as I think there is; but he submitted that the true test was—has the vendor been deprived of the right to dispose of his shares for his own benefit and has that right passed to the purchaser? He says that in the present case the answer to

**I** both questions is in the affirmative. I am satisfied that this is not a mere option case, but I do not think that that test is the right one, because in the case of an option or a right of pre-emption, the vendor does deprive himself of the right to deal with the property for his own benefit. It is true that he can assign the property subject to the option or right of preemption, but he cannot ignore it and take a better offer. Alternatively, counsel for the Crown says that the answer to the question whether the vendor has ceased to be the beneficial owner

depends on the right of the purchaser to specific performance. He says that in this case the purchaser could claim specific performance notwithstanding the condition. He relies in support of that argument on *Long v. Bowring* (4), where there was an agreement to grant an underlease subject to the lessor's consent, with the provision that, if the landlord should refuse to grant a licence, or in case a licence should not be obtained on or before a certain date, then the grantor would pay to the grantee the sum of £1,000, a sum which was thereby mutually agreed should be the damages assigned and fixed by them for not obtaining such licence. The grantor tried to avail himself of that clause to get out of the contract and he refused to seek the consent of the landlord. Thereupon the grantee brought an action for specific performance and succeeded. It may be that in such a case, i.e., a contract for sale of a leasehold property, or the granting of a lease, subject to the landlord's consent, the property does pass in equity immediately on the making of the contract. I am not satisfied, however, that that is so, and in the case of *Long v. Bowring* (4) the object of the order for specific performance was to compel the grantor to take the necessary steps to obtain the licence, and if he could do so then there would be an order directing a conveyance and that was, as I understand it, included in the order from the outset, but if he could not get it, then, of course, the order would have to be discharged or varied. The order could not give the plaintiff an unqualified right to a conveyance.

Counsel for the Crown also says that this was a condition exclusively for the benefit of the purchasers which they could waive. Counsel for the taxpayer company counters that by saying that Silexine might also want protection from it, because Desowag might say, "If you assign your shares you will be liable to us in damages", and it has to be remembered that the agreement was governed by German law. I think, however, that that answer is really a fanciful one, since it is quite clear that by the agreement of July 1, 1959, the taxpayer company were substituted for Silexine Paints, Ltd., who, apart from remaining liable for certain debts until they were paid off, fell out of the matter, and I cannot see how Silexine Paints, Ltd., could possibly be exposed to any liability in damages for assigning their shares. Desowag might quite possibly say that that was an important reason within art. 6 (2) of the agreement, and of course British Ratin Co., Ltd., wanted to be sure that they would not, but I cannot see that Silexine Paints, Ltd., would require any protection in the matter at all. I think, however, that that is closely bound up with the remedy of specific performance. The real test where the vendor has entered into a contract for the sale of his shares, which is not absolute and immediate, is whether the property in the shares has passed at any rate in equity to the purchaser.

In the present case, as I construe the agreement, although the whole contract was not subject to a condition precedent, the obligation to buy and sell the shares was. Therefore, as it seems to me, *prima facie* the property in the shares would not pass to the purchasers until the condition was performed. The two cases on the effect of non-performance of the condition to which I have already referred clearly emphasise the difference between an immediate agreement for sale and an agreement for sale subject to a condition precedent. Thus in *Re Sandwell Park Colliery Co.* (5) MAUGHAM, J., said:

"courts of equity, in dealing with actions for specific performance relating to land, have been accustomed to give effect to the real intention, rather than to the precise words, fixing the date for completion. The effect is that a clause fixing the date for completion is equivalent to a clause stating that completion shall be on that date or within a reasonable time thereafter. But there is no ground for a similar construction in the case of a condition upon which the validity of the contract as one of sale depends. The distinction is obvious."

(4) (1864), 33 Beav. 585.

(5) [1928] All E.R. Rep. at p. 653; [1929] 1 Ch. at p. 282.

A Again in the *Aberfoyle Plantations* case (6) LORD JENKINS said, after citing *Re Sandwell Park Colliery Co.* (7) and *Smith v. Butler* (8):

B “Before parting with these two authorities, their lordships would observe that the reason for taking the date fixed for completion by a conditional contract of sale as the date by which the condition is to be fulfilled appears to their lordships to be that, until the condition is fulfilled, there is no contract of sale to be completed, and accordingly, that, by fixing a date for completion, the parties must by implication be regarded as having agreed that the contract must have become absolute through performance of the condition by that date at latest.”

C I think that assistance is also derived from *Curtis and William (Africa), Ltd. v. E. G. Maas* (9), which is a case of a series of purchasers, one of whom required satisfactory evidence of the existence of the steel, not only to satisfy himself but also to satisfy the buyers from him, and the proviso was, provided you give us proof of existence which is satisfactory to our buyers. PEARSON, J., said (10):

D “I think the effect of those words is this, that if there had been an immediate unqualified acceptance on the other side, those words would have formed a condition precedent to the other obligations under the contract. I think the effect of those words would have been, taking it in order, first that there would be an obligation on the plaintiff company to provide proof of existence, and then there would be an implied obligation on the defendant to take the steps for submitting it to his buyers and obtaining their expression of satisfaction. But, unless and until the expression of satisfaction was obtained from the defendant's buyers, then the rest of the contract would not have to be carried out. It would be a condition precedent to the need for fulfilling the rest of the contract.”

F I would refer finally to *Parway Estates, Ltd. v. Inland Revenue Comrs.* (11). That was a class (4) case because, though the vendor was subject to certain obligations, there was no condition affecting the sale. JENKINS, L.J., giving the decision of the Court of Appeal, alluded clearly to the distinction where he said (12):

G “But, says counsel, this is not an unconditional contract for sale: before the obligations of the parties, on the one hand to sell and on the other hand to buy, become effective, there are in the provisions of this agreement certain obligations imposed on the vendors which they must first perform; and it is said that those obligations are imposed by paras. 4 and 5. Counsel for the taxpayer put these obligations as conditions which have to be fulfilled before there is a contract for sale and purchase which can have the effect of transferring the beneficial interest. I must refer again to those two paragraphs. The first of them reads:

H “‘4. The vendors will on or before the date hereinbefore fixed for completion procure the purchase from the company at the vendors expense of all the assets of the company as detailed in the schedule hereto at a price to be calculated in accordance with the principle as to calculation set out in the said schedule and to be paid by means of an equivalent reduction in the amount of the indebtedness shown to be due from the company to the vendor.’ The other reads:

I “‘5. The vendors will on or before the date hereinbefore fixed for completion procure the discharge by the company of all liabilities due by the company whatsoever.’”

(6) [1959] 3 All E.R. at p. 915; [1960] A.C. at p. 126.

(7) [1928] All E.R. Rep. 651; [1929] 1 Ch. 277.

(8) [1900] 1 Q.B. 694.

(9) [1957] 2 Lloyd's Rep. 223.

(10) [1957] 2 Lloyd's Rep. at p. 227.

(11) (1958), SERGEANT ON STAMP DUTIES (4th Edn.) 428.

(12) (1958), SERGEANT ON STAMP DUTIES (4th Edn.), at pp. 435, 436.



—and that is developed in detail by referring to mortgages, debentures and so forth. Counsel says that these are in the nature of conditions with the result I have mentioned. Of course I think it is really reasonably plain that, if one has a contract of sale and purchase which is expressed to be conditional on the happening of some event, the procuring of some consent or something of that sort, the contract for sale and purchase is in abeyance until such time as the condition is fulfilled, though it may well be that there might be a repudiation even before the condition was fulfilled if one of the parties announced they were never going to perform the contract whether the condition was fulfilled or not. But that is not, as I understand it, this case. I cannot see that either of these paragraphs are conditions precedent.

“Counsel referred us to a passage cited in the judgment of the learned judge from the speech of LORD ATKINSON in *De Beers Consolidated Mines, Ltd. v. British South Africa Co.* (13) ‘Much reliance was placed by counsel for the company in the argument on the application to the agreement of Dec. 7, 1892, and especially to its first paragraph, of the well-known doctrine of courts of equity, that in equity everything should be taken to be done which ought to be done. That doctrine cannot, in its application to contracts, however, be permitted to turn the conditional into the absolute, the optional into the obligatory, or to make for the parties contracts different from those they have made for themselves. What a party to a contract ought to do, within the true meaning of this doctrine, is what he has contracted to do, and nothing more and nothing less is to be taken, in equity, to be done.’

“Counsel says that there is no room here for the application of the doctrine of conversion or, in other words, the maxim that equity looks on that as done which ought to be done so long as the vendors’ obligations set out in paras. 4 and 5 of the agreement remained unperformed. As I understood it, he admitted that the purchaser might, if so minded, enforce the contract while the vendors were still in default under paras. 4 and 5, but said that the vendors on their side could not enforce it until they performed their part of the bargain, and adduced from the vendors’ inability to enforce it until then that the doctrine of conversion could not apply. I do not altogether follow that argument. It appears to me that for the present purpose the material matter is the position of the purchaser. If the purchaser has a contract for the purchase by himself of shares which he can enforce against the legal owner of those shares I should have thought one is coming near to saying that the vendors have become trustees of the shares for the purchaser on the strength of the purchaser’s right to call for specific performance.”

Later at the conclusion of his judgment JENKINS, L.J., said (14):

“For my part, I prefer to found myself on the ground that there is nothing in this agreement to take the case out of the general rule under which there is no doubt that the equitable interest in the shares became vested in the purchaser when the agreement of Jan. 12, 1956, was signed.”

It appears to me to follow quite clearly from that authority that ordinarily, where the mutual obligation of sale and purchase is subject to a condition precedent, the property does not pass so long as the condition remains unperformed, but in the present case I have to consider whether it makes any difference that this was a condition, as I find, solely for the benefit of the purchaser and which he could therefore waive. In a sense therefore he had a contract of which he could obtain specific performance by, at any time, waiving the condition, but on the other hand he had expressly provided that he would buy the

(13) [1911-13] All E.R. Rep. 882 at p. 886; [1912] A.C. 52 at pp. 65, 66.

(14) (1958), SEGEANT ON STAMP DUTIES (4th Edn.) at p. 437.

A shares subject to the condition of the letter which he needed being produced to him. Counsel for the taxpayer company says, "Well, he could have waived, and if he did waive it the property would then pass to him", but unless and until he waived it, it would not. That, I think, is not an entirely easy matter to decide, but on the whole I have come to the conclusion that, as the matter of waiving the condition rested entirely with the purchaser, he could at any time

B require specific performance of the contract, and therefore to use the words of JENKINS, L.J. (15):

"... one is coming near to saying that the vendors have become trustees of the shares for the purchaser on the strength of the purchaser's right to call for specific performance."

C On the whole therefore I have come to the conclusion that under this contract the beneficial interest had sufficiently passed to the purchaser and that the conclusion of the Special Commissioners was right.

*Appeal dismissed.*

Solicitors: *Denton, Hall & Burgin* (for the taxpayer company); *Solicitor of Inland Revenue.*

D [Reported by F. A. AMIES, Esq., Barrister-at-Law.]

## RICHARDS v. PHILLIPS.

E [COURT OF APPEAL, CIVIL DIVISION (Harman, Russell and Widgery, L.JJ.), April 26, 1968.]

*Auction—Bid—Dispute—When auctioneer may properly act on the footing that there is a "dispute respecting a bid"—What constitutes a bid—Necessity for bid to be communicated to auctioneer—National Conditions of Sale (17th Edn.), condition 2 (3).*

F The owners of the Lyric Theatre, Hammersmith, put the property up for sale by auction by the defendant firm of auctioneers. The special conditions of sale incorporated the National Conditions of Sale (17th Edn.), by condition 2 (3) of which "if any dispute arises respecting a bid" the property

G might at the vendor's option either be put up again at the last undisputed bid or be withdrawn. By condition 2 (4) the highest bidder was to be the purchaser. The reserve price was £25,800. The bidding opened at £10,000. The plaintiff bid £15,000 orally and the auctioneer bid £20,000 on behalf of the vendors. At about the same time as the auctioneer's bid of £20,000, another bidder, D., made a motion to bid £20,000. The plaintiff and the

H auctioneer, on behalf of the vendors, made alternate bids culminating in a bid of £26,000 by the plaintiff. D. also signalled a bid of £26,000 at about the same time, but the auctioneer did not see this. D. heard none of the plaintiff's bids, but the auctioneer heard all the plaintiff's bids and was throughout unaware of D.'s bids. When D. realised that the accepted bid was not his, he protested. The auctioneer's clerk corroborated D.'s bid. Acting under

I condition 2 (3) the auctioneer put up the property again for sale. The plaintiff and D. bid one another up to £37,500 at which figure the property was again knocked down to the plaintiff. The auctioneer signed the memorandum of contract at that figure. The plaintiff issued a writ claiming damages of £11,500, against the auctioneers, this amount being the difference between £37,500 and £26,000.

**Held:** on the facts there was a "dispute respecting the bid" within the meaning of condition 2 (3); and the auctioneer had acted properly within

condition 2 (3) by putting the property up for sale again (see p. 862, letters F, H and I, post).

Decision of PENNYCUICK, J. ([1967] 3 All E.R. 876) affirmed.

[As to an auctioneer's liabilities in relation to the purchaser, see 2 HALSBURY'S LAWS (3rd Edn.) 87, paras. 178, 180; and for cases on the subject, see 3 DIGEST (Repl.) 45-46, 315-327.]

### Appeal.

This was an appeal by the plaintiff, Raymond Keith Richards, against the judgment of PENNYCUICK, J., given on Oct. 19, 1967, and reported [1967] 3 All E.R. 876 dismissing his action, which had been begun by writ issued on May 25, 1965, against three defendants, viz., the two defendant vendors, Acton Francis Phillips and Wilfred Oakley, and the defendant auctioneers, Chesterton & Sons. The plaintiff claimed against the defendant vendors specific performance of an agreement to sell to the plaintiff the property known as the Lyric Theatre, Hammersmith, London, for the sum of £26,000 and further or in the alternative damages. These claims were not pursued to decision at the trial. The plaintiff claimed alternatively against the defendant auctioneers damages for failure to sign a sufficient memorandum of a sale to the plaintiff by the defendant vendors of the Lyric Theatre at £26,000 pursuant to an auction of the property on Apr. 28, 1965, conducted by a representative of the defendant firm. This latter claim was tried by PENNYCUICK, J., who dismissed it. By notice dated Jan. 23, 1968, the plaintiff gave notice of appeal from the order of Oct. 19, 1967, seeking that it be set aside and claiming, apart from relief by specific performance, the sum of £11,500 against the defendant auctioneers. The grounds of the appeal were that the trial judge misdirected himself in holding that condition 2 (3) of the National Conditions of Sale (17th Edn.) was applicable and that the defendants were entitled to put up the property again for auction; and that if condition 2 (3) did not apply, the plaintiff was the highest bidder for the property at £26,000, and by condition 2 (4) was the purchaser, and the defendant auctioneers were in breach of contract to the plaintiff in failing to ensure that he was able to enforce the contract for the purchase of the property at £26,000. By a respondent's notice dated Apr. 10, 1968, the defendant auctioneers gave notice that they would contend that the order of Oct. 19, 1967, should be affirmed on the ground that the judge had misdirected himself in holding that Mr. Drummy failed to make an effective bid of £26,000, but should have held that both Mr. Drummy and the plaintiff made effective bids of £26,000, and accordingly should have held that the plaintiff was not the highest bidder for the property under condition 2 (4). The facts are set out in the judgment of HARMAN, L.J.

*H. E. Francis, Q.C., and G. T. Hesketh* for the plaintiff.

*Charles Sparrow, Q.C., and G. M. Godfrey* for the defendant auctioneers.

**HARMAN, L.J.:** This dispute, serious enough, between the parties is a comedy of errors of a remarkable kind. The proprietors of the Lyric Theatre, Hammersmith, who were the first two defendants, and are respondents to this appeal, were in 1965 wishful of selling that desirable property and put it into the hands of well-known auctioneers and estate agents, Chesterton & Sons, to be offered for sale by auction. This was done in April, 1965. Before the sale the plaintiff communicated with the auctioneer, whose name was Bussey, that he intended to bid; but apparently the auctioneer had no other information of any prospective bidder.

The room at the London auction rooms where this was put up was a fairly large room with windows opening on to the street, where a certain amount of noise came in, and had, I gather, a fairly high rostrum for the auctioneer. There were chairs below him and to his left for his partner, who was acting as his clerk, and two junior employees in the firm the duty of one of whom was to get the memorandum signed when a bid was accepted; and in front of him there were two sets of chairs, with an aisle down the middle. Immediately in front of him



A on the left there were five representatives of the Hammersmith Borough Council, headed by a man named Drummy, who was apparently himself an auctioneer. Further back on the same side—that is to say to the auctioneer's left as he looked down the hall—was the plaintiff.

The property was put up. £10,000 was the opening bid. The plaintiff bid £15,000. The auctioneer, bidding for the reserve price, which was £25,800, bid B £20,000. Thereafter the bidding seems to have gone up by thousands until it got to £25,000. It appears that when £21,000 was bid Mr. Drummy roused himself from his lethargy sufficiently to make some kind of motion with his sales card. The auctioneer never saw it. People sitting immediately in front of Mr. Drummy on the floor did see it and they assumed that he had made a bid, because the auctioneer said "I am bid £21,000". The auctioneer had heard a C bid from the plaintiff and had not taken any notice of Mr. Drummy. Mr. Drummy, on the other hand, had heard nothing of what the plaintiff said, nor did the auctioneer's clerk or his two assistants. So here was a thorough comedy of errors going on all round.

Things went on like this, the bidding going up by thousands; Mr. Drummy sank into lethargy again and took no more part in it until £25,000 was reached, D whereupon the auctioneer went very near to his reserve by bidding £25,500. The plaintiff thereupon bid £26,000. At the same time Mr. Drummy raised his card. "£26,000 I am bid", says the auctioneer; and nobody moved a muscle; but the position in fact, as we now know, was that both Mr. Drummy and the plaintiff thought that it was *his* bid of £26,000 which had been accepted, so neither of them made any move. In fact the twitchings of Mr. Drummy fell E unnoticed by the auctioneer, although they were perceptible to the auctioneer's assistants sitting on the floor. The auctioneer thereupon said: "Going, going: gone—£26,000, to the gentleman at the back of the hall". This apparently did move Mr. Drummy a little bit. When the assistant went down with the sheet of particulars, Mr. Drummy got up and said "Oh, but I was the person who made the £26,000 bid, not the other man"; whereupon all was confusion.

F Then the auctioneer, in the exercise, as he thought, of his proper discretion, decided at once, in the ensuing uproar, to put the property up for sale again. Whereupon there was a ding-dong battle right up to £37,500 between the plaintiff and Mr. Drummy, and the plaintiff bought at the latter price. He refused to sign a memorandum, because it was under protest, he maintaining all the time that he had made a good bid and that the property had been knocked down to him at G £26,000 and he ought not to have to pay the extra £11,500. The upshot is that he sues the auctioneers for damages, being unable to have any enforceable contract against the vendors at £26,000 because there was no memorandum to substantiate the sale at that figure. He has agreed to buy at £37,500, and that is out of the case; but this appeal is about whether the plaintiff has a remedy against the auctioneers, Messrs. Chesterton & Sons (in which firm the auctioneer Mr. Bussey is a partner) H for the difference between the £26,000 and the £37,500.

The conduct of this auction does not throw any credit at all on either of the auctioneers involved in it. However that may be, one has to abide by the lamentable show that they made of themselves. The National Conditions of Sale (17th Edn.) governed this matter so far as relevant. Condition 2 of those conditions provides for sale by auction and, so far as is relevant, reads:

I " (1) . . . the sale of the property and of each lot is subject to a reserved price and to a right for the vendor or any one person on his behalf to bid up to that price."

The right to bid up to the reserve price was a duty assigned to the auctioneer; and that he did.

" (2) The vendor may divide the property into lots, re-arrange, consolidate and sub-divide lots and withdraw the property or any lot (not actually sold) without declaring the reserved price."

The vendor acts in all these matters through the auctioneer as his agent.

"(3) No person shall at any bid advance less than the amount fixed for that purpose by the auctioneer, no bid shall be retracted, but the auctioneer may refuse any bid; and, if any dispute arises respecting a bid, the auctioneer may determine the dispute, or the property may, at the vendor's option, either be put up again at the last undisputed bid or be withdrawn. (4) Subject [as aforesaid] the highest bidder shall be the purchaser . . ."

The case made for the auctioneers is that there was a "dispute" within the condition 2 (3)—a dispute "respecting a bid" which had arisen. They contend that there were two people, the plaintiff and Mr. Drummy, each of whom said that he had made a bid, and that, therefore, there was a dispute about a bid. Therefore (so the auctioneers contend) it was at the auctioneer's option either to determine that dispute, as he was entitled to do, or to take the alternative course, of putting up the property again at the price then reached, which is what he did. In either event, so it is contended, he acted within his powers and his conduct cannot be impeached.

The answer made is that there never was any bid in fact except the bid of the plaintiff: Mr. Drummy's motions, being unobserved by the auctioneer, were quite ineffective as bids. The trial judge found that Mr. Drummy's motions were properly unobserved. Therefore, so the plaintiff contends, there never was a bid by Mr. Drummy and the property was knocked down to him; the auctioneer was not entitled to take it back into the market, the matter was closed and he, the plaintiff, was entitled at £26,000. The auctioneer had only to ask the simplest question of Mr. Drummy to find that in fact Mr. Drummy never made an effective bid at all and there was not any genuine dispute.

I cannot take that view. It seems to me that there was a "dispute". Mr. Drummy, however lethargic and however mum, did think that he had made a bid; he did think that he had bid £26,000. He is corroborated in that by the auctioneer's clerk and his two assistants. He is also corroborated in his statement, incredible as that might otherwise sound, that he did not hear any of the plaintiff's calls. That being so, I consider the judge (1) was amply justified in coming to the conclusion which he reached, that this was a dispute concerning a bid within the meaning of the phrase and that the auctioneer rightly determined it by putting the property up for sale again.

I would dismiss the appeal.

**RUSSELL, L.J.:** I agree.

I am clearly of opinion that this was a case in which a "dispute" arose "respecting a bid" within the terms of condition 2 (3) of the National Conditions of Sale (17th Edn.) and that the auctioneer was well entitled to put the property up again. I think that the point was rightly decided by PENNYCUICK, J., (2) and for the right reasons. I say nothing on the other points, which we have not had debated before us.

This brevity will not, I hope, be considered disrespectful to the arguments of both counsel for the plaintiff, particularly at this hour on this day.

**WIDGERY, L.J.:** I, with equal brevity, content myself with saying that I agree with each of the judgments which have been delivered, and wish to add nothing.

*Appeal dismissed.*

Solicitors: *Stilgoes* (for the plaintiff); *Roche, Son & Neale* (for the defendant auctioneers).

(1) See [1967] 3 All E.R. 876 at p. 881, letters D, E.

(2) [1967] 3 All E.R. 876.

A

## R. v. CUMMERSON.

[COURT OF APPEAL, CRIMINAL DIVISION (Widgery and Fenton Atkinson, L.J.J., and Roskill, J.), April 4, 5, 1968.]

*Insurance—Motor insurance—Third party risks—Certificate of insurance—False statement for purpose of obtaining insurance certificate—Withholding material information for the like purpose—Whether guilty mind an element of the offence—Road Traffic Act, 1960 (8 & 9 Eliz. 2 c. 16), s. 235 (2).*

B

The offence, enacted by s. 235 (2)\* of the Road Traffic Act, 1960, of making a false statement for the purpose of obtaining the issue of a certificate of insurance is an absolute offence, which does not predicate consciousness of the falsity of the statement on the part of its maker (see p. 866, letter E, and p. 867, letter C, post); but the offence, also enacted in s. 235 (2), of withholding material information for the same purpose may, it seems, predicate a conscious withholding on the part of the offender (see p. 867, letter F, post).

C

[As to the offence of making a false statement for the purpose of obtaining a certificate of insurance, see 22 HALSBURY'S LAWS (3rd Edn.) 371, para. 759, text and note (u).

D

For the Road Traffic Act, 1960, s. 235, s. 236, see 40 HALSBURY'S STATUTES (2nd Edn.) 911, 912.]

Case referred to:

*Sherras v. de Rutzen* [1895-99] All E.R. Rep. 1167; [1895] 1 Q.B. 918; 64 L.J.M.C. 218; 72 L.T. 839; 59 J.P. 440; 14 Digest (Repl.) 39, 90.

E

**Appeal.**

This was an appeal by Eunice Eileen Audrey Cummerston against her conviction at Southampton City Quarter Sessions, before the assistant recorder (N. R. BLACKER, Esq.) and a jury on Sept. 14, 1967, of two offences under s. 235 of the Road Traffic Act, 1960. The offences were first (count 2) making a false statement in a proposed form for the purpose of obtaining a certificate of insurance on a motor vehicle, and second (count 3) withholding material information for the same purpose. She was fined £10 on count 2 and £15 on count 3. Her conviction on count 3 was quashed as the offence charged was merely repetition of that charged on count 2 (see p. 865, letter C, post). The facts are set out in the judgment of the court.

F

The cases noted below† were cited during argument in addition to the one referred to in the judgment of the court.

G

*D. A. Smith* for the appellant.

*I. A. Kennedy* for the Crown.

WIDGERY, L.J., delivered the following judgment of the court: The appellant was convicted at the Southampton City Quarter Sessions in September, 1967, of two offences under s. 235 of the Road Traffic Act, 1960. On count 2 of the indictment she was convicted of making a false statement for the purpose of obtaining an insurance on a motor vehicle, and on the third count she was convicted of withholding material information for the same purpose. She was fined £10 on count 2 and £15 on count 3, making a fine of £25 in total.

H

On Mar. 25, 1967, the appellant's husband, Mr. Cummerston, bought a car at a motor auction. Mr. Cummerston had not distinguished himself in the past by his respect for laws affecting drivers, and it seems that he was minded to drive it away without insurance. It is to the credit of the appellant that she dissuaded him, and the car was left over the week-end on the premises where it was bought so that insurance could be effected. It was the Easter week-end, so nothing could

I

\* Section 235, so far as material, is set out at p. 865, letters G and H, post.

† *Harding v. Price*, [1948] 1 All E.R. 283; [1948] 1 K.B. 695; *Lim Chin Aik v. Regiam*, [1963] 1 All E.R. 223; [1963] A.C. 160; *R. v. Watkins*, (1964), unreported; *Patel v. Comptroller of Customs*, [1965] 3 All E.R. 593; [1966] A.C. 356.



be done on Monday, Mar. 27; but on Mar. 28 the appellant on behalf of her husband went to the office of an insurance company with a view to arranging insurance. She saw the manager of the company, Mr. McCully, and he explained to her that no insurance could be effected until a proposal form had been signed by her husband. He produced the proposal form, and for her assistance he went through it with her filling in the answers to the relevant questions to assist her. One question was: "How long have you"—and in this connexion "you" means Mr. Cummmerson—"held a British driving licence?" It is not clear from the evidence precisely how the conversation went; it is not clear whether Mr. McCully used those very words or whether he said to the appellant, "For how long has your husband been driving?" Her answer was that he had been driving every since she had known him, a period of twenty-five years, and she says that she added the qualifying words, "on and off"; but Mr. McCully did not hear those words, if they were used. In fact, Mr. Cummmerson had never had a full licence, he had had a long series of provisional licences. In consequence of the conversation Mr. McCully wrote in on the proposal form in answer to this question, "ten years". He said that he thought that was a substantial period and one which reasonably reflected the sense of the appellant's answer. Later in the form was the question "Have you a provisional licence or a full licence?"; and again there was a dispute as to precisely what was said in the course of the interview. Mr. McCully's recollection was that he said, "I presume your husband has a full licence?", and that the appellant did not demur. She thought that he said "I presume your husband has a licence?" Whatever may in fact have passed between them, Mr. McCully entered on the proposal form the word "Full", and consequently the answer as it stood was clearly an answer that Mr. Cummmerson had a full licence, whereas in truth on that day he had no licence at all, and obtained a further provisional licence the following day.

Having completed the proposal form in this way, Mr. McCully gave it to the appellant, so that she could take it home and get her husband to sign it. They were very anxious to get the car moved that day and there was therefore some urgency about it. She took it home, went to bed, her husband came in late, and for one reason or another never signed the form, and the appellant found herself the next day urgently requiring to get the car moved and no insurance effected. She therefore decided to sign the form on her husband's behalf and did so. The form was duly presented, a certificate of insurance was obtained and the car was driven away.

Now the counts in this indictment were most inelegantly framed. Count 2 charged her with

"making a false statement or withholding material information for the purpose of obtaining the issue of a certificate of insurance under Part 6 of the Road Traffic Act, 1960, contrary to s. 235 of the said Act, and the particulars of that offence are that you, Eunice Eileen Audrey Cummmerson, on a day between Mar. 27 and 29, 1967, in the city of Southampton in the county of Hants, made a false statement for the purpose of obtaining a certificate of insurance under Part 6 of the Road Traffic Act, 1960."

Count 3 was in similar cumbersome language and alleged the making of a false statement or the withholding of information, but this time particularised the matter as withholding information. As an ineffective means of conveying information these two counts can scarcely be beaten.

In the result this court has found it very difficult to decide precisely on what the prosecution was relying. Was it relying on the false statement made orally before Mr. McCully or the false statement contained in the proposal form? Was it relying on the false statement with regard to the full licence or the false statement with regard to his previous driving record? Oddly enough, no point was taken on this below. The assistant recorder himself was clearly confused about it, although he directed the jury that it did not matter, and, indeed, no point has been taken in this court on this aspect of the case. Nevertheless this court would not

**A** regard the verdict of the jury as safe or satisfactory except in so far as it was supported by facts which the appellant clearly accepted and admitted in the course of her evidence. The court would not support any conviction which depended on a verdict of the jury in the face of a denial by the appellant, having regard to the way in which the indictment was framed, and to the general conduct of the matter.

**B** Now what is clear is that she signed the form. It is clear, therefore, that she made the written statement comprised in the form. It is abundantly clear that Mr. Cummerston did not have a full licence and, consequently, that the statement that he had a full licence was a false statement. In so far as these charges can be supported on those simple facts the court would be prepared to support them, but it would not, for the reasons I have given, go further.

**C** In addition to that, it is to be observed that count 3, which charges withholding material information, is no more than a repetition of count 2 in different terms. The jury ought to have been instructed that if they convicted on count 2 no verdict would be required from them on count 3, yet in fact they were allowed to convict on both counts. This court, being satisfied that that was clearly wrong, will quash the conviction on count 3, the reason for that order being that the jury should not have been required to return a verdict thereon.

Accordingly, we now turn to the relatively simple problem of deciding whether the conviction on count 2 should stand, on the footing that the appellant made a false statement in writing saying that her husband had a full licence when he had never had any such thing. In the court below there was really no defence to this charge, because counsel on both sides accepted that the offence of making a

**E** false statement under s. 235 of the Act of 1960 was an absolute offence, and that it mattered not whether the appellant knew of the falsity of the statement when she made it. The single judge, however, thought that this was a matter which required consideration, and he gave leave to appeal in order that this court should consider whether it be right that an offence of making a false statement under s. 235 is an absolute offence as everybody in the court below accepted.

**F** Counsel for the appellant in this court, inspired no doubt by the judge's observations, has submitted that the assistant recorder was wrong and that this is not an absolute offence. If that is right, then the conviction will, of course, be quashed.

It is necessary to look carefully at s. 235 of the Act of 1960 and to look, not only at sub-s. (2) with which we are directly concerned, but also at sub-s. (1), and at s. 236 as well. Subsection (1) of s. 235 provides that:

**G** "A person shall be guilty of an offence who knowingly makes a false statement for the purpose—(a) of obtaining the grant of a licence under any part of this Act . . .".

That refers *inter alia* to a driving licence, and the insertion of the word "knowingly" is to be noted. Subsection (2) provides:

**H** "A person shall be guilty of an offence who makes a false statement or withholds any material information for the purpose of obtaining the issue (a) of a certificate of insurance or certificate of security under Part 6 of this Act . . .".

The omission of the word "knowingly" is to be noted. Section 236 provides:

**I** "If a person issues any such document as is referred to in paras. (a) or (b) of sub-s. (2) of the last foregoing section . . . and the document . . . so issued is to his knowledge false in a material particular he shall be liable on summary conviction to a fine . . .".

So in this instance, which is the offence of the issue of a certificate of insurance, falsity creates no offence unless it is done knowingly.

Counsel for the appellant has referred us to a number of authorities. I need not refer to them in detail, because they really all stem from the well-known

and universally accepted dictum of WRIGHT, J., in *Sherras v. de Rutzen* (1). A  
That judgment recognises that, although there is a presumption in law that a  
criminal offence involves an element of *mens rea*, yet in the case of a statutory  
offence that may not be so; and in deciding whether a statutory offence is an  
absolute offence or not one must construe the statute in accordance with ordinary  
principles looking at the language used and looking at the subject matter with  
which the statute is dealing. B

Approaching the matter on that basis, counsel for the appellant recognises  
that the omission of the word "knowingly" in s. 235 (2) is a significant matter.  
In the opinion of this court, its significance is apparent and its omission cannot  
have been accidental. It is quite clear that Parliament when using the word  
"knowingly" in s. 235 (1) and again in s. 236 could not have omitted the word  
from s. 235 (2) accidentally. Accordingly it seems to us that the omission of the C  
word "knowingly" is a strong pointer towards construing this offence as an  
absolute offence. Counsel for the appellant, however, says that the phrase "makes  
a false statement . . . for the purpose of obtaining the issue—(a) of a certificate  
of insurance . . ." is helpful to him. He submits that the true meaning of those  
words is not merely that the statement shall be made for the purpose of obtaining  
the issue of a certificate of insurance but that the statement shall be made D  
"falsely" for that purpose; and on that argument he asks us to say that the  
words, construed as a whole, indicate not only that the statement must be in-  
tended to lead to the grant of a certificate of insurance but also that it shall have  
been consciously made falsely for that purpose.

The court does not accept that submission, and is of the opinion that on the  
true construction of s. 235 (2) all that is necessary is that the statement should E  
be for the purpose of obtaining the issue of a certificate of insurance and that it  
need not have been made with conscious falsity in order to satisfy the terms of the  
subsection.

When one looks at the subject matter of s. 235 to which we are enjoined to look  
by the dictum of WRIGHT, J. (2), it seems to us that there are good grounds for  
thinking that on this subject matter Parliament intended the offence to be an F  
absolute one. The pre-occupation of Parliament with the necessity for drivers  
to be properly insured is clear, and the sort of statement which is contemplated  
in s. 235 (2) is the sort of statement which the owner of a motor-car can normally  
make from his own knowledge, if he takes a little trouble to be precise and accur-  
ate about it. The sort of question which he is normally asked is, what is his age,  
how long has he driven, has he committed a previous offence; these are questions G  
to which anybody can give an accurate answer, if he takes a little trouble. It  
seems to us, therefore, to be wholly consistent with the general intention of  
Parliament in the Road Traffic Act, 1960, that in regard to statements made  
with a view to the obtaining of a certificate of insurance a very high duty should  
be placed on the maker of the statement to use care to get the statement accurate.  
Accordingly, we think that the subject matter of s. 235 (2) does point to Parliament H  
intending the offence to be an absolute one.

The contrast of sub-s. (1) is clear, because in sub-s. (1) the public consequences  
of a false statement are far less important. It matters less to the public that a  
man obtains a driving licence by making a false statement, but it is of critical  
importance to members of the public using the road that he should not obtain  
a certificate of insurance by means of a false statement and thus drive uninsured. I

Finally, counsel for the appellant says that the true explanation of the omission  
of the word "knowingly" in sub-s. (2) is to shift the onus of proof. Without  
referring to authority, it can be said that there are cases in which this conclusion  
has been reached on the construction of a statute which omits the word "know-  
ingly", and it is therefore a submission which must be carefully considered. One

(1) [1895-99] All E.R. Rep. 1167 at p. 1169; [1895] 1 Q.B. 918 at p. 921.

(2) [1895-99] All E.R. Rep. at p. 1169; [1895] 1 Q.B. at p. 921.



- A** asks oneself: why should the onus of proof be shifted when one compares sub-s. (1) with sub-s. (2)? Of course, if the statements are based on knowledge peculiarly within the mind of the person making the statement, it would be understandable that that would justify a shifting of the onus of proof to him. The sort of statement made in an application for a driving licence, however, is no less within the specific and peculiar knowledge of the applicant than is the sort of statement **B** made when seeking to obtain a certificate of insurance.

- We can see no logical reason whatever which would justify Parliament in thinking that the onus of proof should be different when comparing sub-s. (1) with sub-s. (2). Unless there is some logical reason for supposing that the onus of proof should be different, we are not disposed to regard the omission of the word "knowingly" as merely indicative of shifting of the onus of proof. Accordingly, having considered the matter with care, this court concludes that both counsel and the assistant recorder in the court below were quite right when they treated this as an absolute offence, and it matters not that the question of the appellant's knowledge of the falsity of the statement was not investigated. There is, therefore, no ground for regarding the appellant's conviction on count 2 as being unsafe or unsatisfactory. The appeal is accordingly dismissed so far as it relates to count 2, **D** and the conviction and penalty on that count will stand.

- A further point was made by counsel for the appellant with which I ought to deal. He pointed out that under s. 235 (2) an offence was committed by a person who either made a false statement or withheld material information. He submits that the word "withhold" in its natural meaning implies a conscious withholding of information which is in fact in the mind of the withholder. If that is so, he **E** seeks to argue that it would be strange if within the confines of this single subsection one had an absolute offence of making a false statement and a qualified offence of withholding material information. In view of the conclusion which we have already reached on count 3 it is unnecessary to reach a final conclusion on whether a withholding of material information implies a conscious withholding and, therefore, implies a duty on the prosecution to prove knowledge on the part **F** of the accused of the information withheld. Although it is unnecessary for us finally to decide this question, we think it right to say that we are impressed by the argument of counsel for the appellant, and we think that his submission may well be right. Even if it be right, however, there is no reason to suppose that Parliament did not intend to distinguish in this regard between a false statement and a withholding of information. It is one thing to make a false statement in **G** black and white consciously applying one's mind to the statement which one is making and making it falsely, and quite a different thing to fail to disclose information which one may never have had or perhaps may have had but may have momentarily forgotten. We see nothing illogical in a distinction between an absolute and a qualified offence in regard to false statements and withholding respectively, and if it be the case, as counsel submits, that withholding implies **H** conscious withholding, this would still not affect the conclusion which we have reached on count 2.

*Appeal allowed in part. Conviction on count 3 quashed. Appeal dismissed as to conviction on count 2.*

Solicitors: Registrar of Criminal Appeals (for the appellant); P. K. L. Danks, Southampton (for the Crown).

[Reported by S. A. HATTEEA, Esq., Barrister-at-Law.]

## HAKLUYTT v. HAKLUYTT.

[COURT OF APPEAL, CIVIL DIVISION (Willmer and Edmund Davies, L.J.J.), May 3, 1968.]

*Divorce—Judicial separation—Maintenance of wife—Lump sum payment—Additional to annual sum—Factors to be regarded—Commutation of part of husband's pension as retired naval officer, thereby decreasing his income and increasing his capital—Wife's house in need of repair—Generous order for annual maintenance—Matrimonial Causes Act 1965 (c. 72), s. 20 (1).*

Fifteen years after her marriage a wife, who had herself committed adultery, and whose husband had left her about eleven years after the marriage, obtained a decree of judicial separation on the ground of her husband's adultery with a named woman. The two children of the marriage, boys aged about fifteen and ten, remained living with the wife in the former matrimonial home, a house owned by the wife subject to a mortgage, worth about £5,500 but in need of repairs, the cost of which would be about £500. Due partly to the mortgage repayments made by the husband during cohabitation, the mortgage debt had been reduced to £1,250, the wife's interest in the house being thus worth about £4,250. The court found that this was worth about £250 per annum to the wife, who had no income. About two years previously the husband had purchased on mortgage another house for about £4,500; this was vested in the joint names of himself and the woman named; and he lived there with her. At this time, he being then forty-one, the husband retired from the Royal Navy, in which he was a regular officer; he received a pension of £825 per annum (of which his widow would be entitled on his death to a pension of one-third of the amount that he would receive if he lived to the age of sixty) and a terminal grant of £2,475, which he used to repay some of the money borrowed to buy the house vested jointly in him and the woman named (leaving about £3,600 outstanding on mortgage), to repay debts to his bank and to solicitors, to buy a car and to repair and furnish the house. He obtained employment, earning £2,024 per annum. The husband commuted half his naval pension, thereby reducing it to £413 per annum, for a capital sum of about £5,500, which he wished to use to pay off his mortgage and effect alterations and improvements to the house vested in him jointly with the woman named. In proceedings for maintenance of his wife and children the husband undertook to pay his elder son's school fees, which were about £130 per annum. The younger son was not at a fee-paying school. The husband having been ordered to pay £115 per annum less tax as maintenance for each of the two sons, and £800 per annum less tax together with a lump sum of £1,750 by way of maintenance for the wife, appealed on the question of the wife's maintenance.

**Held:** as the husband had deliberately and voluntarily commuted part of his pension in order to raise capital, this was one of the exceptional cases in which a lump sum payment by way of maintenance could properly be ordered under s. 20 (1) (a) of the Matrimonial Causes Act 1965; but as the £800 per annum, ordered was generous annual maintenance, a sum of £500, which would meet the cost of repairing the wife's house, would be awarded as lump sum maintenance in lieu of the £1,750 (see p. 872, letter H, p. 872, letter I, to p. 873, letter A, and p. 873, letters E and G, post).

Principle stated by WILLMER, L.J., in *Davis v. Davis* ([1967] 1 All E.R. at p. 126) applied.

Appeal allowed.

[As to the amount of maintenance in divorce, see 12 HALSBURY'S LAWS (3rd Edn.) 436-438, para. 982; and for cases on the subject, see 27 DIGEST (Repl.) 616-620, 5765-5791.

- A** For the Matrimonial Causes Act, 1965, s. 20, see 45 HALSBURY'S STATUTES (2nd Edn.) 473.]

Case referred to:

*Davis v. Davis*, [1967] 1 All E.R. 123; [1967] P. 185; [1966] 3 W.L.R. 1157; Digest (Repl.) Supp.

**B Interlocutory Appeal.**

This was an appeal by the husband, John Philip Dabbs Hakluytt, against so much of the order of FAULKS, J., made on Jan. 26, 1968, as ordered him to pay his wife, Diana Lilian Hakluytt, maintenance at the rate of £800 per annum, less tax, plus a lump sum of £1,750. The facts are set out in the judgment of WILLMER, L.J.

- C** *K. Bruce Campbell, Q.C.*, and *G. Rodway* for the husband.  
*M. B. Smith* for the wife.

**WILLMER, L.J.:** This is an appeal from an award of maintenance made by FAULKS, J., on Jan. 26, 1968, in matrimonial proceedings, whereby he himself allowed an appeal from Mr. District Registrar BAILEY COX at Portsmouth.

- D** The order which the judge made was one providing for (a) maintenance for the wife at the rate of £800 per annum, less tax, (b) £115 per annum, less tax, in respect of each of two children of the marriage, on an undertaking by the husband to be responsible for the elder child's school fees (said to amount to about £130 per annum) and (c) a lump sum payment of £1,750 for the wife. The registrar had made an order for £2,500 by way of lump sum payment, and the effect of
- E** the judge's order was thus to reduce that to the figure I have stated.

I think it would probably be useful if I state straight away the conclusion at which I have arrived, and proceed thereafter to express to the best of my ability the reasons which have guided me to that conclusion. My conclusion is that the appeal should be allowed, and the lump sum payment reduced to £500, but that the award of annual maintenance, both in respect of the wife and the

**F** children, should remain undisturbed.

This is a case in which there has been no divorce between the parties; but the wife, in 1967, obtained a decree of judicial separation on the ground of adultery committed by the husband with a named woman. The parties were married in 1952, when the husband was twenty-seven years of age and the wife thirty-three years of age. That was sixteen years ago, so that the husband is

**G** now forty-three and the wife forty-nine. There are two children of the marriage, both boys, the elder being about fifteen and the younger about ten.

The husband throughout the years of cohabitation was a serving officer in the Royal Navy, reaching the rank of Lieutenant Commander. The parties established their matrimonial home in Gosport, in a house owned by the wife. It was a house purchased with the assistance of mortgages, and during the

- H** period of cohabitation the husband was making the mortgage payments. I will return in due course to a consideration of the value of the house and the value of the equity having regard to the present state of the mortgages. In the meantime, I continue with the history of the matter. The parties separated in 1963, when the husband left the wife. Thereafter he met the woman named (who, as we have been informed today, was the wife of a brother-officer), and
- I** during 1964 he and the woman named commenced an adulterous association, which is still continuing. In 1966 the husband, having left the matrimonial home, purchased a house of his own at Botley. He did this with the aid of borrowed money. The price was said to be £4,500, of which he borrowed £3,600 odd from a building society. £400 was left on mortgage by the vendor; and the remainder, amounting to nearly £600, was borrowed by the husband from the woman named. He and the woman named then went into occupation of this house, and so far as I know they are still living together there, although, of course, unmarried.



In November, 1966, the husband retired from the Royal Navy, being a man then of forty-one years of age. He obtained a pension from the Royal Navy worth £825 per annum. I would pause there to remark that as part of the rights acquired under the pension scheme his widow, in the event of his death, will be entitled to a pension at the rate of one-third of that to which the husband would be entitled if he lived to the age of sixty. That was the general effect of the regulation which was cited to us. The husband also obtained from the Royal Navy what is described as a terminal grant, that is to say a capital sum, amounting to £2,475. He used that money partly for repaying the £400 which he borrowed from the vendor and the sum which he borrowed from the woman named, partly in making a payment to his bank, partly in paying certain costs for which he was liable, partly in buying a secondhand motor car, partly in paying his own solicitors on account of various proceedings in which he was involved; and the balance was used for the purpose of repairing and furnishing the house which he had bought. Having left the Royal Navy, the husband very quickly obtained a job in which he works either directly or indirectly for the Admiralty, so that he can no doubt use his naval experience. That job brings him in a present salary at the rate of £2,024 a year: it is not an established position, so that it does not of itself carry any pension rights.

The two children of the marriage reside with the wife in her house, which had been the matrimonial home. The elder son goes to a grammar school, in respect of which the husband has undertaken to pay the fees: the younger son, at present at any rate, goes to a state school, which presumably involves no payment of fees.

The parties are thus each left in possession of their own houses. The position with regard to the wife's house is that it is said to be worth about £5,500. Thanks largely to payments made by the husband in the past, the mortgage debts have been reduced to about £1,250, so that the wife's equity in her house is worth somewhere in the neighbourhood of £4,250: that is worth to the wife something like £250 a year. That is a matter to be taken into consideration, because if she did not own the house she would have to use some sum approximating to that figure in renting other accommodation. The husband has still got outstanding the mortgage of £3,600 odd which he took out with the building society. That leaves him with a much smaller equity of redemption than the wife has got: moreover, he has seen fit to transfer to the woman with whom he lives a half-share in the house. That does involve that the woman named must bear a half-share in the liabilities attaching thereto.

What has complicated the case and given rise to the claim for a lump sum payment is the fact that the husband thought it right to commute half his Royal Navy pension for a capital sum. He thereby acquired a capital sum of £5,500 odd: but in return for that his pension was reduced by half, from £825 a year to £413 a year. He therefore has so much less income out of which to make provision for the annual maintenance of his wife. The object of the husband in indulging in this transaction, as I understand it, was to pay off, if he could, the mortgage on his own house, and also to carry out certain alterations and improvements to the house, for which planning permission has already been obtained. It is to be remarked that if that programme is carried out, half the benefit of it will, of course, enure to the woman named with whom he lives and to whom the property belongs in part.

It is in those circumstances that the question has arisen what is the proper way of providing for the wife's maintenance; and the further question has arisen whether it is a proper case in which to order a lump sum payment, in accordance with what is now s. 20 (1) of the Matrimonial Causes Act 1965. That is a relatively new power which has been conferred on the court, and first appeared in the Matrimonial Causes Act 1963 (1). So far as we have been

A informed, this is only the second case in which the propriety or otherwise of ordering a lump sum payment has had to be considered by this court. The only previous case was that to which we have been referred, namely, *Davis v. Davis* (2). That was a case of an entirely different character from the present case. It was a case of a wife who was completely without means of her own, and with no home of her own other than a rented flat in respect of which she had no security of tenure; but it was also a case of an immensely wealthy husband, who was possessed of capital amounting to not less than £400,000 and an income which was variously stated as being something between £27,000 and £40,000 a year. It was clearly a case, therefore, in which the husband was called upon to make very generous provision for his wife. A generous annual maintenance order was made; but the court thought it proper, in the circumstances of that case, to award a lump sum payment in favour of the wife in addition to the generous annual payment. The avowed object of that lump sum payment was to enable the wife to purchase a house of her own and set herself up in an establishment commensurate with the standard of life to which she had been accustomed while living with her husband. There was some disagreement what the appropriate lump sum should be. The registrar started by awarding D £10,000. The judge on appeal thought that £15,000 was the appropriate figure; but this court raised that figure still further to £25,000. I do not think that we need concern ourselves in this case with any consideration of figures such as that; but when the case came to this court we had to consider on what sort of principle lump sum payments ought to be made. That was, of course, the first case in which the matter had been raised in this court. I am reported as saying (3):

E “As a practical matter, it is clear that an order for a lump sum payment can only properly be made against a husband possessed of sufficient capital assets to justify it. It is not to be expected, therefore, that the question is likely to arise except in relatively rare cases”.

I do not feel at all repentant about that: I think that is right. It can only be in relatively rare cases that the question is likely to arise.

F It is said, however, that this is just such an exceptional case, although, it is readily conceded, on grounds quite different from those which appealed to the court in *Davis v. Davis* (2). What is said is that this husband has deliberately elected to sacrifice something of the order of £400 a year of his annual income in order to raise a sum of capital which has in fact been raised, namely, £5,500 odd. In so far as he voluntarily reduced his income he voluntarily reduced the sources out of which he could be expected to pay annual maintenance to the wife. It is clear that he should not be allowed to take advantage of that voluntary act on his part in order to reduce the over-all maintenance which he ought to pay to his wife; but what is further said is that in this case, owing to the fact that the wife has been living in relative poverty since the separation took place, the house in which she is living has got into a bad state of repair and needs a good deal of repair and renovation. Thanks to the discovery on the court file of what would appear to be the judge's notes, it would seem that his figure of £1,750 was arrived at on the basis that £1,250 would be required for the purpose of enabling the wife to pay off the outstanding mortgages on her house, and the round figure of £500 was suggested as being an appropriate amount to put the house into a proper state of repair. If that were done, the wife would then have, all to herself, a house in good repair and totally free from encumbrances.

I It is said, however, on behalf of the husband that this is not an exceptional case such as was contemplated in *Davis v. Davis* (2). It is pointed out that we are dealing here with people who, by comparison with the parties in that case, are in relatively humble circumstances: the capital sum which the husband has

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(2) [1967] 1 All E.R. 123; [1967] P. 185.

(3) [1967] 1 All E.R. at p. 126; [1967] P. at p. 192.

made available to himself, and which (as I have said) he wants to use to pay off his own mortgage and renovate his own house, is of a relatively small amount, and not such as to justify the making of a lump sum payment in pursuance of s. 20 of the Act of 1965. Furthermore, it is said on behalf of the husband that, even without the lump sum payment which the judge thought right to order, this wife has in fact been very generously treated from the point of view of annual maintenance. Approaching the case on the basis that the husband had not commuted half his pension so as to raise capital, but had continued to receive his full pension in addition to his salary, we should then be dealing with a man whose total income was of the order of £2,850. In addition to that, something, I suppose, ought to be added—but something relatively small—in respect of the annual value of his share of the equity of redemption in his own house. The wife has no income of her own; but, as I have already said, the annual value of her interest in her own house is probably of the order of £250 a year, which would bring the joint income to somewhere between £3,100 and £3,200. In those circumstances, although, as this court, and indeed every other court, has consistently said over the years, there is no such thing as a “one-third rule”, it would not have been unreasonable to expect—leaving aside any question of lump sum payment—that the wife should have something of the order of £1,000 a year or a little more. She is already receiving, or notionally receiving, £250 a year, the value of the house she lives in; and in those circumstances, especially bearing in mind that the husband, in addition to supporting his wife, has got to find £360 a year to support and educate his children, there is some justification for saying that the award of £800 a year to the wife would be a generous award. If so, it is said, there ought not to be any lump sum payment in addition, and certainly not a lump sum payment of the order of £1,750. A B C D E

I think that the argument on behalf of the wife is well-founded in so far as reliance is placed on the fact of the husband having deliberately and voluntarily sacrificed part of his income in order to raise capital. I accept the argument that to that extent this case is an exceptional case, in which the question of payment of a lump sum at least arises for consideration; but I also accept the argument for the husband that this wife, quite apart from the question of lump sum payment, has been not ungenerously treated in the order made by the court. I accept the argument that in the circumstances of this case there is no call for capital expenditure in order to pay off the relatively small outstanding mortgages: they do not involve the wife in any very considerable annual expenditure in order to pay the instalments; but it does remain the fact, as sworn to by the wife and not contradicted by the husband—no doubt he is in no position to contradict it—that the wife's house is in bad repair and needs some money spent on it. I recognise that it is something of a guess—but apparently a guess that the judge below was disposed to make—that £500 would be a reasonable sum to allow for that. If, in the event, that sum proves to be insufficient to do the repairs that ought to be done, I can only say that the wife has only herself to blame. It was open to her to furnish the court with particulars of what repairs are required and what the approximate cost might be; but, in all the circumstances of the case, I think that the wife does succeed in making good her claim to a lump sum payment to the extent of £500, which should put her in a position to do whatever repairs are necessary to bring the house up to the standard which she is entitled, in her position, to expect. I do not think, however, that there is any justification for making a lump sum payment going beyond that necessary capital expenditure. I have considered whether, in return for the £500 capital which is to be made available to the wife—which she will, of course, receive free of tax—any adjustment should be made in relation to the annual income which she is to receive; but I have come to the conclusion that any such adjustment would be so relatively trifling that it would not really be appropriate for this court to interfere with the order made by the judge below. F G H I

For those reasons, therefore, I would, as I said at the beginning, allow this



A appeal, reduce the lump sum payment from £1,750 to £500, and leave the order in relation to annual maintenance and the maintenance of the children undisturbed.

EDMUND DAVIES, L.J.: In *Davis v. Davis* (4) WILLMER, L.J., said:

B “As a practical matter, it is clear that an order for a lump sum payment can only properly be made against a husband possessed of sufficient capital assets to justify it. It is not to be expected, therefore, that the question is likely to arise except in relatively rare cases.”

C Counsel for the husband in the present case has urged that there is nothing in these circumstances that could possibly be described as “relatively rare”, and that, were this court now to approve of the award of a lump sum, of whatever amount, the doors would be opened to making lump sum orders a common feature in the general run of such cases as the present. In my judgment those observations are not well-founded. On the contrary, there is, as counsel for the wife observed, at least one quite unusual feature in the case now under consideration. I refer to the fact that the husband, by his own voluntary act of commuting his service pension, not only gained the capital sum of £5,517 but, in consequence, suffered a reduction of that pension from £825 to £413 per annum. The latter figure, when added to his present salary of £2,024, brings his annual income up to some £2,437. It was, I repeat, by his own act that his annual pension was halved, and, that act having operated to vest in him the capital sum already mentioned, to my way of thinking it is but justice that his wife should share to some degree in that capital sum, in the same way as the sum awarded, or to be awarded, to her by way of maintenance would have reached a higher figure, in all probability, had there been no such reduction in his pension.

E Having had the advantage of counsel's submissions, the doubt that has remained in my mind is not whether this is a proper case for the ordering of a lump sum payment under s. 20 (1) (a) of the Matrimonial Causes Act 1965, but rather what that lump sum payment should be. In all the circumstances, F and for the reasons already stated by WILLMER, L.J., I have come to the conclusion that £1,750 was substantially too much; but how far it should be reduced is a question not free from difficulty, and that largely because the evidence presented on behalf of the wife is, unfortunately, exiguous in certain respects. On the whole, I have, like WILLMER, L.J., come to the conclusion that the proper lump sum to be awarded here is about £500. I would accordingly allow G this appeal and vary the judge's order by substituting that sum for the £1,750 awarded the wife. I come to that conclusion the more readily because of my conviction that the order that the wife is to receive £800 per annum maintenance is one which might well be described as being not ungenerous.

H *Appeal allowed. Order below varied by substituting £500 for lump sum award of £1,750.*

Solicitors: *Signy & Co.* (for the husband); *Biscoe-Smith, Heather & Bellingier*, Portsmouth (for the wife).

[Reported by HENRY SUMMERFIELD, Esq., Barrister-at-Law.]

I

# MARLTON (an infant) AND ANOTHER v. LEE-LEVITEN AND ANOTHER.

[COURT OF APPEAL, CIVIL DIVISION (Lord Denning, M.R., Diplock and Sachs, L.JJ.), May 14, 15, 1968.]

*Practice—Want of prosecution—Dismissal of action—Delay—Inordinate delay without excuse—Personal injury to infant plaintiff—No defence on liability—Defendants paid £500 into court—No prejudice to defendants—Action not to be dismissed.*

At the end of August, 1961, the infant plaintiff, then ten years of age, received injuries in France as a passenger in a motor car driven by the second defendant. In September, 1963, a writ was issued on behalf of the infant plaintiff; in November, 1963, a defence was delivered. There was no real issue as to liability. In December, 1963, an order was made that the action should be set down within twenty-one days. The action was not set down. Medical reports were obtained and exchanged by the parties. At the end of April, 1966, the defendants had paid £500 into court. The plaintiff's solicitors, acting after advice from counsel, did not set down the action then for trial, but waited to see what effect the accident might have on the infant plaintiff when she started working in September, 1966. The action, however, was not set down after that time. In March, 1968, after a report of the decision in *Allen v. Sir Alfred McAlpine & Sons, Ltd.*\*, was published, the defendants applied that the action should be dismissed for want of prosecution. It was conceded that the delay was inordinate, if the facts as to time stood alone†.

**Held:** (i) (SACHS, L.J., not concurring) the delay was inexcusable (see p. 876, letters B and E, and p. 877, letter H, post; cf. p. 878, letters B and E, post).

(ii) the defendants had not, however, been prejudiced; and in the circumstances (having regard to the payment into court, and the fact that the action was almost sure to succeed, and to the plaintiff's infancy) the action would not be dismissed (see p. 876, letters D and I, and p. 878, letters F and I, post).

*Allen v. Sir Alfred McAlpine & Sons, Ltd.* ([1968] 1 All E.R. 543) applied.

[As to dismissal of actions for want of prosecution, see 30 HALSBURY'S LAWS (3rd Edn.) 410, 411, para. 771; and for cases on the subject, see 50 DIGEST (Repl.) 140-142, 1230-1238, 605, 2258; 663, 664, 2688-2698; 667, 668, 2717-2779; 970, 5051-5056.]

Cases referred to:

*Allen v. Sir Alfred McAlpine & Sons, Ltd.*, [1968] 1 All E.R. 543; [1968] 2 W.L.R. 366.

*Bullfa and Merthyr Dare Steam Collieries, (1891), Ltd. v. Pontypridd Waterworks Co.*, [1900-03] All E.R. Rep. 600; [1903] A.C. 426; 72 L.J.K.B. 805; 85 L.T. 280; 11 Digest (Repl.) 136, 199.

## Interlocutory Appeal.

This was an appeal by the infant plaintiff to set aside an order made by MILMO, J., dated Apr. 5, 1968, that the plaintiff's action be dismissed for want of prosecution and for the payment out of court of a sum of £500 to the defendants' solicitors without further authority. The order of Apr. 5, 1968, was made on the allowance of an appeal by the defendants from an order of Mr. District Registrar LAWTON made on Mar. 27, 1968, giving the infant plaintiff leave to set the action down for trial out of time, and dismissing the defendants' application to dismiss the infant plaintiff's action for want of prosecution. The grounds of appeal stated in the notice of appeal dated Apr. 17, 1968, included (i) that the

\* [1968] 1 All E.R. 543.

† See p. 877, letter F, post.

A next friend and advisers of the infant plaintiff were not guilty of such delay as justified the dismissal of the action after the cause of action, which accrued on Aug. 31, 1961, had become barred by the Limitation Acts; (ii) that the delay was excusable in that it arose from a desire to determine the true extent of the injuries of the infant plaintiff and the consequences thereof; and (iii) that the delay was not such as to prejudice the defendants, as there was no real issue as to their liability to compensate the infant plaintiff. The facts are set out in the judgment of LORD DENNING, M.R.

*R. B. Gibson, Q.C., Quintin Edwards and Shelagh Morgan* for the plaintiff.

*John D. Stocker, Q.C., and J. R. Pickering* for the defendants.

C LORD DENNING, M.R.: As long ago as Aug. 31, 1961, the first defendant, a Mrs. Lee-Leviten, was driving a motor car in France on a road towards Nice. She had a carload of children with her. It appears that a car came towards her on its wrong side of the road. She pulled to one side and the car hit a tree. Many of the occupants were injured and they brought claims against the first defendant and the second defendant, her husband, who was the owner of the car. Some of those claims were settled, but one of them, the claim of a child, D Ann Marlton, ten years of age, was not settled. On Sept. 16, 1963, the infant plaintiff, by her mother as her next friend, issued a writ claiming damages for negligence against the defendants, Mrs. Lee-Leviten and her husband. The statement of claim was in the ordinary form. The claim was that the infant plaintiff had suffered injuries; that she had a cut to her upper lip and to her left knee, that her teeth were damaged, and there was also a suggestion that E she might have had a fracture of one of the vertebrae which caused her pain. The statement of claim was delivered on Sept. 23, 1963: and the defence was delivered on Nov. 6, 1963. On Dec. 9, 1963, there was an order for directions, saying that the action was to be set down within twenty-one days. The plaintiffs never did set it down. Medical examinations were held and medical reports were exchanged between the parties. The plaintiffs obtained the report of a consultant, Mr. Burwell, in June, 1963, but never got any other report from the consultant for nearly five years. Meanwhile, the defendants obtained the reports of a consultant, Mr. Lamont, over a longer period. They made a payment into court on Dec. 21, 1965, of £250. In January of 1966 the defendants received another report of their medical adviser. Soon afterwards, on Apr. 1, 1966, they increased the payment into court by £250, making a total of £500 paid into court F on Apr. 1, 1966. At that time at least one would have thought that the plaintiffs' advisers would have had a further medical report to see whether or not that sum should be accepted; but they did not do so. They did not take out the sum. Nor did they set the action down for trial. Their legal executive gives this explanation:

H "I considered it advisable to delay the trial of this matter in order that the infant plaintiff could give an accurate account of how she was affected by the injuries she sustained, as in my opinion until she commenced work it was impossible for anyone to attempt to assess whether she would have any trouble from her shoulder . . . After discussions with the mother of the infant plaintiff and counsel, I decided that in all the circumstances it would not be in the best interests of the infant plaintiff to set this action down I for trial until after she had commenced work and I had had an opportunity to see how work was affecting her."

The infant plaintiff started work in September, 1966, but still they did not set down the action for trial. Still they did not get a report from the consultant. They waited until February, 1968, before they asked Dr. Burwell to give another report (five years after his previous report); but before he gave it, the defendants took out a summons to dismiss the case for want of prosecution. The judge has dismissed it. Now there is an appeal to this court.



There are two questions: *First*: were the plaintiff's solicitors guilty of prolonged and inexcusable delay? *Secondly*: have the defendants been seriously prejudiced by the delay?

As to the first point: This was a simple and uncomplicated case. The injuries were not serious. There was no reason to wait to see whether there were hidden troubles which might reveal themselves. The worst complaint was bedwetting, but the infant plaintiff got over it two or three years ago. The plaintiff's advisers were gravely at fault. They could and should have got on with the case years before. Their delay was both prolonged and inexcusable.

The second question is whether the defendants have been seriously prejudiced by the delay. On the issue of liability, I do not think that there was any prejudice. Here a car ran off the road and hit a tree. It would be very difficult for the defendants to show (and I think the burden would be on them to show) that there was no negligence at all on the part of the driver. In any event, I think that they can contest it now as well as they could have done six years ago. Then as to damages. I do not see that they have been prejudiced. They have available the reports of their consultant—far more complete—than those of the plaintiff. In addition, I am much influenced by the fact that the defendants have already paid into court £500. They must have been able to assess the damages at that time. In addition, the plaintiff is a child. In all the circumstances, I do not think it would be right to dismiss the case for want of prosecution; but it should be set down forthwith. We are told that it can come on at the Leeds Assizes in two or three weeks. That is what ought to be done. I would allow the appeal accordingly.

**DIPLOCK, L.J.:** I agree. The delay between the start of this case by writ in September, 1963, and this month of May, 1968, in a simple running down action, is quite inexcusable. It seems to me that there are two relevant periods in that time. The first was between the order for directions of Dec. 9, 1963, and the notice to proceed given in November, 1965. It would be understandable perhaps since the infant plaintiff had some symptoms which had not cleared up, to wait some time for a further medical report; but in point of fact, as LORD DENNING, M.R., has pointed out, no attempt was made to get any medical report even from a general practitioner between a period before the writ was issued and Nov. 20, 1965.

The other period of delay, which seems to me to be inexcusable, is the period of delay between the payment into court and the present day or rather the month of March, 1968. Again, at that time, which was April, 1966, it was known that the infant plaintiff's symptoms of enuresis according to the medical report obtained two years' later had already disappeared. It was also known that the infant plaintiff would be starting work in the autumn of 1966, and their legal executive in his affidavit said he thought that it would be wise to see how the infant plaintiff settled down to work. It may be that it was excusable to wait to see that; but, having seen that well before the end of 1966, not a step was taken in this action or by way of getting any medical report until February, 1968, when a further report was asked for.

In my view if the defendants could have established that they had suffered any prejudice by that delay, it would have certainly entitled them to have the action struck out for want of prosecution. I agree, however, with LORD DENNING, M.R., that in the particular circumstances of this case the action is in fact really no more difficult to try in 1968 than it would have been had the action proceeded with proper despatch. Furthermore, the payment into court, quite apart from protecting the infant plaintiff, gave the defendants fairly obvious notice that the action was not one that the plaintiff intended to abandon. Plaintiffs do not normally abandon actions leaving £500 in court. I do not say that there may not be such delay after a payment into court as to entitle a defendant who has made it to have an action dismissed for want of prosecution

A and possibly payment out again, but I think that he has to show a great deal of prejudice; the defendants have not done so in this case and I agree with LORD DENNING, M.R., that this appeal should be allowed. The question of costs, will, of course, have to be considered afterwards.

B SACHS, L.J.: This is one of the stream of cases which has followed from this court's decision in *Allen v. Sir Alfred McAlpine & Sons, Ltd.* (1) on Jan. 11, 1968. So far as has been ascertained today, the first report giving in full the reasons of the members of the court was on Feb. 27, in the ALL ENGLAND LAW REPORTS. This application was launched on Mar. 7, and it is to be noted that a month before the application, that is to say, on Feb. 8, there had been a request by the plaintiff's solicitors to their doctor to make a further examination. Had this been completed in the ensuing three or four weeks, it would obviously have led them to take appropriate action. In fact, unfortunately the examination only took place on Mar. 5, two days before the summons.

C In such cases as the present, the court, of course, must always watch anxiously to see that nothing is done contrary to the justice of the case, and that anxiety is reinforced in this particular case by some special factors. First of all, D the plaintiff is an infant who was ten years old at the time of the accident and of whom no-one could say that she was in any way to blame for the course of the proceedings. Secondly, it is an action in which it would probably be a meiosis to say that the chances of success were ninety-five per cent. (they might well have been ninety-nine per cent.) and the plaintiff's solicitors would be well justified in assuming that there was no real contest as to liability, especially as E it is undisputed that the settlements with regard to three other youngsters injured by the accident were on a basis of full liability. Thirdly—and this is an important factor—£500 had been paid into court, and, as has been pointed out, it would be strange if any plaintiff simply abandoned an action when there was £500 there to be taken out.

F From those special factors (to which I will later refer further) I turn to the principles applied in *Allen v. Sir Alfred McAlpine & Sons, Ltd.* (1) and thus look at the judgment of SALMON, L.J. (2). There he set out what has to be considered in this class of case. He said that before such an application can succeed the defendant must show, first, that there has been inordinate delay: and that has been conceded by counsel for the plaintiffs—if the facts in relation to time stood alone. Secondly, that that inordinate delay is inexcusable. Here, however, the infant G plaintiff's legal advisers, in her interests and bona fide—for that is not contested—took the view that it would be wrong in all the circumstances to bring the case to trial before April, 1966, having regard to the state of affairs existing when the second payment into court was made that month. How right they were not to proceed earlier is shown by that very payment. As regards what happened afterwards, it does not appear to be contested that, having regard to the situation H as a whole and to the fact that the solicitor consulted counsel, it was wrong to let the matter go on for some period after April, 1966, without taking out the payment in and with a view to seeing what would be the final upshot of the injuries in so far as neurosis was concerned. In that behalf one notes in the report tendered to them by the defendants that immediately before the second payment in some of the sequelae were, in the opinion of the defendants' doctor, I due to psychogenis overlay. How long such an overlay will take to clear up is a matter of medical opinion, and medical opinion, in the experience that has come from trying many cases, is not always right. It may be inaccurate by quite a large measure.

In those circumstances, it seems to me, and I think it so seems to the other members of the court, that to continue without bringing the matter to finality for some time after April, 1966, was reasonable. Indeed, the only question seems to be

(1) [1968] 1 All E.R. 543.

(2) [1968] 1 All E.R. at p. 561.

as to whether it was unreasonable so to continue in relation to a period of, when one works it out, not much more than a year and possibly less than a year before the date on which this summons was taken out. It may well be that many of those concerned with similar cases would have taken out the £500 or brought the action to trial shortly after the second payment in: and I am prepared to agree that in the latter part of the period before Mar. 7, 1968, it was wrong not to bring the action to trial in all the circumstances. I am not prepared to agree, however, that it was inexcusable in the sense that no reasonable solicitor acting in the interests of his client would have taken the course, which in fact was taken: for one should remember firstly that in fact it was an undefended case with regard to liability, secondly, that there would be no detriment to the defendants in letting the matter go on, and, thirdly, that this was an infant whose money would have to remain in court anyway.

It seems to me that one may well remember in some such cases the approach which (in another context and in words which I have paraphrased) was adumbrated by LORD MACNAGHTEN in a wholly different class of case: *Bullfa and Merthyr Dare Steam Collieries (1891), Ltd. v. Pontypridd Waterworks Co.* (3). It may be asked why the court should be made to listen to conjecture on a matter which can become an accomplished fact. Why should the court be asked to guess when it can calculate? Why, with the light before it, should the court be made to grope in the dark? In matters of neurosis there is something to be said for that point of view when children are concerned, although obviously such an approach cannot be carried to extremes, and often does not apply at all where adults (who tend to recover when damages have been assessed) are concerned. In these circumstances, it does not seem to me that, even if the delay was wrong, it was really inexcusable.

As regards the third point made by SALMON, L.J. (4) as a condition precedent to an application of this kind succeeding, one comes to the question of serious prejudice with regard to the defence. On this point I have nothing to add to what has fallen from LORD DENNING, M.R., save to mention that it has been expressly disclaimed by counsel for the defendants that his solicitors were in any way misled.

Finally, one comes to the last factor which SALMON, L.J., mentioned. It is this: he said (4):

“If the defendant establishes the three factors to which I have referred, the court, in exercising its discretion, must take into consideration the position of the plaintiff himself and strike a balance.”

That means, in other words, that one must look at the justice of the case as a whole. Here we have those special factors already mentioned: an infant plaintiff; chances of success at least ninety-five per cent.; a solicitor shaping his course bona fide with the help and advice of counsel; and in addition a set of circumstances such that, to my mind, at any rate, if the solicitor is sued for negligence, the chances of success would be far from strong—having regard, *inter alia*, to the fact that his conduct might well have to be judged in the light of what was the state of practice and procedure before Jan. 11, 1968. The courts should be slow to open themselves to any charge of in effect applying some retrospective legislation against solicitors.

In all those circumstances, it seems to me that this is clearly not a case in which the judge's order can be upheld. To my mind, the defendants, having sought to take advantage of the decision of this court in *Allen's* case (5) and having failed before the registrar, should not have appealed and should not have

(3) [1900-03] All E.R. Rep. 600 at p. 603; [1903] A.C. 426 at p. 431.

(4) [1968] 1 All E.R. at p. 561.

(5) [1968] 1 All E.R. 543.



A continued to seek to elicit from the coffers of the court the £500 which had been paid in. Thus to my mind the registrar's order should be restored.

*Appeal allowed. Order of the registrar restored. Action to be set down forthwith.*

Solicitors: *Lovell, White & King*, agents for *Saffman & Co.*, Leeds (for the plaintiff); *Lawrence, Graham & Co.* (for the defendants).

B [Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

## ABBOTT LABORATORIES, LTD. v. CARMODY (Inspector of Taxes).

C [CHANCERY DIVISION (Goff, J.), March 15, 1968.]

*Income Tax—Allowance—Industrial building or structure—New factory comprising distinct blocks of buildings—Blocks connected by internal roads, etc.—Administrative block excluded from initial allowances, being regarded as an office if taken alone—All buildings viewed collectively found not to be a single industrial building or structure—Question of fact for commissioners—Income Tax Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 10), s. 271 (3), (4).*

D The taxpayers erected a modern factory on a site of fifty-three acres, surrounded by a ring fence, for the purposes of their business as manufacturers of pharmaceutical products. The factory buildings included a chemical block, which was situated at some distance from the other buildings because of the smell and risk of fire, a pharmaceutical block, a maintenance block and an administration block. The maintenance block was connected to the other blocks by pipes and roadways, the chemical and pharmaceutical blocks were similarly connected, internal roads connected all the blocks, a boiler room served all the blocks, and the administration block was twenty-five yards from the pharmaceutical block and was connected to it by a covered passage-way open on one side to the weather. The administration block housed the accounts department, the managing director's office, the advertising and printing department, the scientific directors and the marketing organisation and personnel; considered in isolation it was in use as an office and thus would be excluded by s. 271 (3)\* of the Income Tax Act, 1952, from being an industrial building or structure which might qualify for initial allowances under s. 265. The whole factory area was assessed as a single unit for rating and was formerly so assessed for Sch. A tax. Less than one-tenth of the cost of constructing the whole factory unit had been incurred in constructing the administration block, which accordingly would qualify for inclusion under s. 271 (4) as part of the whole, if the whole were to be regarded as an industrial building or structure. Allowance pursuant to s. 265 of the Income Tax Act, 1952, was refused in respect of the cost of the administration block. On appeal against this refusal, the appeal was argued† on the basis that the collection of buildings were capable in law of being, as a whole, an industrial building or structure within s. 271. The question was then remitted to the Special Commissioners (on the footing that if the lay-out of the buildings was not in law incapable of being an "industrial building or structure" within s. 271) whether the whole premises were such an industrial building or structure. The commissioners then found that they were not, because the administration block was not sufficiently physically integrated with the other structural units within the lay-out.

I **Held:** the question whether (on the legal basis remitted to the commissioners) the premises as a whole were an industrial building or structure

\* Section 271 (3), so far as material, is set out at p. 881, letter D, post.

† The contentions are set out at p. 882, letters E to H, post.

for the purposes of s. 271 of the Income Tax Act, 1952, was a question of fact and degree, and, as the commissioners' decision was one which could reasonably have been reached, it should stand; accordingly the taxpayers were not entitled to capital allowances for the cost of construction of the administration block (see p. 884, letter D, p. 884, letter I, to p. 885, letter A, p. 885, letter G, post).

Dictum of DONOVAN, J., in *Phillips (Inspector of Taxes) v. Whieldon Sanitary Potteries, Ltd.* ((1952), 33 Tax Cas. at p. 219) applied.

Appeal dismissed.

[**Editorial Note.** It appears that the practice of the Inland Revenue is that individual buildings, though forming in some respects a single factory, should be considered separately and cannot in law be regarded as a single unit. This view is contrary to the hypothesis on which the matter was remitted to the commissioners in the present appeal. GOFF, J., ruled that the point of construction was not open to determination in the present appeal, but he expressly intimated that it would be open to determination in a future case (see p. 884, letter B, post).]

As to buildings not qualifying for capital allowances in respect of industrial buildings for income tax purposes, see 20 HALSBURY'S LAWS (3rd Edn.) 484, 485, paras. 921, 922; and for cases on the subject, see 28 DIGEST (Repl.) 115-124, 431-480.

For the Income Tax Act, 1952, s. 271 (3), (4), see 31 HALSBURY'S STATUTES (2nd Edn.) 265.]

Cases referred to:

*Edwards (Inspector of Taxes) v. Bairstow*, [1955] 3 All E.R. 48; [1956] A.C. 14; [1955] 3 W.L.R. 410; 36 Tax Cas. 207; 28 Digest (Repl.) 396, 1753.

*Jones (Samuel) & Co. (Devondale), Ltd. v. Inland Revenue Comrs., Inland Revenue Comrs. v. Samuel Jones & Co. (Devondale), Ltd.*, (1951), 32 Tax Cas. 513; 28 Digest (Repl.) 123, 475.

*O'Grady (Inspector of Taxes) v. Bullcroft Main Collieries, Ltd., O'Grady (Inspector of Taxes) v. Markham Main Collieries, Ltd.*, (1932), 17 Tax Cas. 93; 28 Digest (Repl.) 116, 445.

*Phillips (Inspector of Taxes) v. Whieldon Sanitary Potteries, Ltd.*, (1952), 33 Tax Cas. 213; 28 Digest (Repl.) 109, 410.

### Case Stated.

The taxpayers appealed to the Special Commissioners of Income Tax against an assessment to income tax made on them under Sch. D to the Income Tax Act, 1952, for 1962-63 in the sum of £400,000. The grounds of appeal were\*, so far as material, that in charging the profits or gains of the taxpayers' trade or business capital allowances under the provisions of Part 10 of the Act of 1952 in respect of their factory site in Queenborough, Kent, did not fall to be reduced by excluding expenditure on the construction of one block of the building within the factory area, viz., an administration block. The taxpayers appealed by way of Case Stated to the High Court; the relevant passages from the Case Stated are set out at p. 881, letter G, et seq., post.

*Heyworth Talbot, Q.C.*, and *Peter Rees* for the taxpayer.

*Desmond C. Miller, Q.C.*, and *J. R. Phillips* for the Crown.

**GOFF, J.:** The appellant taxpayers, Abbott Laboratories, Ltd., bought a site at Queenborough in Kent in 1959 which was a substantial piece of land, fifty-three acres in extent, and thereon erected a modern factory for the purposes of their business as manufacturers of pharmaceutical products. Various parts of the whole were erected in blocks some of which, partly because of the extent of the intervening blocks and one, the chemical block, by reason of its nature, were situated at substantial distances from each other. There were, however, properly made-up roads connecting the various blocks, all were served by a

\* The case was remitted for the reason stated at p. 883, letter F, post.

A common heating system, which involved physical connexion by pipes, and the administrative block, with which this case is directly concerned, is physically connected with the pharmaceutical block by a covered passage way. At the time of the hearing before the Special Commissioners one side of that was open to the air, though it appears from the photographs that it has since been closed in. The whole was contained within a ring fence and was assessed as one unit for rating purposes and, whilst Sch. A tax was in force, for the purpose of that tax also.

The problem arose because in assessing the taxpayers to income tax the Crown declined to make an allowance under s. 265 of the Income Tax Act, 1952, so far as concerned the administrative block. Now that block, as its name implies, was used in part as offices for various purposes and it cost some £92,000 to erect. The whole project involved an expenditure of nearly £1¼ million. Section 271 of the Income Tax Act, 1952 provides by sub-s. (3) that:

“Notwithstanding anything in sub-s. (1) or sub-s. (2) of this section, but subject to the provisions of sub-s. (4) of this section, ‘industrial building or structure’ does not include any building or structure in use as, or as part of, a dwelling-house, retail shop, showroom, hotel or office or for any purpose ancillary to the purposes of a dwelling-house, retail shop, showroom, hotel or office . . .”

Subsection (4) enacts that:

“Where part of the whole of a building or structure is, and part thereof is not, an industrial building or structure, and the capital expenditure which has been incurred on the construction of the second mentioned part is not more than one-tenth of the total capital expenditure which has been incurred on the construction of the whole building or structure, the whole building or structure and every part thereof shall be treated as an industrial building or structure.”

It is obvious, of one looks at the total of the buildings which make up this factory including, of course, the administrative block itself, that the cost of that block is sufficiently low to bring the provisions of sub-s. (4) into operation and to entitle the taxpayers to their allowance in respect of that block as well as the rest, but if one looks at it separately then it does not qualify for an allowance. In that state of affairs the taxpayers appealed in 1966 to the Special Commissioners of Income Tax who dismissed the appeal and the taxpayers then appealed further to this court by way of Case Stated. That Case, to which I must now refer, stated in para. 1 (b):

“that in charging the profits or gains of the trade or business of the [taxpayers], capital allowances under the provisions of Part 10, Income Tax Act, 1952 [and the sections to which I have referred are in that part] in respect of the factory site of the [taxpayers] in Queenborough in the county of Kent did not fall to be restricted by reference to one building block in use as an administration office, as hereinafter appeareth.”

After stating the names of the witnesses who had been called and referring to the documents, including a plan and photographs which have been produced to me, the commissioners found certain facts which they set out in para. 3 and which, so far as material, are as follows. They refer to the purchase of the site and state that the taxpayers had erected a modern factory.

“The factory buildings comprised, inter alia, a chemical block, a pharmaceutical block, a maintenance block and an administrative block, the whole factory site being surrounded by a fence. The chemical block was situated at some distance from the other buildings because of the smell and the risk of fire.”

The pharmaceutical block was divided into five parts.



"The administration block housed the accounts department, the managing director's office, the advertising and printing department, the scientific directors and the marketing organisation and personnel. The total area of the block extended to 13,780 square feet..."

The Case Stated then included an estimate of that part of the building which was used by personnel connected with production, and after which it continued:

"The [taxpayers] admitted [and so the findings state] that if the administration block was considered in isolation it was used as an office within the meaning of s. 271 (3), Income Tax Act, 1952."

Then the Case Stated continued:

"The maintenance block was connected to the other blocks by pipes and roadways and the chemical and pharmaceutical blocks were similarly connected. There was a boiler house which serves all the blocks on the site. The administration block was at a distance of twenty-five yards from the pharmaceutical block and connected thereto by a covered passage way which was open on one side to the weather. Internal service roads connected all the blocks on the site and it was admitted on behalf of the [Crown] that the cost of these and of the fence around the factory unit was a proper subject matter for capital allowances."

Then the Case Stated finds that assessments for rating and for Sch. A tax were each made on the whole factory and land in one sum (1). The Case Stated then set out the respective cost which I have already mentioned (2) and continued:

"4. It was contended on behalf of the [taxpayers]:

"(i) that the whole of the [taxpayers'] factory at Queenborough including the administration block hereinbefore referred to was a unitary assemblage of buildings or structures and constituted one building or structure for the purposes of ch. 1 of Part 10 of the Income Tax Act 1952; (ii) that by virtue of s. 1 (i) of the Interpretation Act, 1889, and since no contrary intention appears the words 'industrial building or structure' in ch. 1 of Part 10 of the Income Tax Act, 1952, should be regarded as including the plural [it appears from the argument that that is not a separate point in itself but merely something in aid of the first submission]; (iii) that an allowance under Part 10, Income Tax Act, 1952, ought to be made to the [taxpayers] in charging the profits or gains relevant to the assessment under appeal by reference to the total expenditure on the said factory and that no deduction fell to be made in respect of the administration block."

"5. It was contended on behalf of the [Crown]:

"(i) that the administration block situated on the [taxpayers'] factory site at Queenborough was a separate building or structure within the meaning of s. 265, Income Tax Act, 1952;

"(ii) that in charging to income tax the profits or gains of the [taxpayers'] trade or business relative to the assessment under appeal no allowance fell to be made... in respect of the cost of the said administration block by reason of the provisions of s. 271 (3), Income Tax Act, 1952."

In para. 6 of the Case Stated the commissioners stated that they gave their decision "in principle in writing in the following terms", and, after a paragraph which I need not read, they continued:

"The factory of the [taxpayers], which occupies a site of some fifty-three acres, was designed as a whole to suit the requirements of the [taxpayers']

(1) The date Dec. 1, 1961, was agreed as the date when occupation commenced, and the assessments ran from that date.

(2) The inclusive cost of the entire factory, roadways and boundary fence, but not the cost of the land, plant or machinery, was £1,222,625; and the cost of the administration block was £92,255. The taxpayers received a government grant of £100,000 in connexion with the erection of the factory.

A trade as a manufacturer of pharmaceutical products and was erected in 1960-61 at a cost of £1,222,625, of which amount £92,255 can be attributed to the erection of the administrative block. Section 271 (3), Income Tax Act, 1952, provides that the expression 'building or structure' as used in Part 10 of the Income Tax Act, 1952, does not include any building or structure in use as an office and prima facie the administrative block of the [taxpayers'] factory would not appear to qualify for any allowance. It is said, however, that had the factory been constructed vertically, the whole of the cost including that of the administrative block would have qualified for an allowance, by reason of the provisions of s. 271 (4), the cost of the administrative block being admittedly less than one-tenth of the whole, and that upon a true construction of s. 265 (1) read in conjunction with s. 271 (4) the mere circumstance that this particular factory had been constructed horizontally for reasons of safety and convenience should not lead to a contrary result.

B "We are unable to take this view. In our opinion the provisions of s. 265 (1), which refer to 'a building or structure' and, by inference, the plural 'buildings or structures' are not apt to apply to an extensive factory site, so that it falls to be treated as one unit for the purposes of an allowance under Part 10, Income Tax Act, 1952. Nor do we think that the provisions of s. 271 (4), which prima facie appear to be merely concessionary compel us to take that view."

D When the case had proceeded before me for some time—and I think it had got as far as the Crown's case—it appeared that it would not be satisfactory to proceed to a decision on the case as it stood because the use of the expression "not apt to apply to an extensive factory site" indicated that the commissioners were or might have been proceeding on the basis that as a matter of law an extensive site with a number of blocks on it could not be "a building or structure" within the meaning of this part of the Income Tax Act, 1952. Therefore after some discussion I made an order remitting the case to the commissioners which embodied a formula agreed between the parties. By that order, which was made on Nov. 21, 1966, the Case was remitted to the commissioners for them to decide on the footing that the lay-out of buildings in the case was not in law incapable of being an industrial building or structure within Part 10 of the Act of 1952, whether the whole of the premises were an industrial building or structure and if so or if not for what reasons. For the purposes of making such a decision the commissioners were to hear further argument if so desired by the parties. The commissioners duly heard further argument and they have submitted a report in the form of a Supplemental Case in which they state that they have had before them my order and that they had met in accordance with the order and at the request of the parties had heard further argument. They say:

H "3. On consideration of the said order of the High Court of Justice and the arguments addressed to us and the case cited to us, viz., *Phillips (Inspector of Taxes) v. Whieldon Sanitary Potteries, Ltd.* (3), we find that, on the footing that the lay-out of buildings in the instant Case is not in law incapable of being 'an industrial building or structure' within Part 10 of the Income Tax Act, 1952, the whole premises are not an industrial building or structure.

I "4. Our reasons for this decision are that, even though the said lay-out of buildings was planned and built as a whole to suit the requirements of the [taxpayers'] trade and was in use for the purposes of that trade, the administrative block was not sufficiently physically integrated with the other structural units within the lay-out. These various units including the administrative block appear to us to be separate entities, though sharing

the facilities provided by a common boiler house and connected by made up roads and pathways, and not to constitute one building or structure. We find support for this view by analogy with the case of *Phillips (Inspector of Taxes) v. Whieldon Sanitary Potteries, Ltd.* (4).”

During the hearing it emerged that the Crown, as a matter of practice in cases of this sort, regard the buildings separately and they desired to submit as a matter of law on the construction of the sections canvassed in this case, that the matter has to be dealt with in that way, which, as I gather, means that premises consisting of individual blocks, though forming in some respects a single factory or other form of industrial premises, cannot in law be regarded as a single unit, contrary to the hypothesis on which my order of remitter was made. After some discussion I ruled that that was a new point and that notice that it would be raised not having been given it was not open to the Crown to take that point in this case, but of course that ruling is without prejudice to anything which may be submitted or argued in any other case with comparable facts.

I have, therefore, to decide this case on the basis on which it was argued and on which the order of remitter was framed, that this collection of buildings is capable of being a building or structure within s. 271 of the Act of 1952. It seems to me that I have not got a question of construction or law as to the meaning of the Act of 1952 but a question of fact and in this respect what was said by DONOVAN, J., in the case which I have already mentioned of *Phillips (Inspector of Taxes) v. Whieldon Sanitary Potteries, Ltd.* (4) is material. Reviewing certain earlier cases where a chimney stack had been rebuilt and the question was whether that was a repair of the building which it served or was a capital expenditure on a new chimney, DONOVAN, J., referred to and quoted, as I gather with approval, what ROWLATT, J., had said in one of those cases, *O’Grady (Inspector of Taxes) v. Bullcroft Main Collieries, Ltd.* (5), to this effect (6): “The critical matter is . . . what is the entirety? I think it is very largely a question of degree.” Then in his own language deciding the point before him, which admittedly was on a different provision of the Income Tax Acts, he said this (7):

“These examples illustrate what I think is the truth, that there is no one line of approach to the problem which is exclusively correct. In some cases it will be right to regard the premises as the entire factory, and in others as some part of the factory. Whichever alternative is the right one to adopt will depend on the facts of the particular case. ROWLATT, J., took the view in the *O’Grady* case (8) that he must regard the chimney itself as the premises, or, as he described it, the ‘entirety’ and I would respectfully agree with him. The Court of Session took the view in the case of *Samuel Jones & Co. (Devon-dale), Ltd. v. Inland Revenue Comrs.* (9) that the whole factory must be regarded as the premises. The difference thus exhibited is not a difference of law, but of the right conclusion of fact to be drawn in particular instances.”

Whilst, as I have said, that was on a different provision it seems to me that the principle there laid down is applicable to this case.

That in passing disposes of one objection taken by counsel for the taxpayers, where the commissioners said that they derive support for their view by analogy with *Phillips (Inspector of Taxes) v. Whieldon Sanitary Potteries, Ltd.* (4). Counsel submitted that that showed that they had misdirected themselves but I do not accept that view. Having reached the conclusion that it is a question of fact and degree, I am bound by the findings of the commissioners unless it

(4) (1952), 33 Tax Cas. 213.

(5) (1932), 17 Tax Cas. 93 at p. 102.

(6) (1952), 33 Tax Cas. at p. 217.

(7) (1952), 33 Tax Cas. at p. 219.

(8) (1932), 17 Tax Cas. 93.

(9) (1951), 32 Tax Cas. 513.



A appears that they have misdirected themselves in law or reached a conclusion which no reasonable tribunal could reach in the circumstances. That is clearly stated in the oft cited passage in the speech of LORD RADCLIFFE in *Edwards v. (Inspector of Taxes) v. Bairstow* (10).

B In addition to the point of law of which I have already disposed, counsel for the taxpayers said that it appeared that the commissioners had misdirected themselves in law because, after stating that the administrative block was not sufficiently physically integrated with the other structural units within the whole, they went on to say: "These various units including the administrative block appear to us to be separate entities." Counsel submits that that is a misapprehension and says that they did not appreciate what they had to decide and that they seemed to be regarding the matter as concluded if they saw the administrative block as a separate entity, and they seemed to think that it followed from that that the whole could not be regarded as a separate building or structure. I do not think that that is a tenable view having regard to the fact that they were dealing with an order which expressly required them to assume that the whole was capable of being an industrial building or structure within the meaning of the Act and they expressly stated that they were dealing with the matter on that footing in para. 3 of the Supplemental Case. I think the fair reading of the reference to "separate entities" was that it was a factor which they took into account in answering the question of fact which was before them.

C In the result I cannot see that the commissioners have misdirected themselves in law, and I therefore turn to the other aspect of the matter. Here it is not a question of what conclusion I myself would reach if I were trying the matter de novo, but whether I can say that this was an unreasonable conclusion which enables me to go behind the commissioners' finding of fact, and in my judgment I cannot reach that conclusion. Counsel for the taxpayers asked rhetorically, "What is the criteria by which one can see what is sufficient?" The answer to that appears to be what I have already referred to, that it is a question of degree and it was for the commissioners to weigh that question which they did.

D Counsel has stressed that there were main roads expressly designed to effect linkage between the several blocks, but that does not necessarily make all the units one building or structure, though obviously it promotes the convenience of the taxpayers in using their factory. Nor, again in my judgment, does the common heating system necessarily lead to the conclusion that all the blocks were one building or structure. As I have said, the question is not for me to determine the answer de novo but to review the commissioners' findings, as it has been said, with due respect for the tribunal and to ask myself, is this a conclusion which no reasonable tribunal could reach? I do that, and I answer my own question by saying it is one which a reasonable tribunal could reach and the tribunal, charged with the duty of deciding it, has reached that conclusion and it must therefore stand and for these reasons I dismiss the appeal.

H *Appeal dismissed.*

Solicitors: *Slaughter & May* (for the taxpayers); *Solicitor of Inland Revenue.*

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

I

**TEHERAN-EUROPE CO., LTD. v. S. T. BELTON  
(TRACTORS), LTD.**

[COURT OF APPEAL, CIVIL DIVISION (Lord Denning, M.R., Diplock and Sachs, L.JJ.), May 13, 14, 15, 1968.]

*Agent—Contract—Foreign undisclosed principal—Principal instructing English merchants to negotiate purchase of machines from English suppliers—Machines invoiced to English merchants—Whether privity of contract between English suppliers and foreign principal.*

*Sale of Goods—Implied condition of fitness—Particular purpose—Sale by description—Air compressors—Purpose of re-sale in Persia made known to seller—Buyers, a Persian company, undisclosed principals—Buyers relied on own skill and judgment—No warranty of fitness for re-sale in Persia implied—Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 13 (1), s. 14 (1).*

R., Ltd., an English company that were in fact acting as agents for the plaintiffs, a Persian company, negotiated the purchase of twelve air compressor units from the defendants, an English company, disclosing the fact that R., Ltd. were acting for clients but not identifying the clients. The sale was a sale by description, describing the machines as "new and unused". One such machine was in fact inspected by a representative of the Persian company in London. It was made known to R., Ltd. that the machines were required for re-sale in Persia. The goods were in due course invoiced to R., Ltd. The Persian company sued the defendants for damages for alleged breach of contract on the ground that the machines did not accord with description and were not fit for the purpose for which they were supplied, viz., re-sale in Persia. On appeal from a decision on a preliminary issue in the action,

**Held:** (i) the rule that an undisclosed (or unnamed) principal could sue on a contract made for him by his agent, unless the contract otherwise provided expressly or impliedly, applied to a foreign principal, and, though the fact that the principal was a foreigner was a factor to be taken into consideration in determining whether the contract in the circumstances excluded enforcement by or against the foreign principal, there was no business usage rendering the contract in the present case unenforceable at the instance of the Persian company; accordingly, as there was nothing to confine the contract on its true construction to R., Ltd., the Persian company had the ordinary right of undisclosed principals to sue on it (see p. 889, letters B and G, p. 892, letters A and H, p. 894, letters H and I, and p. 895, letter E, post).

Dictum of BLACKBURN, J. in *Elbinger Act. für Fabrication von Eisenbahn Materiel v. Claye* (1873), L.R. 8 Q.B. at p. 317) over-ruled.

(ii) the particular purpose of re-sale of the goods in Persia as new and unused machines had not been made known to the defendants in such a way as to show that the buyers relied on the defendants' skill and judgment and there was no presumption in the circumstances of the present case of such reliance, but the true inference was that the Persian company relied on their own skill and judgment in this respect; accordingly no warranty of fitness for re-sale in Persia was implied in the contract by virtue of s. 14 (1) of the Sale of Goods Act, 1893 (see p. 890, letters E and F, p. 893, letter H, p. 894, letters C and E, and p. 896, letter A, post).

*Manchester Liners, Ltd. v. Rea, Ltd.* ([1922] All E.R. Rep. 605) not followed.

Decision of DONALDSON, J. ([1968] 1 All E.R. 585) affirmed on (i), reversed on (ii), above.

[As to the presumption of absence of privity of contract with foreign principals, see 1 HALSBURY'S LAWS (3rd Edn.) 218, para. 496; and for cases on the subject, see 1 DIGEST (Repl.) 752, 2912, et seq.]

**A** As to the impermanence of trade usages, see 11 HALSBURY'S LAWS (3rd Edn.) 203, para. 377.

For the Sale of Goods Act, 1893, s. 14 (1), see 22 HALSBURY'S STATUTES (2nd Edn.) 993.]

Cases referred to:

**B** *Chanter v. Hopkins*, [1835-42] All E.R. Rep. 346; (1838), 4 M. & W. 399; 8 L.J.Ex. 14; 150 E.R. 1484; 39 Digest (Repl.) 550, 818.

*Elbinger Act. für Fabrication von Eisenbahn Materiel v. Claye*, (1873), L.R. 8 Q.B. 313; 42 L.J.Q.B. 151; 28 L.T. 405; 1 Digest (Repl.) 752, 2912.

*Grant v. Australian Knitting Mills, Ltd.*, [1935] All E.R. Rep. 209; [1936] A.C. 85; 105 L.J.P.C. 6; 154 L.T. 18; 39 Digest (Repl.) 541, 762.

**C** *Holt (J. S.) & Moseley (London), Ltd. v. Sir Charles Cunningham & Partners*, (1950), 83 Lloyd L.R. 141.

*Kendall (Henry) & Sons (a firm) v. William Lillico & Sons, Ltd.*, ante p. 444.

*Manchester Liners, Ltd. v. Rea, Ltd.*, [1922] All E.R. Rep. 605; [1922] 2 A.C. 74; 91 L.J.K.B. 504; 127 L.T. 405; 39 Digest (Repl.) 547, 804.

**D** *Mash & Murrell, Ltd. v. Joseph I. Emmanuel, Ltd.*, [1961] 1 All E.R. 485; [1961] 1 W.L.R. 862; *reversd.* C.A. [1962] 1 All E.R. 77; [1962] 1 W.L.R. 16; 39 Digest (Repl.) 545, 788.

### Appeal.

This was an appeal by the defendants from a judgment of DONALDSON, J., given on Dec. 19, 1967, and reported [1968] 1 All E.R. 585, holding on the trial of a preliminary issue (i) that privity of contract existed between the plaintiffs, Teheran-Europe Co., Ltd., a company incorporated in Persia (being foreign undisclosed principals in the purchase of goods) and the defendants, S. T. Belton (Tractors), Ltd., the English suppliers of the goods, and that the plaintiffs were accordingly entitled to sue in respect of the contract; (ii) that there was an implied term of the contract in accordance with s. 14 (1) of the Sale of Goods Act, 1893, that the goods should be merchantable, should accord with the contract description and should be fit for the purpose of re-sale in Persia as "new and unused" machines. The relevant grounds of appeal stated in the notice of appeal dated Jan. 1, 1968, were as follows. **A.** (as to the agency issue) that the judge was wrong in holding (i) that privity of contract existed between the plaintiffs and the defendants; (ii) that, when a contract was made by an agent for an undisclosed foreign principal, the principal might intervene; and (iii) that there was no longer a usage of trade that a foreign principal did not authorise an English agent to establish privity of contract between him and the third party. **B.** (on the contractual term issue) that (i) the judge was wrong in proceeding on the basis that, where a buyer made known to the seller the particular purpose for which the goods were required and if the goods were of a description which it was in the course of a seller's business to supply, there was a presumption that the buyer relied on the seller's skill or judgment; (ii) if there was such a presumption, it did not apply where the buyer or his agent was a dealer in the goods; and (iii) that the evidence indicated that the plaintiffs bought the goods by relying on their own skill and judgment.

**H** The cases noted below\* were cited during the argument in addition to those referred to in the judgments.

**I** *E. W. Eveleigh, Q.C.*, and *P. H. Otton* for the defendants.

*B. Finlay, Q.C.*, and *W. A. B. Forbes* for the plaintiffs.

May 15. LORD DENNING, M.R.: The plaintiffs, Teheran-Europe Co., Ltd., are a company incorporated in Persia which carries on business in Teheran. They import machinery into Persia and re-sell it there. They buy machinery in England through an intermediary called Richards Marketing, Ltd., which is an English company carrying on business in London. In 1957, the managing

\* *Miller, Gibb & Co. v. Smith & Tyrer, Ltd.*, [1917] 2 K.B. 141; *Brandt (H. O.) & Co. v. Morris (H. N.) & Co., Ltd.*, [1916-17] All E.R. Rep. 925; [1917] 2 K.B. 784.



director of the plaintiffs came over to England. He was interested in machines called air compressors. Some of these machines were being offered for sale by the defendants, a company called S. T. Belton (Tractors), Ltd., of Boston, Lincolnshire. The defendants had acquired several of these compressors as surplus government stores. Eventually, a contract was made for the purchase of twelve of these air compressors at £340 each. Six of them were delivered. The plaintiffs complained that they were not up to contract and brought an action against the defendants for breach of contract. In that action (1) two preliminary issues have been raised for determination. A  
B

The first issue is whether the following contention raised by the defence is correct: it says that:

"The plaintiffs were at all material times an undisclosed foreign principal in respect of the agreement now sued upon, and there has at no time been any privity of contract between the plaintiffs and the defendants, and the plaintiffs are not entitled to sue the defendants in respect of their alleged cause of action herein (if any, which is denied)." C

In order to understand this issue I must set out the material words of the agreement. On Aug. 10, 1957, Richards Marketing, Ltd. wrote to the defendants that: D

"We have been in communication with our clients and have been instructed to put forward an offer to purchase twelve units at £300 each delivered London packers. . . . We shall be obliged to have your acceptance to this."

On Aug. 17, 1957, the defendants replied to Richards Marketing, Ltd. that: E

"We have been going into your offer very carefully. Our best offer is twelve units delivered free to your packers (London) for the sum of £340 each."

On Aug. 19, 1957, Richards Marketing, Ltd. wrote to the defendants

"We now have pleasure in confirming our acceptance as follows [then a number of details] twelve air compressors, new and unused: . . . delivered London packers at £340 each. We shall require delivery of these, if convenient to you, two at a time within intervals of approximately two/three weeks commencing Sept. 9 . . . Our clients are asking for a liberal supply of descriptive literature for advertising purposes in Iran . . . Yours faithfully, Richards Marketing, Ltd." F

It is to be noted that in those letters Richards Marketing, Ltd. referred to the plaintiffs as "our clients", but did not name them. The defendants did not know who they were. The words "our clients" are ambiguous: they might denote that a Persian company were principals to the contract, or alternatively were customers to whom Richards Marketing, Ltd. would re-sell. In these circumstances I think that it was correct for the defendants in the issue to describe the plaintiffs as "undisclosed foreign principals". Their identity was not disclosed. Their existence as principals was not disclosed. G  
H

The plaintiffs, however, were principals to the contract, albeit undisclosed. They employed Richards Marketing, Ltd. as their agents, paying them a commission. The judge said (2):

"... I have no doubt whatsoever that as between the plaintiffs and Richards, Richards acted throughout as the plaintiffs' agents and not as principals." I

I think also that it was correct for the defendants in the issue to state that there was "at no time privity of contract", strictly so called, between them and the plaintiffs. The defendants did not look to the plaintiffs of whom they knew nothing. They looked to Richards Marketing, Ltd. who were the only people they knew. Richards Marketing, Ltd. could, I think, sue and be sued on the

(1) [1968] 1 All E.R. 585.

(2) [1968] 1 All E.R. at p. 589, letter C.

A contract in their own name. They signed the contract in their own name without qualification. They did not add the words "as agent for" or "for and on behalf of" or any of the phrases which exclude personal liability.

Nevertheless, I do not think that on this issue the contention of the defendants is well-founded. It is a well-established rule of English law that an undisclosed principal can sue and be sued on a contract, even though his name and even his

B existence is undisclosed, save in those cases when the terms of the contract expressly or impliedly confine it to the parties to it. This rule is an anomaly, but is justified by business convenience. It has been held so for many years. The only question in the case is whether this rule (that an undisclosed principal can sue and be sued) extends to a case where the principal is a foreigner. In my opinion, the rule applies to a foreign principal just as to an English principal.

C I know that nearly one hundred years ago BLACKBURN, J., used words which have led people to suppose the contrary. In *Elbinger Act. für Fabrication von Eisenbahn Materiel v. Claye* (3), in 1873, he said (3):

"...yet where a foreigner has instructed English merchants to act for him, I take it that the usage of trade, established for many years, has been that it is understood that the foreign constituent has not authorised the merchants to pledge his credit to the contract, to establish privity between him and the home supplier. On the other hand, the home supplier, knowing that to be the usage, unless there is something in the bargain showing the intention to be otherwise, does not trust the foreigner, and so does not make the foreigner responsible to him, and does not make himself responsible to the foreigner."

E I do not think that that usage of one hundred years ago applies today. Overseas business is conducted very differently now from what it was then. In this case, as in nearly every other case, the foreign buyers opened a bankers' commercial credit, so that the goods were paid for before they left England. On Aug. 22, 1957, the defendants wrote to Richards Marketing, Ltd.:

F "As these compressors are for export we must ask for cash payment before delivery as it is customary for us to have irrevocable credit on the equipment which we export."

In the light of modern usage I think that an undisclosed foreign principal can sue and be sued on a contract, just as an undisclosed English principal can, save, of course, when the contract on its true construction limits it to the English intermediary and excludes a foreign principal. The fact that the principal is a foreigner is an element to be thrown into the scale on construction, but that is all. In the present case there is nothing in the contract to confine it to Richards Marketing, Ltd. I am quite clear that the plaintiffs can sue in their own name on the contract. I agree with the judge on this issue.

H The second issue is this: "what are or were the precise terms of the contract sued upon by the plaintiffs?" This issue resolved itself into a discussion whether there was an implied term that the machines "should be reasonably fit for the purpose of re-sale in Persia as new and unused machines". It was said that this term was to be implied under s. 14 (1) of the Sale of Goods Act, 1893.

I Now, as I read this contract, it was a contract for the sale of goods by description. These were air compressors, described as new and unused—described in the catalogue and in the correspondence. There was clearly an implied term that they should comply with the description as set out in s. 13 (1) of the Sale of Goods Act, 1893.

So far as s. 14 (1) is concerned, it is quite clear that the buyers made known to the sellers that they were required for re-sale in Persia. In the letter of Aug. 10, 1967, Richards Marketing, Ltd. wrote to the defendants:

"We have now received provisional estimates for packing these units singly suitable for shipment to Khorranshahr, and cross-country transit."

Khorranshahr, as far as I understand it, is in Persia. Then in the letter of Aug. 19, 1957, they wrote: "Our clients are asking for a liberal supply of descriptive literature for advertising purposes in Iran." So that it is quite clear that the plaintiffs made known to the defendants that they required them for re-sale in Persia. A

The section of the Act of 1893, however, contains a further requirement before a condition is implied. The particular purpose might be made known to the seller so as to show that the buyer relies on the seller's skill and judgment. The judge held that, once the purpose was made known, there was an inference that the buyer relied on the seller's skill and judgment. He quoted (4) some of the speeches in the case of *Manchester Liners, Ltd. v. Rea, Ltd.* (5). That case has, however, in the last few days, been considered by the House of Lords in *Henry Kendall and Sons (a firm) v. William Lillico & Sons, Ltd.* (6). Lord REID said (7): B

"I do not think that this case [*Manchester Liners, Ltd. v. Rea, Ltd.* (5)] is any authority for the view, which has sometimes been expressed that, if the seller knows the purpose for which the buyer wants the goods, it will be presumed that the buyer relied on his skill and judgment." C

So the observations in *Manchester Liners, Ltd. v. Rea, Ltd.* (5) have received a knock-out blow. We can revert once more to the Act of 1893. The particular purpose must be made known "so as to show that the buyer relies on the seller's skill or judgment". That means that the buyer makes the particular purpose known to the seller in such a way that the seller knows that he is being relied on. That cannot be said here. The defendants here did not know they were being relied on for re-sale in Persia. They knew nothing of conditions in Persia. The plaintiffs knew all about those conditions. The plaintiffs saw the machine here. They read its description. They relied on their own skill and judgment to see that it was suitable for re-sale in Persia and not on the defendants. At all events, they did not make the purpose known to the defendants in such circumstances as to show him that they relied on the defendants' skill and judgment. So I do not think that there was an implied term that they should be fit for the purpose of being re-sold in Persia. So on this point I differ from the judge and I would allow the appeal accordingly. I say nothing as to how the knowledge might affect the measure of damages; that is a matter which is not before us. I would therefore affirm the judge (8) on the first issue and reverse him on the second. D

**DIPLOCK, L.J.:** I will deal first with the agency issue. In determining who is entitled to sue or liable to be sued on a contract, a useful starting point, where the contract is in writing, is to look at the contract. In doing so a number of elementary principles should be borne in mind. The first is that a person may enter into a contract through an agent whom he has actually authorised to enter into the contract on his behalf or whom he has led the other party to believe that he has so authorised. We are concerned here, however, only with actual authority. Where an agent has such actual authority and enters into a contract with another party intending to do so on behalf of his principal, it matters not whether he discloses to the other party the identity of his principal, or even that he is contracting on behalf of a principal at all, if the other party is willing or leads the agent to believe that he is willing to treat as a party to the contract anyone on whose behalf the agent may have been authorised to contract. In the case of an ordinary commercial contract such willingness of the other party may be assumed by the agent unless either the other party manifests his unwillingness, or there are other circumstances which should lead the agent to realise that the other party was not so willing. E

(4) [1968] 1 All E.R. at p. 592  
(6) Ante p. 444.

(5) [1922] All E.R. Rep. 605; [1922] 2 A.C. 74.

(7) Ante, at p. 455.

(8) [1968] 1 All E.R. 585.



**A** Whether the agent was actually authorised to enter into a particular contract on behalf of a particular principal depends on what passed between the agent and the principal. In the present case the judge has found as a fact that the plaintiffs did authorise Richards Marketing, Ltd. to enter on the plaintiffs' behalf into the contract on which they now sue; and that is no longer contested.

**B** Whether the agent did make a contract on behalf of his principal with the other party depends on the intention of the agent and what passed between him and the other party. The judge has found as a fact (9) that Richards Marketing, Ltd. did intend to enter on behalf of the plaintiffs into the contract with the defendants on which the plaintiffs now sue. Richards Marketing, Ltd. did not disclose the identity of the plaintiffs as their principal. The issue is whether the defendants were willing or led Richards Marketing, Ltd. to believe that they were

**C** willing to treat as a party to the contract anyone on whose behalf Richards Marketing, Ltd. were in fact authorised to contract.

One looks, therefore, at the contract. It is contained in correspondence. The important letters are three: an offer by Richards Marketing, Ltd. of Aug. 10; a counter-offer by the defendants of Aug. 17; and an acceptance of the counter-offer by Richards Marketing, Ltd. of Aug. 19, 1957. The relevant passages in

**D** the letters are as follows. In the letter of Aug. 10:

“Dear Sirs, Dorman/Air Pumps Mobile Compressors . . . We have been in communication with our clients and have been instructed to put forward an offer to purchase twelve units at £300 each delivered London packers exclusive of any form of packing and to proceed immediately with shipment of the first two units. We shall be obliged to have your acceptance to this

**E** giving us an approximate date for the earliest delivery.”

On the construction of the letters, that offer appears to me to be an offer made on behalf of a principal whose identity is not disclosed; or, at least, it made it clear that Richards Marketing, Ltd. might be acting on behalf of an unidentified principal. The relevant passage in the letter of Aug. 17 is this:

**F** “Dear Sirs, Dorman/Air Pumps Mobile Compressors. Many thanks for your letter of Aug. 10. We are sorry for the delay in replying to your letter but we have been going into your offer very carefully. Our best offer is twelve units delivered free to your packers (London) for the sum of £340 each. Delivery could be arranged at the rate of two per week.”

That letter disclosed no unwillingness on the part of the defendants to contract with Richards Marketing, Ltd. on behalf of the unnamed client on whose behalf they had put forward the offer. What it was was a counter-offer to sell at a higher price, namely, £340. The relevant passage in the letter of acceptance of that counter-offer of Aug. 19, is as follows:

**G**

**H** “Dear Sirs, Thank you for your letter dated Aug. 17, and we note it is not possible for you to entertain a reduction beyond that originally envisaged. However, we now have pleasure in confirming our acceptance as follows:—Twelve—Dorman diesel 4 cyl. 4DWD engines coupled to Air Pumps V twin type T.S. 20 complete 156 C.f.m. at 100-lbs. p.s.i. Compressor new and unused on bedplate with removable 5/6 tons 900 × 16 pneumatic tyred trailer, internal expanding brakes, hand brake, timken roller bearings, semi-elliptic road springs, mudguards, etc. equal to new, delivered London packers

**I** at £340 each.”

I have read the description at length because the contract terms are relevant to the second issue. The relevant passage in the other part of the letter is this:

“Our clients are asking for a liberal supply of descriptive literature for advertising purposes in Iran and we shall be obliged to say forty copies of illustrated matter.”

The reference to "our clients" is clearly a reference to the clients referred to in the letter of Aug. 10, who are said in that letter to have instructed Richard Marketing, Ltd. to put forward an offer to purchase the goods. That letter is an acceptance of the counter-offer. There is thus nothing in the contract itself which manifests the unwillingness of the defendants to enter into the contract with the principals of Richards Marketing, Ltd. whoever they might be. What is relied on, however, is the circumstance that the principal was a foreigner. It is said that that should have led Richards Marketing, Ltd. to realise that the defendants were not willing to enter into a contract with the plaintiffs because the plaintiffs were foreigners.

Reliance for this is placed on the observations of BLACKBURN, J., in *Elbinger Act. für Fabrication von Eisenbahn Materiel v. Claye* (10) of which the relevant part is as follows:

"I quite agree that a man may, as agent, make a contract upon such terms as not only to bind himself but also so as to bind the principal; in other words, so that the principal shall be party to the contract, and may then either sue or be sued... But although such a contract may be where the principals are English; yet where a foreigner has instructed English merchants to act for him, I take it that the usage of trade, established for many years, has been that it is understood that the foreign constituent has not authorised the merchants to pledge his credit to the contract, to establish privity between him and the home supplier. On the other hand, the home supplier, knowing that to be the usage, unless there is something in the bargain showing the intention to be otherwise, does not trust the foreigner, and so does not make the foreigner responsible to him, and does not make himself responsible to the foreigner."

BLACKBURN, J., was really dealing with two usages which he considered (for the suggestion came from him, not from counsel) were current in 1873: the first a usage existing between English merchants and foreign principals, viz., that foreign principals did not authorise English merchants to enter into contracts on their behalf. The second usage, which was a consequence of the knowledge by English merchants of the first, is a usage between English merchants that unless an English merchant states the contrary, he is not willing to enter into a contract with a foreigner through an English agent.

I agree entirely with DONALDSON, J. (11) that commercial usages are far from immutable. For my part I find it difficult to see how even in 1873 there can have been the first usage. For the authority conferred on the English merchant must have depended on the terms of the contract of agency made between him and his foreign principal of which the proper law may be other than English law. Conflict of laws was not, however, in the forefront of the judicial mind in 1873. Anyway I am confident that there is no such usage today. The reason for the second usage has accordingly vanished, and I have no doubt that it too has disappeared. I agree with DONALDSON, J. (12), that the fact that the principal is a foreigner is one of the circumstances to be taken into account in determining whether or not the other party to the contract was willing, or led the agent to believe that he was willing, to treat as a party to the contract the agent's principal, and, if he was so willing, whether the mutual intention of the other party and the agent was that the agent should be personally entitled to sue and liable to be sued on the contract as well as his principal. It is, however, only one of many circumstances, and as respects the creation of privity of contract between the other party and the principal its weight may be minimal, particularly in a case such as the present where the terms of payment are cash before delivery and no credit is extended by the other party to the principal. It may have considerably more weight in determining whether the mutual intention of the other party and the agent was that the agent should be personally liable to be sued as well

(10) (1873), L.R. 8 Q.B. at p. 317.

(11) [1968] 1 All E.R. at p. 590, letter E.

(12) [1968] 1 All E.R. at p. 591, letter C.

**A** as the principal, particularly if credit has been extended by the other party; but we are not concerned with that issue here.

I agree with LORD DENNING, M.R., that there is nothing in the contract or in the circumstances which leads to the conclusion that the defendants were not willing to enter into the contract with the plaintiffs as the actual principals of Richards Marketing, Ltd., or that being so willing, they nevertheless did not

**B** do so. On the agency issue I would dismiss this appeal.

The contractual terms issue arises in a highly artificial form. The task of the court in construing any contract is to look at the words used in the contract and at what has passed between the contracting parties before it was made, and to determine what it was that the party alleged to be in breach, by the words of the contract and his conduct, induced the other party to believe he was accept-

**C** ing a legally enforceable obligation to do or to refrain from doing. Nevertheless the fact that the law about contracts for the sale of goods has been codified so as to specify what, in the absence of express words to the contrary in the contract itself, one contracting party would reasonably be induced to believe the other contracting party was accepting a legally enforceable obligation to do or refrain from doing, by his use of particular kinds of expressions in the contract and by particular matters passing between them, has resulted in these expressions and these matters being set out in separate sections or subsections of the Sale of Goods Act, 1893, as if they gave rise to separate and unrelated obligations. This is, of course, not the case. For instance, the description of the goods which is dealt with by s. 13 may well be by reference to the particular purpose for which the buyer requires them, which is dealt with by s. 14 (1).

**E** The habit persists, however, and has been adopted in this case of pleading the obligations of which the party sued is alleged to be in breach as if they arose from separate and distinct undertakings; and in this particular case there have been alleged as separate and distinct undertakings, first, that the goods should comply with the description as to being new and unused; and, secondly, that they should be reasonably fit for the purpose of being re-sold in Persia as new

**F** and unused machines. The second undertaking differs from the first only if the goods, although in fact new and unused, would not be reasonably fit for re-sale as such in Persia, and this could only be so if there were some peculiarity about the market for machines of this description in Persia which does not exist in England. I will assume that the issue intended to be decided as the contractual terms issue was whether or not the defendants undertook that if there was such a

**G** peculiarity about the market for machines of this description in Persia, the machines supplied would not only be new and unused but would also satisfy the peculiarity.

There is not a word in the contract to suggest that the defendants undertook anything of the sort. The plaintiffs' case is based solely on the fact that Richards Marketing, Ltd., their agents, informed the defendants that their principals required the machines for re-sale in Persia. It is argued on behalf of the plaintiffs that s. 14 (1) of the Sale of Goods Act, 1893, makes this fact of itself sufficient to give rise to the undertaking that the machines would be fit for that purpose in addition to being new and unused; and reliance is placed on the speech of LORD BUCKMASTER in *Manchester Liners, Ltd. v. Rea, Ltd.* (13), where he said:

**I** "If goods are ordered for a special purpose, and that purpose is disclosed to the vendor so that in accepting the contract he undertakes to supply goods which are suitable for the object required, such a contract is, in my opinion, sufficient to establish that the buyer has shown that he relies on the seller's skill and judgment."

The plaintiffs, I am sorry to say, also relied on some observations of my own in the case of *Mash & Murrell, Ltd. v. Joseph I. Emmanuel, Ltd.* (14), which,

(13) [1922] All E.R. Rep. at p. 607; [1922] 2 A.C. at p. 79.

(14) [1961] 1 All E.R. 485 at p. 489.



though I think that they were correct in the context of that case, where the description of the goods was generic, were expressed with incautious wideness. A

Of course, in many cases, particularly where the description by which the goods are bought is a wide one, as it was in *Mash & Murrell, Ltd. v. Joseph I. Emmanuel, Ltd.* (15) the communication by the buyer to the seller of the purpose for which he requires the goods is sufficient to show to the buyer that he relies on the seller's skill or judgment, for there is no other reason why the buyer should make known his purpose to the seller. Where a foreign merchant, however, buys by description goods, not for his own use, but for re-sale in his own country, of which he has no reason to suppose the English seller has any special knowledge, it flies in the face of common sense to suppose that he relies on anything but his own knowledge of the market in his own country and his own commercial judgment as to what is saleable there. To hold the contrary would mean that whenever anyone known by the seller to be a foreign merchant bought from a seller in England goods for sale in his own country there would rise automatically an undertaking on the part of the seller, unless he expressly disclaimed it, that the goods would be suitable for sale in the market of which the foreign buyer knew everything and he, the seller, knew nothing. With great respect, that would be nonsense. It only piles nonsense on nonsense in the present case to add that the plaintiffs, to the knowledge of the sellers, actually insisted on themselves inspecting a machine of the description which they subsequently ordered before authorising Richards Marketing, Ltd. to enter into the contract. B

I agree with LORD DENNING, M.R., that the appeal on the contractual issue should be allowed. C

**SACHS, L.J.:** As regards the agency issue, once counsel for the defendants had conceded that he could not challenge the findings of the trial judge (16) that the plaintiffs at the material time were principals of Richards Marketing, Ltd. ("Richards") and that the latter had authority to enter into contracts such as that now under consideration, the issue for decision became simplified and compact. Were the terms of the contractual documents passing between Richards and the defendants such as to exclude the plaintiffs from being able to sue the defendants or to be sued by them on the contract that was made? Otherwise the plaintiffs are entitled to sue the defendants by virtue of the general rule, stated by LORD DENNING, M.R., that normally a principal can always step in and enforce the contract if his name was unmentioned or even if his existence was undisclosed at the time the contract was made. (In so far as any question arises whether in this case the plaintiffs were what is termed unnamed, or, on the other hand, undisclosed principals, for my part I take the view that the letter of Aug. 10, which has been read out by DIPLOCK, L.J., makes them in this case unnamed rather than undisclosed principals.) D

In approaching the question whether on these particular documents such an exclusion was effected it is convenient and correct to subdivide the issue by seeking answers to two sub-questions: first, would the requisite privity of contract have been excluded if Richards' principals had been a firm carrying on business in England? Secondly, should the answer turn out to be that there was no exclusion, then does it make any difference that Richards' principals in fact carried on business in Persia? E

The first is one of the construction of particular documents. It raises no special point of law, and I agree with my lords that the answer to that question is that there was no exclusion on the face of those documents. F

On the second I agree that in determining whether the exclusion can be established the courts ought to take into account, as part of the totality of the circumstances, the fact that the principal was a foreign one, but that no presumption of exclusion can be founded on that fact alone. The presumption which G

A at one time existed no longer exists, because, as DONALDSON, J., said (17), the usages of the law merchant are not immutable. In determining the intention of the parties on this point the modern approach was aptly stated by PRITCHARD, J., in *J. S. Holt & Moseley (London), Ltd. v. Sir Charles Cunningham & Partners* (18) where he said:

B “The intention of the parties can only be ascertained from the facts as proved in evidence, and the nationality and whereabouts of the principal is no more and no less than one of the facts to which such weight will be given as in any particular case the court thinks proper.”

As the years go by many factors change in relation to estimating the intention of the parties. For instance, the system of credits is constantly changing, as my lords have already stated: and as reciprocity in the enforcement of judgments between nationals of this country and nationals of the other country develops and becomes more effective, the weight of the fact that the principal is foreign has diminished and no doubt will continue to diminish further as new factors, such as the scope of Government inspired guarantees, evolve. In any given case it may, as DONALDSON, J., said (19), already be minimal; but it is not always necessarily minimal. For instance, the weight may vary according to the country in which the principal carries on his business. There may be differences between cases where the country is one with little civilisation or no really effective legal system, and cases concerning countries such as those which are members of the E.E.C. Suffice it to say that in the present case the weight to my mind to be attached to the principals being from Persia was minimal. It did not in any shape or sense out-weigh the other factors which have been mentioned by my lords; and for that reason I agree that the appeal on that issue should be dismissed.

E As regards the contractual issue I agree also that the appeal succeeds, but I found my agreement on a relatively narrow ground relating to the particular facts of the case. I would make it clear that I see no reason why a buyer may not be able to establish on the same set of facts that he has concurrent rights under the provisions of s. 14 (1) and s. 14 (2), and for that matter s. 13 (2), of the Sale of Goods Act, 1893. Many laborious years of pleading Sale of Goods Act cases would lead me to the conclusion that it is right to set out each of the facts relating to the particular subsection on which one relies and to make it clear that one is relying on that subsection. To take an instance in relation to s. 14 (1) and (2), artificial silk sold as such under a contract made when the seller knows it is required to be made into dresses may attract warranties under both subsections, with different results as regards damages according to whether one or the other or both are found to be broken.

For my part I see no reason why the contract for the goods now under consideration could not in law attract warranties under both subsections merely because of their description, and I doubt very much whether the terms of that section bring the compressors, as was suggested at one stage in the argument in this court, into the territory of the *Chanter v. Hopkins* (20) inspired proviso to s. 14 (1), which relates to patents and trade names. Indeed I observe from the tenor of the judgment of the trial judge that no attempt appears to have been made in the courts below to assert that the compressors fell within that proviso.

I Nevertheless before a buyer can establish that he is entitled to rely on s. 14 (1) one has to examine closely the “particular purpose” on which his case is founded to see if the vendor’s skill and judgment can reasonably be said to have been relied on. Thus the buyer who asks for lawn seed saying it is for his own lawn cannot, if the seed is fit for normal lawns but not for his particular lawn, rely on s. 14 (1) merely because his own lawn has some peculiar characteristic

(17) [1968] 1 All E.R. at p. 590, letter E.

(18) (1950), 83 Lloyd. L.R. 141 at p. 145.

(19) [1968] 1 All E.R. at p. 591, letter C.

(20) [1835-42] All E.R. Rep. 346.

known only to him, unless he has made known that characteristic to the seller in circumstances which would bring into force the subsection. In this particular case the defendants could not be expected to know the special characteristics or, as DIPLOCK, L.J., put it, peculiarities, of the Persian market for mobile air compressors. Nor were they told about them. So that to my mind, too, they cannot be held to have given a warranty under s. 14 (1). Indeed, the evidence, when taken as a whole, shows that the plaintiffs must have relied on their own skill and judgment. A  
B

I would wish to reserve my views as to other points raised in the course of argument in connexion with this subsection; and, not least, I would be anxious not to say anything which might cast any doubt on a line of reasoning to which LORD REID referred at another stage in his opinion in *Henry Kendall & Sons (a firm) v. William Lillico & Sons, Ltd.* (21) I refer to that part where he cited *Grant v. Australian Knitting Mills, Ltd.* (22) in reference to the relations which will in general be inferred from the fact that the buyer goes to a shop in confidence that the tradesman has selected his stock with skill and judgment, and to the fact that the main inducement to go to a good retail shop is the expectation that the tradesman will have rightly bought goods of reliable make. LORD REID approved of that line of reasoning when he said (23): C  
D

“A shopkeeper’s goodwill consists largely in the reputation of being reliable—the better the shop the easier it is to draw this inference.”

It is for that reason that I say nothing about whether presumptions may arise when a particular purpose is made known to a vendor, but have confined my judgment to the point with which I have specifically dealt. I would for the above reasons allow the appeal as regards the contractual issue. E

*Appeal dismissed on the agency issue, allowed on the issue of warranty.*

Solicitors: *Lee, Bolton & Lee*, agents *Roythorne & Co.*, Boston, Lincs. (for the defendants); *Eric G. L. Temple* (for the plaintiffs),

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.] F

## THOMPSON AND ANOTHER v. COMMISSIONER OF STAMP DUTIES.

[PRIVY COUNCIL (Viscount Dilhorne, Lord MacDermott, Lord Guest, Lord Pearce, and Lord Pearson), April 1, 2, 3, May 27, 1968.] G

*Privy Council—Australia—New South Wales—Death duty—Exercise of general power of appointment by will of person domiciled in New South Wales—Trust fund comprising shares situate outside New South Wales—Validity of legislation of New South Wales imposing death duty—Construction of New South Wales Stamp Duties Act, 1920-1965, s. 102 (2) (a), (2A).* H

The deceased, who was entitled under her father’s will to a life interest in trust funds and, subject thereto, to a general power of appointment over the trust fund, died domiciled in New South Wales, having by her will exercised the power of appointment in favour of her husband, who survived her. The fund comprised investments outside New South Wales.

**Held:** (i) in regard to personal property outside New South Wales disposed of by the exercise of a general power of appointment by the will of a person domiciled in New South Wales (which property accordingly was, e.g., subject to the payment of the appointor’s debts) there was sufficient territorial connexion to have the consequence that legislation of New South Wales imposing liability to death duty in respect of that property on the I

(21) Ante p. 444.

(22) [1935] All E.R. Rep. 209, at p. 215; [1936] A.C. 85 at p. 90.

(23) Ante, at p. 455.



- A** death of the appointor was valid; accordingly death duty was leviable on the trust fund comprising the property outside New South Wales in the present case (see p. 903, letter H, post).
- Johnson v. Comr. of Stamp Duties* ([1956] 1 All E.R. 502) distinguished.
- Grey v. Federal Comr. of Taxation* (1939), 62 C.L.R. 49 applied.
- (ii) in s. 102 (2) (a)\* of the Stamp Duties Act, 1920-1965, the words "containing any trust in respect of that property" qualified only the preceding reference to disposition by a settlement, but did not qualify the prior reference to disposition by will (see p. 900, letter D, post).
- B** *Rabett v. Comr. of Stamp Duties* ([1929] A.C. 444) followed.
- Appeal dismissed.
- [As to the validity of extra-territorial legislation of the states of the Commonwealth of Australia, see 5 HALSBURY'S LAWS (3rd Edn.) 475, 476, para. 1052.]
- C** Cases referred to:
- A.-G. v. Australian Agricultural Co.* (1934), 34 S.R. (N.S.W.) 571.
- Beyfus v. Lawley*, [1900-03] All E.R. Rep. 796; [1903] A.C. 411; 72 L.J.Ch. 781; 89 L.T. 309; 37 Digest (Repl.) 340, 840.
- D** *Broken Hill South, Ltd. v. Comr. of Taxation (New South Wales)*, (1937), 56 C.L.R. 337.
- Comr. of Stamp Duties v. Stephen*, [1904] A.C. 137; 89 L.T. 511; sub nom. *Comrs. of Stamp Duties of New South Wales v. Stephen*, 73 L.J.P.C. 9; 37 Digest (Repl.) 240, 49.
- Comr. of Stamp Duties (New South Wales) v. Millar* (1932), 48 C.L.R. 618.
- E** *Drake v. A.-G.*, (1843), 10 Cl. & Fin. 257; 1 L.T.O.S. 382; 21 Digest (Repl.) 99, 481.
- Grey v. Federal Comr. of Taxation* (1939), 62 C.L.R. 49.
- Horsfall v. Comr. of Taxes (Victoria)* (1918), 24 C.L.R. 422.
- Hoskin's Trusts, Re* (1877), 6 Ch.D. 281; 46 L.J.Ch. 817; 23 Digest (Repl.) 317, 3829.
- F** *Johnson v. Comr. of Stamp Duties*, [1956] 1 All E.R. 502; [1956] A.C. 331; [1956] 2 W.L.R. 454; 21 Digest (Repl.) 41, \*53.
- Lawley, Re, Zaïser v. Lawley*, [1902] 2 Ch. 799; 37 Digest (Repl.) 340, 840 (*affd.* sub nom. *Beyfus v. Lawley*, *supra*).
- O'Grady v. Wilmot*, [1916] 2 A.C. 231; 85 L.J.Ch. 386; sub nom. *Re O'Grady, O'Grady v. Wilmot*, 114 L.T. 1097; 21 Digest (Repl.) 70, 294.
- G** *Platt v. Routh* (1840), 6 M. & W. 756; *affd.* 3 Beav. 257; 21 Digest (Repl.) 99, 481, (*affd.* sub nom. *Drake v. A.-G.*, *supra*).
- Rabett v. Comr. of Stamp Duties*, [1929] A.C. 444; 98 L.J.P.C. 140; 140 L.T. 509; 21 Digest (Repl.) 32, \*34.
- Tomlinson, In the goods of* (1881), 6 P.D. 209; 50 L.J.P. 74; 46 L.T. 484; 23 Digest (Repl.) 75, 707.
- H** **Appeal.**
- This was an appeal from an order made by the New South Wales Court of Appeal (WALLACE, P., WALSH and JACOBS, J.J.A.) on June 30, 1967, whereby the court had determined certain questions submitted in a Case Stated by the Commissioner of Stamp Duties under s. 124 of the Stamp Duties Act, 1920-1965 (see p. 898, letter G, post). The appeal was brought by leave of the New South Wales Court of Appeal granted on Oct. 23rd, 1967. The questions raised involved the validity of s. 102 (2) (a) as extended by s. 102 (2A)† of the Stamp Duties Act, 1920-65 of New South Wales.
- I** *D. A. Staff, Q.C.* (of the New South Wales Bar) and *J. G. Monroe* for the appellants.
- Harold Snelling, Q.C. (Solicitor-General for New South Wales)*, *G. D. Needham, Q.C.* (of the New South Wales Bar) and *Mervyn Heald* for the respondents.

\* For the text of s. 102 (2) (a), see p. 899, letter E, post.

† For the text of s. 102 (2A), see p. 899, letter F, post.

**LORD PEARSON:** John Arthur Buckland, who died in 1931, had by his will left a share of his residuary estate in trust primarily for his daughter Mrs. Rita Buckland Thompson. The will provided that the trustees were to invest the share, and to pay the income to her during her life, and after her death to hold the share on certain trusts in favour of her children and subject to those trusts (which failed because she had no child) to "hold such share and the income thereof in trust for such person or persons for such purposes and in such manner in all respects as such daughter shall by will or codicil appoint". The trustees set aside and appropriated certain assets of the estate to answer Mrs. Thompson's share or interest in the estate, and duly held them on the trusts of the will. Mrs. Thompson who died in 1965, had by her will provided inter alia as follows:

"If my husband the said Cecil Wolsey Curtis Thompson shall be living one month after my death I devise and bequeath to him the whole of my real and personal estate including all property over which I have a power of appointment under the will of my late father the late John Arthur Buckland."

Cecil Wolsey Curtis Thompson was living one month after the death of his wife and is still living. Accordingly the assets which have been mentioned passed to him under the appointment contained in her will.

She died domiciled in New South Wales. At the time of her death the assets comprised certain items of property of comparatively small value situate in New South Wales and shareholdings valued at \$288,167.43 situate outside New South Wales (being partly in Victoria and partly in Australian Capital Territory).

The appellants, who are the executors and trustees of the will of Mrs. Thompson, admit liability for death duty in respect of the items of property situate in New South Wales. The question at issue in this appeal relates to the shareholdings situate outside New South Wales. The respondent contends that they do, and the appellants contend that they do not, form part of the estate of Mrs. Thompson for the purpose of the assessment and payment of death duty thereon.

In para. 20 of the Stated Case, which came before the Court of Appeal of the Supreme Court of New South Wales, the questions to be decided were:

"1. Whether the said sum of \$288,167.43 was for the purposes of the assessment and payment of death duty properly included in the final balance of the dutiable estate of Rita Buckland Thompson?

"2. If the answer to question 1 is in the negative whether any part, and if so, what part of the said sum of \$288,167.43 was properly so included?

"3. How should the costs of this Stated Case be borne and paid?"

The Court of Appeal deciding in favour of the respondent's contention, answered the first question "Yes" and the third question "By the appellants". On the view which they took on the first question, the second question did not arise.

The principal factors to be taken into account in this appeal stand out clearly. Mrs. Thompson died domiciled in New South Wales. The assets with which this appeal is concerned were situate outside New South Wales at the time of her death. She had in respect of those assets a general power of appointment under the will of her father. She exercised the power in favour of her husband by her own will.

The relevant statutory provisions are contained in the Stamp Duties Act, 1920-65, of New South Wales, and are as follows:

"100. . . . 'Disposition of property' means— . . . (b) the creation of any trust; . . .

" 'General power of appointment' includes any power or authority which enables the donee or other holder thereof, or would enable him if he were of full capacity, to appoint or dispose of any property, or to charge any sum of

A money upon any property, as he thinks fit for his own benefit, whether exercisable by instrument inter vivos or by will or otherwise, but does not include any power exercisable by any person in a fiduciary capacity for the benefit of others only arising under a disposition not made by himself, or exercisable as tenant for life under Part IV of the Conveyancing and Law of Property Act, 1898, or as mortgagee."

B "101. In the case of every person who dies after the passing of this Act, whether in New South Wales or elsewhere, and wherever the deceased was domiciled, duty hereinafter called death duty, at the rate mentioned in the Third Schedule to this Act shall be assessed and paid—(a) upon the final balance of the estate of the deceased, as determined in accordance with this Act . . ."

C "102. For the purposes of the assessment and payment of death duty but subject as hereinafter provided, the estate of a deceased person shall be deemed to include and consist of the following classes of property—

D "(1) (a) All property of the deceased which is situate in New South Wales at his death. And in addition where the deceased was domiciled in New South Wales all personal property of the deceased situate outside New South Wales at his death; . . .

E "(2) (a) All property which the deceased has disposed of, whether before or after the passing of this Act, by will or by a settlement containing any trust in respect of that property to take effect after his death, including a will or settlement made in the exercise of any general power of appointment, whether exercisable by the deceased alone or jointly with another person; provided that the property deemed to be included in the estate of the deceased shall be the property which at the time of his death is subject to such trust . . . (j) Any property over or in respect of which the deceased had at the time of his death a general power of appointment . . .

F "(2A) All personal property situate outside New South Wales at the death of the deceased when—(a) the deceased dies after the commencement of the Stamp Duties (Amendment) Act, 1939; and (b) the deceased was, at the time of his death domiciled in New South Wales; and (c) such personal property would, if it had been situate in New South Wales, be deemed to be included in the estate of the deceased by virtue of the operation of para. (2) of this section."

G The general scheme of s. 102 is plain. Paragraph (1) applies to the actual property of the deceased, i.e., property actually belonging to him at the time of his death. Under this paragraph the dutiable estate includes all such property situate in New South Wales at the time of his death, and also includes such property then situate outside New South Wales if it is personal property and he was then domiciled in New South Wales. Paragraph (2) applies to various categories of what may conveniently be called "notional" property of the deceased, including in certain cases property disposed of by him. This para. (2) has been interpreted consistently with the language of para. (2A) (c) as applying only to property situate in New South Wales at the time of the death (*Johnson v. Comr. of Stamp Duties* (1)). Then para. (2A) brings into the dutiable estate "notional" property of the deceased situate outside New South Wales at the time of his death, if he was then domiciled in New South Wales.

I The respondent claims that the assets with which this appeal is concerned should be included in the dutiable estate under either or both of the sub-paras. (a) and (j) in s. 102 (2) as applied by s. 102 (2A) to property situate outside New South Wales at the death of the deceased. If the respondent has a valid claim under sub-para. (a), it will not be necessary to consider his claim under sub-para. (j).

The first point argued in this appeal is one of construction. Does s. 102 (2) (a)

(1) [1956] 1 All E.R. 502 at p. 508; [1965] A.C. 331 at pp. 351, 352.



on its true construction apply to this case? The appellants contend that it does not. The contention was not put forward in the Court of Appeal, but was allowed to be put forward in the argument of the present appeal, because it had been set out in the appellants' case, and it is matter simply of law and no evidence could have affected it, and it is within the scope of the first question to be decided as set out in para. 20 of the stated case (2). A

The appellants' contention is that in the sub-paragraph (s. 102 (2) (a)) the words "containing any trust in respect of that property to take effect after his death" qualify the word "will" as well as the word "settlement"; that therefore the words "such trust" in the proviso refer to a trust contained in the will or the settlement, as the case may be; that therefore the sub-paragraph has no application to a disposition by will unless the property disposed of was at the time of the death subject to a trust to take effect after the death; and that in the present case Mrs. Thompson's exercise of her power of appointment in favour of her husband by her will either did not create any trust or created only a trust coming into operation one month after the death, so that the property was not "subject to such trust" at the time of the death, as required by the proviso. B

There may be some difficulty or uncertainty affecting the last step in the argument, but there is no need to come to a decision on that point, because the argument fails at an earlier stage for several reasons. First, according to the proper grammatical construction of the sub-paragraph the words "containing any trust in respect of that property to take effect after his death", are to be read with and qualify only the words "by a settlement". If the intention had been to make the qualification apply to a will as well as a settlement, the appropriate wording would have been "by a will or settlement containing...". C  
Secondly, it is unnecessary to refer to anything in a will taking effect after the death because everything in a will must take effect after the death. Thirdly, in *Rabett v. Comr. of Stamp Duties* (3) their lordships' board held that the true interpretation of the sub-paragraph was to construe the qualifying words as applying only to the settlement. The sub-paragraph in the form in which they were considering it is set out in their judgment (4), and it has not been changed subsequently. Fourthly, however, counsel for the respondent referred to an earlier version of the provision as it was in s. 49 (2) of Act No. 27 of 1898: D

"Duties to be levied, collected and paid according to the duties mentioned in the said third schedule shall also be charged and chargeable upon and in respect of—

"(A) all estate, whether real or personal— E

"(a) which any person, dying after the twenty-second day of May, one thousand eight hundred and ninety-four, has disposed of, whether before or after that date, by will or by settlement containing any trust in respect of that estate to take effect after his death, under any authority enabling that person to dispose of the same by will or deed, as the case may be;" F

In that early version of the provision there was no proviso. In the absence of a proviso there would be no reason at all for reading the qualification as applying to anything except the settlement. The addition of the proviso cannot reasonably be considered to have altered the construction of the main provision: it refers to "such trust", which is the trust contained in a settlement. G

The other point argued on behalf of the appellants was that the sub-paragraph (s. 102 (2) (a)) as applied by para. (2A), in so far as it purports to cover a disposition of property situate outside New South Wales by the exercise of a general power of appointment, is invalid on the ground that there is no relevant territorial nexus with New South Wales. H

(2) See p. 898, letter G, ante.

(3) [1929] A.C. 444 at p. 448.

(4) [1929] A.C. at p. 447. I

A In the words of the Supreme Court in *Johnson's* case (5), quoted by their lordships in their judgment (6):

B “The legislature of New South Wales is a subordinate legislature. Its powers are to be found in the Constitution Act, 1902, (7), s. 5 of which, so far as material, provides that: ‘The legislature shall subject to the provisions of the Commonwealth of Australia Constitution Act have power to make laws for the peace, welfare, and good government of New South Wales in all cases whatsoever’. Legislation on any subject-matter which has no relevant territorial connexion whatever with New South Wales falls outside the power of the legislature of New South Wales (see *A.-G. v. Australian Agricultural Co.* (8) and *Comr. of Stamp Duties (New South Wales) v. Millar* (9)).”

C For the purpose of ascertaining whether there is a relevant territorial connexion the scope of possible relevancy is wide. In *Broken Hill South, Ltd. v. Comr. of Taxation (New South Wales)* (10) in the High Court of Australia, Dixon, J., said (11):

D “The power to make laws for the peace, order and good government of a State does not enable the State Parliament to impose by reference to some act, matter or thing occurring outside the State a liability upon a person unconnected with the State whether by domicile, residence or otherwise. But it is within the competence of the State legislature to make any fact, circumstance, occurrence or thing in or connected with the territory the occasion of the imposition upon any person concerned therein of a liability to taxation or of any other liability. It is also within the competence of the legislature to base the imposition of liability on no more than the relation of the person to the territory. The relation may consist in presence within the territory, residence, domicile, carrying on business there, or even remoter connexions. If a connexion exists, it is for the legislature to decide how far it should go in the exercise of its powers.”

F Nevertheless it appears from decided cases that there is no “relevant territorial connexion” if the connexion with the territory of New South Wales is too slight. There is an element of degree involved.

G In *Comr. of Stamp Duties (New South Wales) v. Millar* (9) it was held by the majority of the High Court of Australia that provisions purporting to authorise the inclusion in the dutiable estate of a person, dying resident and domiciled out of New South Wales, of shares held by him in a company incorporated out of and having no share register within that State, but which carried on the business of mining within the State, were in excess of the power of the legislature of New South Wales.

H In *Johnson's* case (12) the provision under consideration was s. 102 (2) (g), as applied by para. (2A) to property outside New South Wales. Sub-paragraph (g) provides for inclusion in the dutiable estate of any property in which the deceased or any other person had an estate or interest limited to cease on the death of the deceased or at any time determined by reference to the death of the deceased . . . to the extent to which a benefit accrues or arises by cesser of the limited interest . . . to or for the benefit of a person entitled to an estate or interest in the property in remainder or reversion expectant on the determination of the limited interest. If para. (2A) is to apply, the domicile of the deceased must have been in New South Wales. But all other relevant persons and things (for instance the reversioners or remaindermen, the property concerned, the creation of the trust and the law

(5) [1956] 1 All E.R. 502; [1956] A.C. 331.

(6) [1956] 1 All E.R. at p. 507; [1956] A.C. at p. 350.

(7) I.e., of New South Wales.

(8) (1934), 34 S.R. (N.S.W.) 571.

(9) (1932), 48 C.L.R. 618.

(10) (1937), 56 C.L.R. 337.

(11) (1937), 56 C.L.R. at p. 375.

(12) [1956] All E.R. 502; [1956] A.C. 331.

governing its creation and execution) might be outside New South Wales. Also there would not, or might not be any relevant disposition by the deceased. In the judgment of your lordships' board there is this passage (13):

"The case is not that of a deceased dying possessed of personal estate, or a case of a deceased who has given away property shortly before his death without valuable consideration. The deceased's only interest was a limited interest ceasing on her death, and it is not her estate that is brought into charge. If the presence of the property in the state at the death of the deceased is lacking, every other incident, or circumstance, associated with the limited interest may also find its place, as has already been exemplified, outside New South Wales. The domicile of a deceased within New South Wales at the date of his death is, in their lordships' judgment, a quite insufficient ground by itself to make good the lack of any other connexion with the State. In the succinct language of the Supreme Court: 'The case may be exemplified as being one in which a duty is levied on or in respect of the property of A because of the domicile in the jurisdiction of B'."

The last two sentences in that passage should be understood in relation to the sub-paragraph which was there under consideration (i.e., sub-para. (g) as applied by para. (2A)) and not as necessarily applying generally in relation to all the sub-paragraphs in s. 102 (2).

There are, however, in the present case two material elements of territorial connexion in addition to the domicile of Mrs. Thompson in New South Wales. First, being so domiciled she had in respect of the property a general power of appointment and she could have exercised it for her own benefit in a number of ways. Secondly, being so domiciled, she did in fact exercise the power and thereby she made a disposition of the property.

There are numerous judgments both in Australian and in English cases explaining the position of property subject to a general power of appointment, when the power is exercised, and the reasons for including "notional" property in a dutiable estate. It will be sufficient to cite passages from one English and one Australian case.

In *Comr. of Stamp Duties v. Stephen* (14), LORD LINDLEY said (15):

"The distinction between a person's own property and property which is not his own, but which he can dispose of by will in any way he pleases by virtue of a power conferred upon him, is well established. Such last-mentioned property is not his own in any proper sense; and even if he executes the power by his will, no probate duty is payable upon that property unless such duty is made payable by a statute so worded as clearly to comprehend it. A statute imposing duty on a testator's property generally is not sufficient for this purpose. This was finally settled in *Drake v. A.-G.* (16) affirming *Platt v. Routh* (17).

"But it has long been settled that property appointed by will under a general power of appointment is subject to the payment of the appointor's debts: *Beyfus v. Lawley* (18); and if such property is personal property, it is equitable assets of the testator which his executor can claim for distribution in the proper order: see *Re Hoskin's Trusts* (19) and *Re Lawley* (20). Notwithstanding, therefore, the difference between a person's own property and property which he can dispose of as he pleases and does dispose of, although it is not his own, the distinction is one which the legislature can hardly be expected to recognise when imposing probate or other duties

(13) Per LORD KEITH OF AVONHOLM, [1956] 1 All E.R. at pp. 510, 511; [1956] A.C. at p. 355.

(14) [1904] A.C. 137.

(15) [1904] A.C. at p. 140.

(16) (1843), 10 Cl. & Fin. 257.

(17) (1840), 6 M. & W. 756.

(18) [1900-03] All E.R. Rep. 796; [1903] A.C. 411.

(19) (1877), 6 Ch.D. 281.

(20) [1902] 2 Ch. 799 at p. 807.



A payable on the death of a person who has exercised his power of disposition. Accordingly, modern Acts imposing such duties are almost always, if not always, so framed as to include both classes of property; and this is reasonable and just."

In *Grey v. Federal Comr. of Taxation* (21), RICH, J., said (22):

B "A taxing Act, generally speaking, is aimed at obtaining a subvention to the treasury at the expense of the citizen either on some occasion when the citizen is found with replenished resources or in respect of his possession of property. Among such Acts those imposing death duties are usually concerned with the transmission of property on death. In order to prevent resort to gifts and dispositions inter vivos on the part of men of property who manifest more benevolence to their offspring or other claimants on their bounty than interest in the budgets of their country some provision is almost invariably included in such Acts whereby property, the subject of the gift, is treated as comprehended in the deceased's estate: cf. *Horsfall v. Comr. of Taxes* (Victoria) (23). Further, as a general power of appointment enables the donee of the power to dispose of property as if it were his own, it is usual to levy duty upon property subject to such power as if it were part of the estate passing upon death. Section 8 (3) (a) by the bracketed words reaches after property devolving upon the exercise of a general power."

In the same case DIXON, J., said (24):

E "It is quite clear why it was thought proper to include in the dutiable estate property over which a testator had exercised a general testamentary power of appointment. It is because the donee of a general power of appointment has a right of disposition which is in many respects the equivalent of property. The power enables him to appoint to himself or his executors. It enables him to devise or bequeath the property subject to the power as freely and effectually as if it were his own. That property becomes subject to his debts as if it were his own estate. He may release the power instead of exercising it. Further, all these things he may do for valuable consideration. A general power immediately arising, therefore, has many practical results which ordinarily flow from the ownership of property. At the same time, in point of law, property subject to a general testamentary power forms no part of the property or assets of the donee of the power and the instrument exercising the power, though in form a will operates rather as the completion of a conveyance than as a testament (*In the Goods of Tomlinson* (25); *O'Grady v. Wilmot* (26))."

H It follows from the principles stated in those judgments that the sub-paragraph (s. 102 (2) (a) as applied by para. (2A)) as affecting property outside New South Wales disposed of by the exercise of a general power of appointment by a person domiciled in New South Wales is not lacking in relevant territorial connexion and is valid.

I It is not necessary to consider the details of the definition of "general power of appointment" contained in s. 100. That is only an "including" definition, designed to bring in powers or authorities which might not be within the ordinary meaning of "general power of appointment", and it does not have any application to the present case, where there is a general power of appointment according to the ordinary meaning of the words.

Reference was made to other sections of the Act, especially s. 114, s. 115 and s. 120, relating to payment of the death duties and enforcement of the liability.

(21) (1939) 62 C.L.R. 49.

(22) (1939), 62 C.L.R. at pp. 59, 60.

(23) (1918), 24 C.L.R. 422 at p. 441.

(24) (1939), 62 C.L.R. at pp. 63, 64.

(25) (1881), 6 P.D. 209 at p. 210.

(26) [1916] 2 A.C. 231.

Consideration of these sections does not alter the conclusions arrived at under s. 102. A

The decision of the Court of Appeal was correct and should be affirmed. Their lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the respondent's costs of the appeal.

*Appeal dismissed.*

Solicitors: *Alan, George & Sacker* (for the appellants); *Light & Fulton* (for the respondent). B

[Reported by S. A. HATTEEA, Esq., Barrister-at-Law.]

## UNITED DOMINIONS CORPORATION (JAMAICA), LTD. v. SHOUCAIR. C

[PRIVY COUNCIL (Viscount Dilhorne, Lord Guest, Lord Devlin, Lord Pearce and Lord Pearson), March 20, 21, 25, 26, May 14, 1968.]

*Privy Council—Jamaica—Moneylending—Mortgage—Variation of contract—Interest—Rate of interest raised—Increase accepted by mortgagor by letter—No provision in mortgage for raising rate of interest but principal repayable on demand—No written memorandum of variation complying with Moneylending Law—No memorandum in writing of original mortgage necessary—Whether mortgage enforceable without the variation in rate of interest—Moneylending Law of Jamaica (c. 254), s. 8.* D

The appellants lent £55,000 to the respondent on a mortgage. The principal was repayable on demand and bore interest at nine per cent. but the mortgage did not provide for raising the rate of interest. The bank rate having been raised by two per cent., the appellants wrote to the respondent that they had to raise the mortgage interest by a corresponding amount. The respondent confirmed acceptance of the increase. By s. 8\* of the Moneylending Law no contract for repayment of money lent and no security given was enforceable unless a memorandum in writing containing all the terms of the contract was signed by the borrower before the money was lent or the security was given, and unless a copy of the memorandum was delivered to the borrower. The respondent defaulted in the payment of interest and the appellants gave notice that they would exercise their powers of sale under the mortgage unless principal and interest† were paid by a certain date. On the question whether the original mortgage with interest at nine per cent. remained enforceable, the appellants not seeking on appeal interest at eleven per cent. but only at nine per cent., E

**Held:** the agreed variation raising the amount of mortgage interest from nine to eleven per cent. did not reveal an intention to rescind the mortgage transaction, and therefore, though the variation was not enforceable for non-compliance with s. 8 of the Moneylending Law, the original mortgage bearing interest at nine per cent. was not rescinded but remained enforceable (see p. 907, letter E, and p. 908, letter F, post). F

*Morris v. Baron & Co.* ([1918] A.C. 1) and *Cooper v. Zeffert* ((1883), 32 W.R. 402) applied. G

[As to the effect of a variation of contract, see 8 HALSBURY'S LAWS (3rd Edn.) 155, para. 265, 177, 178, para. 305; and for a case on the subject, see 12 DIGEST (Repl.) 405, 3134. H

\* Section 8 is set out at p. 906, letters B to D, post. The Moneylending Law was ch. 254 of the Revised Edition (1953) of the Laws of Jamaica.

† It was conceded at the trial that the rate of interest at which the total demanded was computed was eleven per cent. I

A As to the requirement of a memorandum in writing of a moneylending contract in English law, see 27 HALSBURY'S LAWS (3rd Edn.) 31, para. 49.]

Cases referred to:

- British & Beningtons, Ltd. v. North Western Cachar Tea Co., Ltd.*, [1922] All E.R. Rep. 224; [1923] A.C. 48; 92 L.J.K.B. 62; 128 L.T. 422; 13 Lloyd's L.R. 67; 12 Digest (Repl.) 400, 3101.
- B *Cooper v. Zeffert*, (1883), 32 W.R. 402; 7 Digest (Repl.) 135, 770.
- Eldridge and Morris v. Taylor*, [1931] All E.R. Rep. 542; [1931] 2 K.B. 416; 110 L.J.K.B. 689; 145 L.T. 499; 35 Digest (Repl.) 245, 438.
- Kok Hoong v. Leong Cheong Kweng Mines, Ltd.*, [1964] 1 All E.R. 300; [1964] A.C. 993; [1964] 2 W.L.R. 150; Digest (Cont. Vol. B) 248, 101a.
- C *Morris v. Baron & Co.*, [1918] A.C. 1; 87 L.J.K.B. 145; 118 L.T. 34; 12 Digest (Repl.) 499, 3744.
- Williams v. Moss' Empires, Ltd.*, [1915] 3 K.B. 242; 84 L.J.K.B. 1767; 113 L.T. 560; 12 Digest (Repl.) 399, 3099.

### Appeal.

D By writ issued in 1962 the present respondent, Michael Mitri Shoucair, sought a declaration that a mortgage made between the respondent and the appellants, United Dominions Corporation (Jamaica), Ltd., dated Apr. 22, 1961, and varied in writing on July 31, 1961 (purporting to be effective as from July 26, 1961), was unenforceable having regard to s. 8 of the Moneylending Law of Jamaica, and the respondent claimed consequential relief. By order of DOUGLAS, J., in the Supreme Court of Jamaica, dated May 13, 1963, the court declared that the mortgage as varied was unenforceable and that it, and the letter of July 31, 1961, confirming the variation, should be cancelled and delivered to the respondent. By order dated Apr. 18, 1966, of the Court of Appeal of Jamaica (LEWIS and HENRIQUES, J.J.; DUFFUS, P., dissenting) the court dismissed the appellants' appeal from the order of DOUGLAS, J. By order dated Sept. 3, 1966, the Court of Appeal in Jamaica gave final leave to appeal to Her Majesty in Council.

F *J. L. Arnold, Q.C.*, and *R. A. Gatehouse* for the appellants.

*David Coore, Q.C.*, *R. Mahfood, Q.C.* (both of the Jamaica Bar) and *Robert S. Alexander* for the respondent.

G LORD DEVLIN: This is an appeal from a decision of the Court of Appeal of Jamaica upholding a decision of the Supreme Court which declared to be unenforceable by reason of s. 8 of the Moneylending Law, a mortgage made between the parties on Apr. 22, 1961, and varied on or after July 26, 1961. The respondent had borrowed £55,000 from the appellant company and this was the principal secured by the mortgage in question. It was repayable on demand and bore interest at nine per cent. The variation, which raised the rate of interest to eleven per cent., was effected by means of a circular letter dated July 31, 1961, which the appellants sent out to their borrowers, including the respondent. The letter said that because of the increase of two per cent. in the bank rate the appellants had to raise their rate by a corresponding amount. They trusted this would only be a temporary measure and requested the borrower to confirm by signing and returning an attached copy of the letter. The respondent did as requested on Sept. 7, 1961.

I There was no provision in the mortgage entitling the appellants to raise the rate of interest to correspond with bank rate. What was proposed in the letter of July 31 was therefore a variation of the mortgage terms, which the borrower might have been expected to reject if it were not for the fact that the debt was repayable on demand. Their lordships have heard argument about whether there was good consideration for the borrower's acceptance of the increased rate. Both the courts below held that there was and their lordships will, without deciding the point, assume this to be correct. On this assumption the matter



to be determined by the Board is the effect on the whole transaction of s. 8 of the Moneylending Law. A

Section 8 is a provision relating to the formal requirements of the contract of a sort that is well known in the moneylending laws of the Commonwealth. It is in the same terms as s. 6 of the Moneylenders Act, 1927, in force in the United Kingdom and is as follows:

“ 8. (1) No contract for the repayment by a borrower of money lent to him or to any agent on his behalf after the commencement of this law or for the payment by him of interest on money so lent and no security given by the borrower or by any such agent as aforesaid in respect of any such contract shall be enforceable, unless a note or memorandum in writing of the contract containing the particulars required by this section be made and signed personally by the borrower, and unless a copy thereof be delivered or sent to the borrower within seven days of the making of the contract; and no such contract or security shall be enforceable if it is proved that the note or memorandum aforesaid was not signed by the borrower before the money was lent or before the security was given as the case may be. B

“ (2) The note or memorandum aforesaid shall contain all the terms of the contract, and in particular shall show the date on which the loan is made, the amount of the principal of the loan, and the interest charged on the loan expressed in terms of a rate per centum per annum.” C

In the application of this section to the transaction between the parties, three matters are agreed. First, the section had not on Apr. 22, 1961, any effect on the mortgage of that date because by s. 13 (1) the law does not apply to loans bearing interest at ten per cent. or less (1). Secondly, the variation agreement, if looked at by itself, is rendered unenforceable by s. 8 because it does not contain all the terms of the contract. Thirdly, the variation agreement cannot be saved by reading the letter of July 31 in conjunction with the original mortgage. Apart from any other difficulties, the provisions in s. 8 requiring the note to be signed before the lending and a copy to be sent to the borrower within seven days of the making of the contract, make it impossible for a later document to incorporate terms by reference to an earlier document. What it comes down to is that the only safe way of effectively altering a moneylending contract is to cancel it and start afresh. Accordingly the appellants make no attempt to enforce a mortgage carrying interest at eleven per cent. What they want to do is to enforce the original mortgage at nine per cent.; and whether they can do so or not depends on whether the agreement of variation, itself unenforceable, drags down with it to the same fate the agreement which it was seeking to amend. D

At the root of the problem there lies the concept of unenforceability, first introduced into English law by the Statute of Frauds (1677), and since made use of in a number of other settings, including the Moneylenders Act, 1927. If the statute made the amending contract void and of no effect, there would be no problem at all. An attempt at changing the original contract would have failed altogether and so left it quite untouched; but unenforceability creates only a procedural bar. The substance of the contract is good; yet, although the contract is alive and real, the court will not give effect to it unless its existence can be proved in the way prescribed by the statute. Thus the difficulty about enforcing the original mortgage in this case is that, although itself untouched by the statute, it is no longer the real contract between the parties. In reality, although the statute prevents reality from being proved, there is no longer a mortgage at nine per cent. but one at eleven per cent. Since however the real contract is not evidenced in the way required by the moneylending law, it cannot be enforced. This is the approach made by DOUGLAS, J., in the Supreme Court E

(1) Section 13 (1) provided: “ This law does not apply to— . . . (e) any loan or contract or security for the repayment of money lent at a rate of interest not exceeding ten per centum per annum.” F

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A and by LEWIS, J., who gave the leading judgment for the majority in the Court of Appeal.

Another way of arriving at the same result is to treat a variation of a contract as something that necessarily requires the rescission of the old contract and the substitution of a new one. On this view the old contract cannot be enforced because it has been rescinded and the new contract cannot be enforced because B it is not properly evidenced. This was the conclusion reached by the Divisional Court in *Williams v. Moss' Empires, Ltd.* (2) and adopted by the Court of Appeal in *Morris v. Baron & Co.* (3). As SANKEY, J., put it in the former case (4):

"The result of varying the terms of an existing contract is to produce, not the original contract with a variation, but a new and different contract."

C The disadvantage of this view is that a minor variation may destroy the effect of the whole of the transaction between the parties. The alternative view, adopted by the House of Lords in *Morris v. Baron & Co.* (3) and again in *British and Beningtons, Ltd. v. North-Western Cachar Tea Co., Ltd.* (5) (where LORD SUMNER (6) referred to the former view as possibly correct "as a matter of formal logic") is based on the intention of the parties. They cannot have that which D presumably they wanted, that is, the old agreement as amended; so the court has to make up its mind which comes nearer to their intention—to leave them with an unamended agreement or without any agreement at all. The House answered this question by rejecting the strict view propounded by SANKEY, J. (4), and distinguishing between rescission and variation. If the new agreement reveals an intention to rescind the old, the old goes; and if it does not, the old E remains in force and unamended.

If the principle in *Morris v. Baron & Co.* (3) applies to this case, the mortgage of Apr. 22 remains in force. The contrary has not been and could not be argued. It would be impossible to contend that a temporary variation in the rate of interest reveals any intention to extinguish the debt and the mortgage. So the question in this appeal is whether the Board should apply to the Moneylending F Law the reasoning which *Morris v. Baron & Co.* (3) applied to the Statute of Frauds or whether the Board should apply the reasoning which in *Morris v. Baron & Co.* (3) the House rejected. There is no direct authority on the point. The point could have arisen in *Eldridge and Morris v. Taylor* (7), but there the lender sought to enforce only the variation and not the original agreement. The case was rightly distinguished on this ground by DUFFUS, P., in the Court G of Appeal.

In their lordships' view the problem—that is, how to handle the consequences of unenforceability—takes the same form under the Moneylending Law as it does under the Statute of Frauds and similar statutes considered in *Morris v. Baron & Co.* (3). Both the Statute of Frauds and the Moneylending Law are procedural statutes enacting that a contract shall not be enforced unless certain H matters can be proved. The matters are not in the two cases the same in all respects. Both statutes require the production of a note or memorandum containing all the terms of the contract, but the Moneylending Law requires also that the note must be one that was signed by the borrower before the money was lent and one of which a copy was delivered to the borrower within seven days of the making of the contract. These additional requirements do not in their lordships' view alter the nature of the problem. I

The choice before the Board lies between solving the problem by means of what LORD SUMNER (6) called formal logic or solving it by giving effect as far

(2) [1915] 3 K.B. 242.

(3) [1918] A.C. 1.

(4) [1915] 3 K.B. at pp. 247, 248.

(5) [1922] All E.R. Rep. 224; [1923] A.C. 48.

(6) [1922] All E.R. Rep. at p. 233; [1923] A.C. at p. 68.

(7) [1931] All E.R. Rep. 542; [1931] 2 K.B. 416.

as possible to the intention of the parties as was done in *Morris v. Baron & Co.* (8). A  
 The argument for the respondent assumed rightly that their lordships would  
 accept the guidance offered in *Morris v. Baron & Co.* (8), unless it could be  
 shown that despite the similarity in the operative parts of the statutes there  
 are underlying differences between them that destroy the value of the guidance.  
 There are, however, differences which counsel for the respondent has expounded. B  
 Some stem from the differing attitude of the courts which have been more  
 sympathetic to the objects of moneylending legislation than they have to those  
 of the Statute of Frauds. Thus the rule that an estoppel cannot be set up in  
 the face of a statute has not been applied to the Statute of Frauds, but has been  
 applied to moneylending legislation on the ground that the latter reflects a  
 general or social policy which the courts will assist: see *Kok Hoong v. Leong*  
*Chcong Kweng Mines, Ltd.* (9) per VISCOUNT RADCLIFFE (10). C  
 Other differences stem from the fact that the formal requirements of the two statutes are not  
 precisely the same, so that what may be a good note or memorandum for one  
 statute may not be good for the other. The missing link in counsel for the  
 respondent's argument is the one that should connect such differences with the  
 reasoning in *Morris v. Baron & Co.* (8) and the *British and Beningtons'* case (11). D  
 It is not enough for him to show that there are differences. He must show also  
 that they are such as to make the application of formal logic, which the House  
 rejected as a solution of the problem when it arose out of the Statute of Frauds,  
 appropriate as a solution of the same problem when it arises under the Money-  
 lending Law. None of the differences suggested touch that point. The intention  
 of the parties is just as important in moneylending contracts as in any other.  
*Cooper v. Zeffert* (12) was usefully cited by counsel for the appellants as a case E  
 in which the principle later applied in *Morris v. Baron & Co.* (8) was applied  
 by the Court of Appeal in England in an action on a bill of sale given as security  
 for a debt. The Board can see no reason for not following *Morris v. Baron &*  
*Co.* (8).

For these reasons, which are substantially the reasons given by DUFFUS, P.,  
 in his dissenting judgment in the Court of Appeal, the Board will humbly advise F  
 Her Majesty to allow this appeal and to order that the costs of the proceedings  
 in the court below should be paid by the respondent. The respondent must also  
 pay the costs of the proceedings before the Board.

*Appeal allowed.*

Solicitors: *Simmons & Simmons* (for the appellants); *Druces & Attlee* (for G  
 the respondent).

[Reported by S. A. HATTEEA, Esq., Barrister-at-Law.]

(8) [1918] A.C. 1.

(9) [1964] 1 All E.R. 300; [1964] A.C. 993.

(10) [1964] 1 All E.R. at p. 307; [1964] A.C. at p. 1014.

(11) [1922] All E.R. Rep. 224; [1923] A.C. 48.

(12) [1883], 32 W.R. 402.



## DIAMOND v. GRAHAM.

[COURT OF APPEAL, CIVIL DIVISION (Danckwerts, Diplock and Sachs, L.J.J.),  
March 12, 1968.]

*Bill of Exchange—Holder for value—Value given for cheque—Consideration not passing directly between holder and drawer—Whether drawee of cheque deemed holder for value as against drawer—Whether drawer of cheque became a party to it prior to the time when value was given—Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 27 (2).*

H. asked a friend, D., for the loan of £1,650 urgently. D. agreed to make the loan provided that G. made out a cheque for £1,665 in favour of D. and that this latter cheque was in D.'s possession before the cheque that D. was to draw in favour of H. was presented for payment. D. then drew a cheque in favour of H., the day being a Friday. H. was unable to obtain G.'s cheque on the following Monday, so D. stopped payment of his cheque to H. G.'s cheque for £1,665 was obtained by H. in the course of the Tuesday, and on that day was paid into D.'s bank, D. then authorising payment of his cheque to H. When G. drew the cheque for £1,665 in favour of D., H. had also drawn a cheque for the same amount in favour of G. G.'s cheque to D., and also H.'s cheque to G., were dishonoured. In an action by D. against G. on the cheque for £1,665 the question arose whether D. was deemed as against G., by virtue of s. 27 (2)\* of the Bills of Exchange Act, 1882, to be a holder for value of the bill (viz., the cheque for £1,665), G. contending that the requirement of s. 27 (2) that value should have been given for the bill predicated that valuable consideration should have passed directly between D. and G. On appeal,

**Held:** there was nothing in s. 27 (2) of the Bills of Exchange Act, 1882, which required that value for the bill should have been given directly by the holder (in this case by D.) to another party to the bill (in this case to the drawer G.), as long as value had been given for the cheque (see p. 911, letter F, and p. 912, letter E, post); consideration had been given by D. to H. for the bill, as a result of which D. acquired possession of the bill and thus became the "holder" of it within s. 2 of the Act of 1882, and accordingly D. was deemed to be a holder for value of the cheque for £1,665, G., being a party thereto (viz., the drawer) who became a party prior to the time when value was given (see p. 911, letter G, and p. 912, letters C and G, post).

Appeal dismissed.

[As to who is a holder for value, see 3 HALSBURY'S LAWS (3rd Edn.) 146, para. 224 text and note (m), p. 177, para. 294; and for cases on the subject, see 6 DIGEST (Repl.) 123, 124, 913-924.

As to the liability of a drawer of cheques, see 3 HALSBURY'S LAWS (3rd Edn.) 214, para. 380; and for cases on the subject, see 6 DIGEST (Repl.) 288, 2118-2120.

For the Bills of Exchange Act, 1882, s. 27, see 2 HALSBURY'S STATUTES (2nd Edn.) 519.]

### Appeal.

By his statement of claim as amended, endorsed on a writ issued on Aug. 16, 1962, the plaintiff, H. R. Diamond, sued the defendant, J. J. Graham, on a cheque, dated July 26, 1960, and drawn by the defendant in favour of the plaintiff, for £1,665, the plaintiff claiming as the holder in due course or the holder for value of the cheque. By a re-amended defence, re-served on July 26, 1967, the defendant admitted that he was the drawer of the cheque for £1,665 and denied that there was consideration for the cheque; the defendant further denied that the plaintiff was ever a holder in due course or a holder for value of the cheque. The action was tried before MEGAW, J., who gave judgment on July 27, 1967,

\* Section 27 (2) is set out at p. 911, letter D, post.

for the plaintiff for £1,665 with interest from July 6, 1966, at six per cent. per annum, this date being the date when leave to amend was given. On the plaintiff's contention under s. 27 (2) of the Bills of Exchange Act, 1882, the trial judge held that value was given by the plaintiff for the defendant's cheque for £1,665 in that the plaintiff on obtaining possession of the cheque released payment of his own cheque for £1,650 in favour of a Mr. Herman which cheque, prior to that time, was stopped; and the trial judge further held that the defendant had become a party to the cheque for £1,665, which he had drawn, prior to the time when value was given, within the meaning of the words "prior to such time" in s. 27 (2), with the consequence that the plaintiff was deemed by s. 27 (2) to be a holder for value of the cheque for £1,665.

By notice dated Sept. 6, 1967, the defendant appealed against the order of MEGAW, J., dated July 27, 1967, on the following grounds—(i) that the judge was wrong in law in having held that the defendant was not an accommodation party to the cheque and that the plaintiff had given value to Mr. Herman for the cheque and was therefore holder of the cheque for value, and (ii) that the judge was wrong in law and in fact in holding that the defendant had become a party to the cheque prior to the plaintiff's giving value for it.

*A. H. Tibber* for the defendant.

*H. Lester* for the plaintiff.

**DANCKWERTS, L.J.:** This is an appeal against a judgment of MEGAW, J., given on July 27, 1967, in which he gave judgment for the plaintiff for the sum of £1,665 in an action on a cheque drawn by the defendant, Mr. Graham, for that sum in favour of the plaintiff, Mr. Diamond. A cheque, of course, is just a bill of exchange drawn on a bank in favour of the named person. That is the definition, as s. 3 of the Bills of Exchange Act, 1882, shows. The cheque was dishonoured, and therefore *prima facie* the action would not normally admit of any defence; but matters, of course, are not quite so simple as that, or the appeal would never have arisen.

The series of events was this. The date of the cheque was July 26, 1960. It had originally been dated July 22, but the date was altered to July 26. A third person, Mr. Herman, comes into the picture. Mr. Herman was a friend of the plaintiff, and had borrowed money from him from time to time, though the judge rejected a claim that the plaintiff was a moneylender, and no appeal arises on that point.

On Friday, July 22, 1960, Mr. Herman wanted a sum of £1,650 for urgent commitments that he had to meet. He went to the plaintiff and asked him to lend him the sum of £1,650, and the plaintiff said that he would lend him the sum only if on the Monday (July 25) he would procure a cheque from the defendant, Mr. Graham, for £1,665. That was the pre-condition. Two conditions were that the defendant's cheque should be made payable to the plaintiff, and that the defendant's cheque must be in the plaintiff's possession by the time that the plaintiff's cheque was presented. So the plaintiff then drew a cheque to Mr. Herman for £1,650. It turned out that Mr. Herman could not get the cheque from the defendant on the Monday (July 25) because he was not available on that day. So the cheque having been taken to the plaintiff's bank, he stopped the cheque and told the bank manager not to pay it until authorised by him, the plaintiff. On July 26, 1960, Mr. Herman got his cheque from the defendant made out to the plaintiff. The defendant had asked Mr. Herman who was the friend providing him with temporary relief, and he was told the plaintiff's name. So that the cheque was made out to the plaintiff, who then paid it into his bank. Thereupon the plaintiff authorised payment of his cheque in favour of Mr. Herman, and at the suggestion of the bank manager the date was altered to July 26, and initialled by the plaintiff. Unfortunately the defendant's cheque was returned with "effects not cleared" written on it, and it was dishonoured. Apparently the defendant had asked Mr. Herman, so he said, not to present the

A cheque to be specially cleared, but to let it go through in the ordinary manner, which would have taken two or three days, of course, before it came to be presented against the defendant's account. He was very upset to find that it had come home so quickly when the funds which he had expected to meet it apparently had not arrived.

Two points were taken before the judge. One was that the drawing of the cheque was an accommodation, so that it came within the appropriate section of the Bills of Exchange Act, 1882, and did not require consideration. That was negatived by the judge, I think correctly, and has not really been pursued here; and I do not think that the section in question, s. 28 of the Bills of Exchange Act, 1882, can have anything whatever to do with the present case.

Prima facie, of course, a bill of exchange is presumed to be for value, and the onus is on the drawer of the cheque to show that it was not for value; and the discussion which has taken place before us has really revolved round the provisions of s. 27 (2) of the Bills of Exchange Act, 1882, which provides:

"Where value has at any time been given for a bill the holder is deemed to be a holder for value as regards the acceptor and all parties to the bill who became parties prior to such time."

The contention of counsel for the defendant is that the plaintiff was not a holder for value because no value had passed directly between him and the defendant, the drawer; I think that that was the effect of his argument. There is one thing that I have not mentioned, I think that when the defendant drew the cheque in favour of the plaintiff, Mr. Herman drew his own cheque for the amount and gave it to the defendant, but unfortunately Mr. Herman's cheque was dishonoured, and I gather that he has since become bankrupt.

It seems to me that in presenting the argument which he did, counsel for the defendant was giving a meaning to s. 27 (2) which the words do not bear and is not in accordance with the words of that subsection. There is nothing in the subsection which appears to require value to have been given by the holder as long as value has been given for the cheque. The words actually are these:

"Where value has at any time been given for a bill the holder is deemed to be a holder for value as regards the acceptor and all parties to the bill who became parties prior to such time."

In the present case it seems to me that double value was given for the cheque, first of all by Mr. Herman, who gave his own cheque to the defendant in return for the defendant drawing a cheque in favour of the plaintiff, and as it appears to me further value was given by the plaintiff when he thereupon released his cheque to Mr. Herman. Consequently there was clearly value for the cheque given, and therefore the plaintiff was a holder for value. It seems to me, therefore, that the defence fails, the plaintiff succeeds, and the appeal must be dismissed.

It appears to be a very short point, depending entirely on the words of the subsection. Counsel for the defendant founded his argument on the notes contained in *BYLES ON BILLS OF EXCHANGE* (22nd Edn.) at p. 203; but in my view those notes go beyond the terms of the subsection, and consequently do not produce the result for which counsel contended. Accordingly, in my view the appeal must be dismissed.

**DIPLOCK, L.J.:** I agree. The point in this case is a very short point which turns on the construction of s. 27 (2) of the Bills of Exchange Act, 1882, read in conjunction with the definitions to be found elsewhere in the Act. Section 27 (2) provides:

"Where value has at any time been given for a bill the holder is deemed to be a holder for value as regards . . . all parties to the bill who became parties prior to such time."

"Value" is defined in s. 2 as meaning "valuable consideration". "Valuable



consideration " is described in s. 27 (1) as including " Any consideration sufficient to support a simple contract ". Here there clearly passed between the plaintiff and Mr. Herman " consideration sufficient to support a simple contract ". Was that consideration given for a bill? A bill is defined by s. 3 (1) in these terms:

" A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person, or to bearer."

Plainly this was a bill, an unconditional order in writing, and it was for the bill that consideration was given to Mr. Herman. " Holder " is defined in s. 2: " ' Holder ' means the payee or indorsee of a bill or note who is in possession of it . . ." The plaintiff was plainly the payee of the bill, who acquired possession of it as the result of the consideration which he gave to Mr. Herman. It seems to me that clearly he falls within all the requirements of the section.

I should add that the defendant became a party to the bill " prior to such time ". Section 21 (3) dealing with delivery, says:

" Where a bill is no longer in the possession of a party who has signed it as drawer . . . a valid and unconditional delivery by him is presumed until the contrary is proved."

Counsel for the defendant has argued, as my lord has said, that one must not read the words of s. 27 (2) in their literal meaning, but subject to a qualification that the subsection applies only where the consideration has passed directly between one party to the bill and another party to the bill. I can see nothing in the authorities which requires that qualification, and I can see nothing in common sense or justice which requires that qualification in circumstances (though they must be rare) such as existed in this case. I too would dismiss the appeal.

**SACHS, L.J.:** I agree. Not only has the defendant got nowhere near establishing that he did not become a party for value to this cheque, but on the evidence it is abundantly clear to my mind that valuable consideration was given for it within the meaning of s. 27 (1) (a), and in addition that value was given for it within the meaning of s. 27 (2). Accordingly the appeal must be dismissed.

*Appeal dismissed.*

Solicitors: *Bennett & Rigden* (for the defendant); *Sampson & Co.* (for the plaintiff).

[*Reported by F. A. AMIES, ESQ., Barrister-at-Law.*]

A  
Re STREDOCESKA FRUTA NARODNI PODNIK'S  
APPLICATION, No. B.836429, and Re V. J. FEJTEK'S  
OPPOSITION, No. 13202.

[CHANCERY DIVISION (Plowman, J.), May 22, 23, 30, 1968.]

B Trade Mark—Registration—Opposition—Confusion—Contrary to morality—  
Mark formerly used by opponent in connexion with his business in Czecho-  
slovakia and Central Europe—Business nationalised in 1948 by Czecho-  
slovakian law—No compensation paid—Opponent migrated to Canada—  
C Nationalised business began exporting to United Kingdom—Such exporting  
continued thereafter—Opponent having established similar business in Canada  
began exporting to United Kingdom in 1960—Canadian exports small in  
comparison with exports from Czechoslovakian business—Whether Czecho-  
slovakian business entitled to registration of mark—Trade Marks Act, 1938  
(1 & 2 Geo. 6 c. 22), s. 11.

The appellants had carried on business in Czechoslovakia, marketing goods  
in central Europe under a mark "Nova", for some years prior to the  
D nationalisation of his business in 1948. He alleged that he received no  
compensation on nationalisation of his business. In 1948 the nationalised  
business began exporting to England. The appellants went to Canada where  
he set up a similar business, using the same mark. For the next twelve years  
the respondents, proprietors of the nationalised business, continued exporting  
substantial quantities of goods to the United Kingdom. In 1960 the appellants  
E began exporting goods from Canada to the United Kingdom under the same  
mark, but the quantity exported by him to the United Kingdom in the  
period October, 1960, to July, 1962, was small compared with that so  
exported by the respondents. The respondents applied for registration of  
the mark under which they exported goods. The appellants objected on the  
grounds (under s. 11\* of the Trade Marks Act, 1938) that registration would  
be contrary to morality and would cause confusion.

F Held: (i) there being no evidence of the Czechoslovakian nationalisation  
law and no sufficient clarity concerning the position of the appellants in regard  
to compensation on nationalisation of his business in Czechoslovakia, the  
appellants had not established that registration of the mark used by the  
respondents would be contrary to morality (see p. 916, letter D, post);  
G moreover (a) immorality in the context of s. 11 of the Trade Marks Act, 1938,  
must be inherent in the mark itself, and (b) English trade had not been con-  
fiscated from the appellants, as his business had not exported to England  
before nationalisation (see p. 915, letter H, post).

*Arthur Fairest, Ltd.'s Application* ((1951), 68 R.P.C. 197) applied on (a)  
above.

H (ii) on the evidence it had not been established that the mark used by  
the appellants since July, 1960, had acquired a sufficiently substantial  
reputation to render s. 11 applicable (see p. 916, letter I, post); moreover,  
as it seemed that the mark had been used for years in connexion with the  
respondents' goods and had become distinctive of their goods, any confusion  
arising from the more recent use by the appellants of his similar mark was  
not a ground for refusing the respondents protection by registration of their  
I older mark (see p. 917, letter I, to p. 918, letter A, post).

Dictum of WILBERFORCE, J., in *Welsh Lady Trade Mark* ([1964] R.P.C.  
at p. 461) applied.

Appeal dismissed.

[As to opposition to registration of a trade mark, see 38 HALSBURY'S LAWS  
(3rd Edn.) 541, para. 899, and 557-559, paras. 927-929; as to objection on the

\* Section 11 is set out at p. 915, letter F, post.

grounds of confusion and immorality, see *ibid.*, pp. 542-543, para. 903; and for cases on opposition, see 46 DIGEST (Repl.) 85-87, 470-483. A

For the Trade Marks Act, 1938, s. 11, see 25 HALSBURY'S STATUTES (2nd Edn.) 1189.]

Cases referred to:

*Fairest (Arthur), Ltd.'s Application*, (1951), 68 R.P.C. 197; 46 Digest (Repl.) 87, 481. B

*Smith Hayden & Co., Ltd.'s Application, Re*, (1945), 63 R.P.C. 97; 46 Digest (Repl.) 67, 371.

*Welsh Lady Trade Mark*, [1964] R.P.C. 459; 46 Digest (Repl.) 39, 200.

### Originating Motion.

This was a motion on notice, dated Mar. 12, 1968, by way of appeal from a decision, given on Nov. 15, 1967, by assistant registrar R. L. MOORBY, acting for the Registrar of Trade Marks, directing that the application of the respondents, Stredoceska Fruta Narodni Podnik, a Czechoslovakian corporation of Mochov, Czechoslovakia, for the registration of the trade mark "Nova" in Class 29 in respect of "preserved gherkins, sauerkraut and tomato purée, all being canned" should proceed to registration. The appellant, V. J. Fejteck, who opposed the registration, was the managing director and general manager of Canada Foods Ltd., Kentville, Nova Scotia, and prior to 1948 had been the proprietor of a business in Czechoslovakia which marketed preserved pickles, vegetables, fruit and the like, using the mark "Nova". In 1948 the appellant's Czechoslovakian business had been nationalised under law of the Czechoslovak government, and thereafter was vested in the respondents, which in 1948 began exporting, and had thereafter continued to export, to the United Kingdom under the same mark "Nova". C  
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The cases noted below\* were cited during the argument in addition to those referred to in the judgment.

*Anthony Walton* for the appellant.

*John Burrell* for the respondents. F

*Cur. adv. vult.*

May 30. **PLOWMAN, J.**, read the following judgment: Prior to 1948 the appellant was the proprietor of a firm in Czechoslovakia whose business consisted of marketing preserved pickles, vegetables, fruit and the like. In that business he used the mark Nova. The firm did not export to the United Kingdom. In 1948 the business was nationalised and taken over by the Czechoslovak government. The appellant says that he was paid no compensation. In the same year the nationalised firm began exporting to the United Kingdom and did so under the same mark Nova. From 1948 to 1953 the export value of the goods so exported to the United Kingdom amounted to £334,000. The retail sales price in the United Kingdom is said to be some forty per cent. more. No figures of imports are available for the years 1954, 1955 or 1956, but in the period 1957 to July 3, 1962 (the date of the respondent's application for registration) the value of sales to the United Kingdom of tinned gherkins, sauerkraut and tomato purée, based on export prices amounted to some £616,000. The mark Nova has also been brought to the public's notice in this country through G  
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\* *Newman v. Pinto*, (1887), 4 R.P.C. 508; *Re Fuente's Trade Marks*, (1891), 8 R.P.C. 214; *Russian Commercial and Industrial Bank v. Le Comptoir d'Escompte de Mulhouse*, [1924] All E.R. Rep. 381; [1925] A.C. 112; *Bass, Ratcliff & Gretton, Ltd. v. Nicholson & Sons, Ltd.*, (1931), 49 R.P.C. 88; *A. Bailey & Co., Ltd. v. Clark, Son & Morland, Ltd.*, [1938] 2 All E.R. 377; 55 R.P.C. 253; *Aristoc, Ltd. v. Rysta, Ltd.*, [1945] 1 All E.R. 34; 62 R.P.C. 65; *Re Jellinek's Application*, (1946), 63 R.P.C. 59; *Anglo Iranian Oil Co., Ltd. v. Jaffrate*, [1953] 1 W.L.R. 246; *Re Hassan el-Madi's Application*, (1954), 71 R.P.C. 281; *Re Herbert Wragg & Co., Ltd.*, [1956] 1 All E.R. 129; [1956] 1 Ch. 323; *Re Brown Shoe Co. Inc.*, [1959] R.P.C. 29; *Burmah Oil Co., Ltd. v. Lord Advocate*, [1964] 2 All E.R. 348; [1965] A.C. 75.



A advertisements in trade journals, in the national press and at various exhibitions.

When his business was taken over, the appellant went to Nova Scotia and set up a pickling industry there. In October, 1960, that business began to export their products, including pickled gherkins, to the United Kingdom under the mark Nova. By then the respondents had been doing the same thing for twelve years and had exported to this country something like three-quarters of a million pounds worth of goods plus whatever amount is attributable to 1954 to 1956. From October, 1960, to July, 1962, the value of the goods exported to the United Kingdom by the appellant was £12,400, or about one per cent. of the value of the goods brought into this country by the respondents.

B From the appellant's notice of opposition it appeared that the objections to registration were based on two grounds. I quote from the registrar's decision C where he said this:

"The objections raised by the opponent are on two grounds: First, one of priority because the opponent's Canadian firm applied on Sept. 24, 1960, to register virtually the same mark for a specification covering the goods claimed under the present application and, second, because the mark is almost identical to one which the opponent was using since 1931 in connection with his ownership of the firm Nova-Jos. Novotny in Czechoslovakia and since Mar. 31, 1950, in Canada, and for exports to the United Kingdom with the exception of the interruption during the World War II period."

D Counsel for the appellant, says, however, that the registrar was misled about this and failed to appreciate what the appellant's point really was. Counsel expressly E disclaims any opposition based on priority or on s. 17 (1) of the Trade Marks Act, 1938 (1), and rests the appellant's case entirely on s. 11 of the Act of 1938. Section 11 is in these terms:

"It shall not be lawful to register as a trade mark or part of a trade mark F any matter the use of which would, by reason of its being likely to deceive or cause confusion or otherwise, be disentitled to protection in a court of justice, or would be contrary to law or morality, or any scandalous design."

The appellant now says, first, that the use of Nova as a trade mark would be likely to cause confusion; and, second, it would be contrary to morality.

Let me deal with the second point first. The argument starts with the assertion that the appellant's business was confiscated without compensation and that G this is something contrary to the principles on which the courts in this country administer justice. In those circumstances counsel for the appellant says that it would offend morality to give the respondents a monopoly in the mark for a business acquired in that way. There are certain obvious difficulties in the way of this argument, and I mention two in passing. The first is that it has been held H that the immorality must be inherent in the mark itself (see *Arthur Fairest, Ltd.'s Application*, (2)). The second is the fact that the appellant's English trade was not confiscated for the simple reason that it did not exist in 1948.

I In my judgment, however, the argument does not even start to get on its feet. The only evidence about the matter, in so far as it can be called evidence, is a letter which accompanied the appellant's notice of opposition. That is dated Aug. 28, 1964, and it contains the following sentences:

"My firm in 1948 was one of the largest of its kind in Central Europe and was nationalised by the communistic government in March 1948. The law which announced the nationalisation had expressed clearly that the nationalisation will be conducted against compensation. I should like to make a declaration that, for this industry—representing the value of several million dollars—I have not received any compensation whatsoever . . .

(1) For s. 17 (1) of the Trade Marks Act, 1938, see 25 HALSBURY'S STATUTES (2nd Edn.) 1194.

(2) (1951), 68 R.P.C. 197.

"For the above reasons I deny to Stredoceska Fruta Narodni Podnik any right to this application, as they cannot claim any legal title to its ownership even in Czechoslovakia. When law of nationalisation was announced by the Czechoslovakian government in 1948, among conditions of nationalisation it was clearly stated that the nationalisation will be performed against compensation. As mentioned above, no compensation for my industry in Prague was offered or performed in any shape or form."

Then in the statutory declaration of Mr. Fejteck dated May 7, 1965 there is this sentence:

"In 1948 my said firm was taken over by the Czechoslovak government without my consent and I have not received any compensation."

I have no evidence of what the law under which the appellant's business was nationalised said, except that it apparently contained some provision for compensation. I have no evidence whether the appellant was entitled to compensation under that law, nor have I any evidence why the appellant has not received compensation, whether, for example, he would have received compensation if he had chosen to stay in Czechoslovakia instead of going to Canada. The whole matter is far too nebulous to justify the conclusion that some moral principle would be infringed if I allowed the application for registration to proceed. I therefore reject this ground of objection.

I turn now to the question of confusion. Counsel for the respondents, argued that the appellant cannot rely on confusion under s. 11 when the confusion, if any there be, arises solely from his use of the respondents' mark. Counsel for the appellant, submitted that there is no such doctrine in trade mark law. He submitted that the proper approach under s. 11 is this: that the initial onus is on the appellant to establish that he has acquired a reputation in the use of the mark Nova; if he succeeds in doing that, the onus then shifts to the respondents to establish that the registration proposed would not be reasonably likely to cause confusion among a substantial number of persons (see, for example, the *Ovax* case, *Re Smith Hayden & Co., Ltd.'s Application* (3), per EVERSHED, J.). This, counsel for the appellant submits, the respondents have failed to do.

The evidence about reputation and confusion is contained in a number of statutory declarations exhibiting answers to questionnaires which have been produced by both parties. The assistant registrar deals with them in his decision and I do not propose to analyse them in detail, but I will make one or two general observations. (i) The assistant registrar says this in his decision:

"Nevertheless, in this case, there is evidence of the mark having been used by [the respondents] on what I consider to be a very substantial scale. I think it is reasonable to assume from the volume of sales, despite the paucity of trade evidence, that there is a sizeable reputation attaching to the trade mark used by the applicants in the United Kingdom."

That is an inference which in my view the assistant registrar was fully justified in drawing.

(ii) The appellant has not satisfied me that at the date of the application he had acquired a sufficiently substantial reputation in this country to shift the onus of proof. In KERLY'S LAW OF TRADE MARKS AND TRADE NAMES (9th Edn.), para. 325, the following passage occurs:

"It should be noted that under s. 11 consideration must be given to the extent and character of the reputation belonging to the earlier mark. Before the section can be applied at all, it must be established that the opponents' mark is known to a substantial number of persons in the United Kingdom."

As I have said, the appellant has not satisfied me that he has passed that test. That in itself would be a sufficient reason for dismissing this appeal, but I

A would add another point, which is this. The passage in KERLY to which I have just referred goes on as follows:

“Where a trade mark has been long used by a person who is applying to register it, it will not be refused on the ground of recent use of a similar mark by another trader. The mark does not by such recent use become calculated to deceive.”

B Those words which I have just quoted, as the footnote indicates, were approved by WILBERFORCE, J., in *Welsh Lady Trade Mark* (4). Although this case was not cited at the Bar, I have found it of some assistance here and I would like to refer to it. The headnote is as follows (5):

C “The registered proprietors of three identical trade marks embodying a quasi-national emblem used these marks from about 1900 and registered them in 1958. Since 1954 the applicants for rectification had used a label embodying a similar device as an indication of Welsh origin. An unsuccessful application was made to the registrar for rectification on the grounds that the marks were not adapted to distinguish the proprietors’ goods, or because they were likely to cause deception or confusion. On appeal by motion to the High Court. Held: (i) that a particular version of a quasi-national emblem could become distinctive of an individuals’ goods and that as the evidence established that the proprietor’s marks were distinctive, no valid objection to their remaining on the register could be sustained under s. 9 of the Act. [That is a point with which I am not concerned here]. (ii) That such confusion as was proved in evidence had arisen from the acts of the applicants for rectification after the marks had become distinctive of the proprietors. This was not a ground for refusing the proprietors registration of their marks and therefore there was no justification for removing the marks from the register.”

In the statement of facts it was stated (5):

F “The applicants raised objections to the marks remaining on the register under s. 9 and s. 11 of the Trade Marks Act, 1938, alleging under s. 9 that the marks were not adapted to distinguish the goods, and under s. 11 that the marks were likely to cause deception or confusion.”

WILBERFORCE, J., dealing with the latter point, said this (6):

G “With regard to s. 11 based on confusion, it really rests on a piece of evidence which comes from the side of the proprietors and which indicates that there has been confusion.”

He refers to the evidence on the question of confusion and continued (6):

H “That is a point of evidence of confusion between the two marks, the Holytex mark with the lady on it and the registered mark of the proprietors, but one has to relate that to the wording of the section and the section says a mark cannot be registered ‘if by reason of confusion the user of it would be disentitled to protection in a court of justice’. It seems to me, on the evidence, that this mark had been used for many years in connection with the proprietors’ goods and that it had become distinctive of their goods, and it would be quite impossible to say that they would be disentitled to protection in respect of it in a court of justice. The applicants’ use of a similar mark which, it appears, has caused the confusion is of more recent use, and it does not seem to me that a more recent use of that kind causing confusion would be a reason for disentitling the owners of the older mark to registration.”

I Then he goes on to refer to the passage in KERLY to which I have already referred. Therefore, in addition to the other matters that I have mentioned and for

(4) [1964] R.P.C. 459 at p. 461.

(5) [1964] R.P.C. p. 459.

(6) [1964] R.P.C. p. 461.



similar reasons to those which are mentioned in the passage from WILBERFORCE, J.'s judgment to which I have just referred, I think that the assistant registrar, although dealing with rather different points, came to the right conclusion, and I therefore dismiss this appeal.

*Appeal dismissed.*

Solicitors: *Ward, Bowie & Co.* (for the appellant); *Garber, Vowles & Co.* (for the respondents).

[*Reported by JACQUELINE METCALFE, Barrister-at-Law.*]

J. G. INGRAM & SON, LTD. v. CALLAGHAN  
(Inspector of Taxes).

[CHANCERY DIVISION (Goff, J.), March 11, 12, 13, 1968.]

*Income Tax—Discontinuance of trade—Question of fact—Permanent discontinuance—Question of law whether trade was permanently discontinued for purposes of taxing enactment—Taxpayer company manufacturing pharmaceutical products—Sale of shares and business to public company—Proposed change from rubber to plastic components—Pilot plant to test commercial possibilities—Discontinuance of taxpayer company's operations—Manufacture of same products by public company's subsidiary—Marketing by public company—Sales in taxpayer company's name to its customers—Subsequent resale of shares and business—Restoration of taxpayer company's operations after nine months—Whether permanent discontinuance and commencement of new trade, or merely temporary suspension of trade and its resumption—Income Tax Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 10), s. 127, s. 128, s. 342.*

The taxpayer company carried on the business of manufacture and sale of surgical and pharmaceutical products having glass and rubber parts, using the brand name "Ingram", but owing to the development of cheaper and more durable plastic and other substitutes for rubber it fell into difficulties and suffered serious losses. A receiver was appointed and in September, 1960, he sold the company's factory. In May, 1960, however, the taxpayer company's shares had been acquired by a public company which had many subsidiaries and diverse interests and intended to extend its interests into the field of plastics. Three-quarters of the taxpayer company's machinery was transferred by the public company to the Hainault factory of one of its subsidiaries; the rest of the machinery was sold and the taxpayer company's business was continued there. Following continued losses it was decided in March, 1961, to close the Hainault factory, but, a suitable alternative to rubber having by then been found by research there, it was decided to change the taxpayer company's products from rubber to plastics and a pilot plant to investigate their possible use commercially was installed in the premises of another subsidiary, which paid for it; the machine began operating in June, 1961, and the taxpayer company ceased the production of rubber components and all manufacturing in May, 1961, though continuing to supply customers from stocks for a short time. The taxpayer company's machine was sold and its staff was paid off, one sales representative continuing with the first subsidiary and being engaged part of his time on taxpayer company's sales. The Hainault factory closed in September, 1961. From that date the second subsidiary company manufactured plastic components for and assembled and packed the taxpayer company's products. Those products were indistinguishable from and were accepted as identical with its previous rubber products, were marketed under its brand name "Ingram" on its behalf by its long-term employee at the first subsidiary's London office, and were invoiced and delivered to the

- A** old customers in its name by the controlling company's staff (following its general practice) and deliveries by the second subsidiary were charged to the taxpayer company at an arranged price. The taxpayer company was then little more than a shell. In June, 1962, the second subsidiary's machines and raw material of the trade and the taxpayer company's issued share capital were sold for £3,500 (£375 being allocated to the purchase of the shares) to a plastics company which moved the machines and material to its own factory, rented the space for them to the taxpayer company and sold them to it. The taxpayer company thereafter manufactured plastic parts for its products, bought glass parts, assembled the products and sold them itself, the business being exactly the same as before September, 1961, except that the components which it manufactured were plastic instead of rubber. The customers throughout remained substantially the same. The taxpayer company was assessed to income tax on the basis that in September, 1961, when the Hainault factory was closed and the second subsidiary manufactured and produced the products, the taxpayer company's trade had been permanently discontinued and a new trade had commenced, as distinct from there having been a temporary suspension of the old trade followed by a continuation of it in June, 1962. On appeal from a decision of the Special Commissioners based on findings of permanent discontinuance followed by setting up a new trade\*,

- Held:** (i) as the commissioners' decision that the taxpayer company's trade (or the essence of that trade) ceased in September, 1961, involved no wrong principle of law but was a decision of fact, and as there was evidence to support it, their decision on that point should stand (see p. 924, letter I, to p. 925, letter A, and p. 926, letter A, post).

*Gordon & Blair, Ltd. v. Inland Revenue Comrs.* ((1962), 40 Tax Cas. 358) followed.

- (ii) the question whether the discontinuance of the taxpayer company's trade in September, 1961, was a permanent discontinuance, was not, however, one purely of fact, but involved a question of law; having regard to the finding that the business at the end was exactly the same as the business at the beginning, the inevitable inference was that the trade was suspended and not permanently discontinued in September, 1961, that it was then followed by a period which was experimental, and that the resumption of similar activities since June, 1962, constituted a continuation of the former trade, with the consequence that permanent discontinuance of that trade was not established (see p. 928, letter F, post).

- Kirk and Randall, Ltd. v. Dunn* ((1924), 8 Tax Cas. 663) and *Gladstone Development Co., Ltd. v. Strick (Inspector of Taxes)*, (1948), 30 Tax Cas. 131) applied.

Appeal allowed.

- H** [As to what constitutes discontinuance of a trade for income tax purposes, see 20 HALSBURY'S LAWS (3rd Edn.) 134-139, paras. 236-245; and for cases on the subject, see 28 DIGEST (Repl.) 69-70, 260-267.

For the Income Tax Act, 1952, s. 127, s. 128, and s. 342, see 31 HALSBURY'S STATUTES (2nd Edn.) 122, 123, 328.]

Cases referred to:

- I** *Bell (Surveyor of Taxes) v. National Provincial Bank of England, Ltd.*, [1904] 1 K.B. 149; (1903), 73 L.J.K.B. 142; 90 L.T. 2; 68 J.P. 107; 5 Tax Cas. 1; 28 Digest (Repl.) 67, 253.  
*Briton Ferry Steel Co., Ltd. v. Barry*, [1939] 4 All E.R. 541; [1940] 1 K.B. 463; 109 L.J.K.B. 250; 162 L.T. 202; 23 Tax Cas. 414; 28 Digest (Repl.) 67, 251.

\* The questions of financial substance were whether assessments should be on the basis applicable to a new trade (s. 128 of the Act of 1952), and whether losses could be carried forward against profits (s. 342); see p. 920, letter E, post.

- Edwards (Inspector of Taxes) v. Bairstow*, [1955] 3 All E.R. 48; [1955] A.C. 14; A  
[1955] 3 W.L.R. 410; 36 Tax Cas. 207; 28 Digest (Repl.) 397, 1753.
- Gladstone Development Co., Ltd. v. Strick (Inspector of Taxes)*, (1948), 30 Tax  
Cas. 131; 28 Digest (Repl.) 70, 262.
- Gordon & Blair, Ltd. v. Inland Revenue Comrs.*, (1962), 40 Tax Cas. 358;  
1962 S.C. 267; [1962] S.L.T. 373; Digest (Cont. Vol. A) 879, \*323a.
- Hillerns and Fowler v. Murray (Inspector of Taxes)*, [1932] All E.R. Rep. 814: B  
17 Tax Cas. 77; 146 L.T. 474; 28 Digest (Repl.) 34, 152.
- Kirk and Randall, Ltd. v. Dunn*, (1924), 8 Tax Cas. 663; 131 L.T. 288; 28  
Digest (Repl.) 62, 231.
- Laycock (Inspector of Taxes) v. Freeman, Hardy and Willis, Ltd.*, [1938] 4 All  
E.R. 609; [1939] 2 K.B. 1; 108 L.J.K.B. 270; 160 L.T. 41; 22 Tax  
Cas. 288; 28 Digest (Repl.) 67, 250.
- Tryka, Ltd. v. Newall*, (1963), 41 Tax Cas. 146; Digest (Cont. Vol. A) 864, 267b. C

### Case Stated.

The taxpayer company appealed to the Special Commissioners of Income Tax (i) against the following assessments to income tax: 1961-62 in the sum of £6,223; 1962-63 in the sum of £8,103 less £213 capital allowances; 1963-64 in the sum of £5,930 less £36 capital allowances; and (ii) against the refusal of the inspector of taxes to allow losses previously sustained by the company to be deducted from or set off against the amount of profits assessed, under s. 342 of the Income Tax Act, 1952. The question for decision was whether, throughout the whole period covered by the assessments, the company carried on one and the same trade. In relation to the computation of the profits assessed, the question was whether the profits should be computed on the "preceding year" basis under E s. 127 (1) of the Act of 1952, or on the basis of a new trade having been set up and commenced (s. 128 of the Act of 1952). In relation to the claim to carry forward losses (s. 342), the question was whether the losses were sustained in the same trade as that in which the profits assessed were earned\*. The taxpayer company contended as follows: (i) that the company's trade was not permanently discontinued at any time during the period under review, but continued throughout the period; (ii) that accordingly the taxpayer company's profits should be computed on the preceding year basis for each of the years of assessment under appeal, and (iii) that the company was entitled to carry forward losses suffered by it before 1961. The Crown contended as follows: (i) that the trade carried on by the taxpayer company ceased in September, 1961; (ii) that the company set up a new trade in September, 1961, which was a trade of merchanting; (iii) that the assessments under appeal were correctly based; and (iv) that the taxpayer company was not entitled to carry forward losses suffered before September, 1961. The commissioners found† (i) that the taxpayer company between September, 1961, and June, 1962, was not carrying on the trade which it had carried on theretofore but a new and different trade, set up and commenced in September, 1961, and discontinued in June, 1962; and H (ii) that in September, 1961, the trade previously carried on was not merely suspended but permanently discontinued, and that the company's activities after June, 1962, although very similar to those before September, 1961, constituted a new trade and not a continuation of the old trade. The claim under s. 342 of the Act of 1952 therefore failed, but the assessments were reduced to the following figures: 1961-62 nil, 1962-63 £981; and 1963-64 £1,692 (agreed capital allowances £106). The taxpayer company appealed by way of Case Stated to the High Court. I

*Hubert H. Monroe, Q.C.*, and *J. E. H. Pearce* for the taxpayer company.  
*Desmond C. Miller, Q.C.*, and *J. R. Phillips* for the Crown.

\* The facts of the case are set out at p. 921, letter A, to p. 922, letter F, post.

† The terms of the commissioners' decision are set out at p. 922, letter H, to p. 923, letter D, post.



**A** **GOFF, J.:** This is a case in which the taxpayer company, J. G. Ingram & Son, Ltd., carried on for a good many years a successful business in the manufacture and sale of surgical and pharmaceutical products having glass and rubber parts. Owing to the fact that plastics and comparable products became not only a possible substitute for the rubber, but something which was both cheaper and more durable, and therefore clearly better, the company fell into difficulties

**B** and suffered serious losses, so much so, that a receiver was appointed, who sold the company's factory, completion taking place in September, 1960. In the meantime, the taxpayer company's shares had been acquired in May, 1960, by Redland Holdings, Ltd. ("Redland"), a public company with many subsidiaries and diverse interests. The commissioners found that Redland intended to extend its interests into the field of plastics and had for that reason recently

**C** acquired a company, Tuck & Co., Ltd. There was space in Tuck & Co., Ltd.'s factory premises at Hainault, and Redland caused three-quarters of the taxpayer company's machinery to be moved to Hainault, the remainder being sold, and thereafter the taxpayer company continued its business at Hainault.

Paragraph 7 of the Case Stated is as follows:

**D** "7. It was the policy of Redland to find plastic substitutes for rubber in the [taxpayer company's] product. Mr. Kalepp, an expert in this field, who was employed in the Redland group, became managing director of the [taxpayer company]; he conducted experiments at the Hainault factory, and by March, 1961, a suitable alternative had been found and it was decided that the [taxpayer company's] products should change over from rubber to plastics. It was also decided to set up a pilot plant to investigate

**E** the possibility of using this alternative commercially and a suitable machine was ordered and eventually installed in the premises of Martindill, Ltd. ["Martindill"] another Redland subsidiary. The machine was paid for by Martindill and came into operation in June, 1961. The [taxpayer company] ceased production of rubber components in May, 1961, continuing for a short time to supply customers from stocks."

**F** It does not appear that Martindill or anyone else ever acquired any plant other than the pilot plant so far as the facts found are concerned, but it may be that that one pilot plant was and is sufficient.

Notwithstanding these efforts, considerable losses continued to be incurred and in March, 1961, Redland decided to close the Hainault factory and the Case

**G** Stated recites as follows:

"8. At the same time Martindill's factory had surplus space and accordingly the pilot plant was set up there as previously stated. The [taxpayer company's] machinery was sold, manufacturing ceased in May, and Tuck sold the Hainault factory, which closed in September, 1961. The [taxpayer company's] staff were paid off: one man, the sales representative, was employed at Tuck's London office where he was engaged partly on the [taxpayer company's] sales and partly on other duties.

**H**

"9. From September, 1961, until June, 1962, the position was as follows: (a) plastic components for the products were manufactured by Martindill and Martindill assembled the products and packed them; (b) these products were indistinguishable from those which the [taxpayer company] had previously been marketing and the brand name 'Ingram' was used and they were accepted as identical with the rubber products previously supplied; (c) marketing was carried out on behalf of the [taxpayer company] by a long-service employee of the company who was accommodated at the London office of Tuck; (d) the goods were invoiced and delivered to customers in the [taxpayer company's] name by Redland staff in accordance with the practice in respect of all companies in the group: deliveries made by Martindill for the [taxpayer company] were charged to the [taxpayer company] monthly by Martindill at an agreed price, designed to show a

**I**

profit both to Martindill and to the [taxpayer company]—bearing in mind that the sale price charged by the company to its customers had been previously fixed by contract; (c) the [taxpayer company] itself was a little more than a shell; it was made use of by the Redland group for the purpose of selling goods produced by Martindill; the profits it made were merchanting profits on goods charged to it by Martindill.

“ 10. The products produced by Martindill were not entirely satisfactory, and in April or May, 1962, Redland decided to dispose of the [taxpayer company]; . . . ”

and on June 4, 1962, they made an offer to another company called Plastage (Sussex), Ltd. (“ Plastage ”) which was accepted, and under which they agreed to sell the Losca moulding machine (which must, I think, be the pilot machine), complete with all ancillary equipment and moulds, all raw materials in stock, and to transfer the whole of the issued share capital of the taxpayer company for the sum of £3,500. It was said to be an integral part of the agreement that all orders of the taxpayer company outstanding as at May 31, 1962, would be undertaken by the purchasers and satisfied. It is indeed expressly stated that the machinery referred to was Martindill’s machinery. The part of the consideration allocated to the taxpayer company’s shares was £375. The company had no physical assets. It had its order book which was valuable to Plastage and the name Ingram was well known and was a valuable acquisition for Plastage.

Paragraph 11 of the Case Stated finds that:

“ 11. Shortly after Plastage acquired the [taxpayer company’s] shares, the machine and raw material stocks bought by Plastage from Martindill were moved to a factory at Portslade owned by Plastage, and Plastage sold them to the [taxpayer company] which rented space in Plastage’s factory and thereafter manufactured plastic parts for its products, bought glass parts, assembled the products and sold them itself. Its business thereafter was exactly the same as it had been prior to September, 1961, except that the components which it manufactured were plastic instead of rubber.”

In view of the finding in para. 9 (b) that Martindill’s products, which were made with plastic components, were accepted as identical with the rubber products previously supplied, the exception in para. 11 is of no significance.

On those facts it is material both as to the mode of assessment, and more importantly, on the question of carrying forward losses, to determine whether the taxpayer company’s business continued throughout, or whether there was a break and a change over to a new trade when Martindill took over and the taxpayer company was reduced in the manner I have described, and then again when Plastage having acquired the taxpayer company, the same business as had been in operation prior to September, 1961, was again carried on, and if there were such breaks, whether the first change amounted to a permanent discontinuance of the trade, or whether there was merely a suspension.

The commissioners’ findings, starting at para. 15 (2) are as follows:

“ 15 (2). It is common ground that the [taxpayer company] carried on a trade of manufacturers and suppliers of surgical and pharmaceutical products up to September, 1961, and incurred losses therein.”

Pausing there, it is a little surprising that that was common ground because it is clear from the findings that the taxpayer company ceased production in May, 1961, and one would have thought that that was the relevant date rather than September, but there it is. The subparagraph continues:

“ We find that from June, 1962, onwards the [taxpayer company] has been carrying on a trade which so nearly resembles the trade it was carrying on prior to September, 1961, that we would have had no doubt it was the

A same trade if we had not got the events of the intervening nine months to consider.

" (3) Looking at the [taxpayer company's] activities between September, 1961, and June, 1962, we find it was not during that period carrying on the trade it had carried on theretofore. It was not disputed that the activities amounted to trading, but in our view it was a new and different trade, set up and commenced in September, 1961, and discontinued in June, 1962."

B It is difficult to see what was set up and commenced in September, 1961. It is true that the factory at Hainault was not closed until then, but the Martindill arrangements were clearly operating before September, 1961, and, as I have before observed, it is found that the taxpayer company ceased production in May. Continuing the quotation:

C "The question, as we see it, is whether the former trade was suspended (to be continued again after June, 1962) or whether it was permanently discontinued in September, 1961, and a new trade was set up in June, 1962. We have not found this easy to decide, but looking at all the evidence we have come to the conclusion that in September, 1961, the trade previously carried on was permanently discontinued, and that its activities since June, 1962, although very similar to its activities before September, 1961, constitute a new trade and not a continuation of the old trade."

D Those conclusions were not acceptable to the taxpayer company, which has appealed to this court.

E Counsel for the taxpayer company puts his case in two ways: first he says, in order to see whether a trade has ceased when there has been a change in the mode of carrying it on, or in proprietorship, it is necessary to see what the essence of the trade was and to see whether in that essence it has been preserved, in support of which he relies on *Laycock (Inspector of Taxes) v. Freeman, Hardy and Willis, Ltd.* (1), and *Briton Ferry Steel Co., Ltd. v. Barry* (2). He submits that the essence here was selling the product, not manufacture and sale. On that basis he contends that the first trade did not cease at all. Alternatively, he says that, if the trade did cease, it was only a temporary cessation and the commissioners should have found that the trade was suspended, not permanently discontinued.

F Different considerations in my view apply to these two separate submissions. On the first it seems to me that the question involved is clearly one of fact as has been reiterated in numerous cases. In the *Freeman, Hardy and Willis* case (3),

G SIR WILFRID GREENE, M.R., said:

"That, of course, does not mean that the business, regarded after the succession, must be in every respect and in every detail identical with the business which was carried on before the succession. The successor may succeed to a business, let me say, with fifty shops. He may choose to shut up some of those shops. He may make alterations in the goods that he sells. All sorts of alterations of that kind may take place. He may change his supplier. He may cut out a particular class of customer or a particular area. All questions of that kind appear to me to be really matters of fact for the determination of the commissioners, who, where matters of that kind arise, have to set themselves the question whether or not it is true and fair to say that the business in respect of which the successor is said to be making profits is the business to which he succeeded. Changes of that kind may or may not be so substantial as to make it right to say, as a matter of fact (that would be a question for the commissioners), that the business is not the same as the one to which he succeeded. The differences may be so substantial as to justify a finding to that effect."

(1) [1938] 4 All E.R. 609; 22 Tax Cas. 288.

(2) [1939] 4 All E.R. 541; 23 Tax Cas. 414.

(3) [1938] 4 All E.R. at p. 614; 22 Tax Cas. at p. 297.



Later SIR WILFRID GREENE, M.R., said (4):

"... the question which arises appears to me to be whether or not it can truly be said that the business of a wholesale manufacturing concern is being carried on by the respondents. The answer to that question seems to me to be quite clearly in the negative. Manufacture in these factories is being carried on, but the mere manufacture is not the thing which produces the profit of the business. That part of the business of the subsidiaries which was essential for the realisation of taxable profit—namely, the selling of their goods wholesale—has disappeared, and the goods are now sold and the profits realised by the respondents in their ordinary organisation and in their ordinary retail shops. It seems to me, therefore, that the Special Commissioners were amply entitled to find, and I think on the facts they were bound to find, that the businesses of the two subsidiary companies ceased..."

Then there is *Gordon & Blair, Ltd. v. Inland Revenue Comrs.* (5), to which I must presently refer again, and *Tryka, Ltd. v. Newall* (6), where WILBERFORCE, J., said:

"Now whether the trade in question is 'that trade' or the same trade must, of course, be basically a question of fact. I have had referred to me a number of cases which [counsel for the taxpayer company] has very helpfully explained in order to illustrate how the courts have approached questions of this kind. I think it is clear that the position is the familiar one in relation to questions of this kind—questions of cessation, identity of business and so on—that it is for the commissioners to find the facts and that the court will not readily interfere with their finding; but of course the court will do so if it comes to the conclusion that they have drawn the wrong inferences from the facts or if it comes to the conclusion that reasonable men ought not to have come to the conclusion to which they did come upon the facts which they have set out."

That passage restates the well-known passage in the speech of LORD RADCLIFFE in *Edwards (Inspector of Taxes) v. Bairstow* (7) and I need not separately read from that report. Counsel for the taxpayer company points out that the taxpayer company never did manufacture all the components for their products, that after September, 1961, the goods were still sold under the same brand name and that there were continuing contracts, and he relies very strongly on the finding of fact that the customers remained the same. He submits that the essence of the trade was selling these particular appliances to these specialist customers. Those points are important, and I am not certain that, if I were trying the case de novo, I would have arrived at the same conclusion, though it is fair to say there are weighty considerations pointing in the opposite direction. The company ceased to manufacture any of the components and even to do the work of assembly. It had no factory. It was reduced to buying and selling and ceased to have any staff other than one part-time selling representative.

Counsel for the Crown relies very strongly on those features and he points out that the cases, a number of which he has cited to me, show that the factors which weigh in considering whether a business has been continued or discontinued are those of intention, ability to implement it, and ownership of the apparatus of trade. However, it seems to me on this part of the case, having regard to the authorities to which I have referred, that I can only go behind the commissioners' findings of fact if I can say that there was no evidence to support them or that they drew from the primary facts inferences which no reasonable person could draw, or of course, if they misdirected themselves in law.

Still dealing with the method of presentation, of counsel for the taxpayer

(4) [1938] 4 All E.R. at p. 615; 22 Tax Cas. at p. 299.

(5) (1962), 40 Tax Cas. 358.

(6) (1963), 41 Tax Cas. 146 at p. 154.

(7) [1955] 3 All E.R. 48 at p. 59; 36 Tax Cas. 207 at p. 231.

A company. I can see no question of any wrong principle of law and I find it quite impossible to say that there was no evidence to support the primary findings or that the inferences drawn were not at least reasonably possible in the face of the decision of the Court of Session in *Gordon & Blair's* case (8) which I have already mentioned. The facts of that case were in some respects very similar to those of the present, including the continued sameness of the customers. In one respect they were perhaps a little weaker, in that there was no evidence of continuing contracts, but in another stronger sense the brewery company in that case continued to bottle the purchased beers, whereas in the present case the company had, as I have observed, given up even the work of assembly. The Lord President (LORD CLYDE) said (9):

C “It appears to me that in this situation the Special Commissioners were entitled to conclude that the trade carried on by the appellants before Oct. 1, 1952, was not the same trade as that carried on afterwards. The question is primarily, if not indeed wholly, a question of fact dependent upon the special circumstances of the particular case. It was contended that it was immaterial to the appellants' trading whether they manufactured their particular brand of beer by the hands of their own workmen or arranged with some other party to manufacture it for them and to their order. In either event, their trade was the distribution and sale for profit of their own particular brand of beer. Upon such an approach to the matter, the trade both before and after Oct. 1, 1953, so it was contended, was the same. But, in my view, this contention involves a misdescription of the real nature of the appellants' trade. The essence of that trade, as I see it, prior to Oct. 1, 1953, was the manufacture for sale by the appellants of their own particular brand of beer. Their selling and distribution organisation was merely ancillary to that main trading activity. It is, in my view, quite false to suggest that their trade throughout was essentially the distribution of a special brand of beer, whoever may have been the manufacturer. After Oct. 1, 1953, what had been, in my view, their ancillary activity became the appellants' sole trading activity, and instead of being brewers of beer, they became distributors of beer which they did not brew but which another firm contracted to brew for them. In these circumstances the Special Commissioners were entitled, in my view, to reach the conclusion to which they came.”

F LORD GUTHRIE said (10):

G “Now it is true in a sense that a company's earnings are made by the disposal of its product and that the process of manufacture per se yields no financial return. That does not mean, however, that in considering what is the trade of a company one should have regard only to the distribution of the product sold. If it is of the essence of the business of a company that it is the disposal of a product manufactured by the company, then the discontinuance of manufacture and the disposal instead of a product made by another manufacturer is a change in the nature of the business of the company which can properly be held to be the cessation of the trade and the commencement of a new one. On the facts stated, I am of opinion that the Special Commissioners were entitled to hold that there had been a change in the essence of the business of the appellants in October, 1963.”

I Counsel for the taxpayer company argues that the ratio decidendi in that case was that it was there held that brewing was the essence of the trade. He distinguishes it from the *Freeman, Hardy and Willis* case (11) on that ground. So be it; the most that I could do, as it seems to me, would be to remit the case

(8) (1962), 40 Tax Cas. 358.

(9) (1962), 40 Tax Cas. at pp. 361, 362.

(10) (1962), 40 Tax Cas. at p. 363.

(11) [1938] 4 All E.R. 609; 22 Tax Cas. 288.

for the commissioners to consider further what was the essence of the trade in this case before and after September, 1961, but I do not think that even that would be justified. In my judgment the fact remains, and the case of *Gordon & Blair* (12) shows that clearly, that there was ample evidence on which the commissioners could find as they did. A

I was exercised in my mind by one special feature in this case, viz., the statement in para. 15 (2) of the Case Stated (13) that it was common ground that the taxpayer company carried on a trade of manufacturers and suppliers up to September, 1961, which is a concession by the Crown, as I see it, that the original trade continued after the taxpayer company had ceased manufacture, and after the regime which operated during the nine months between September, 1961, and June, 1962, had come into being. I think, however, that it would be wrong to upset the findings of the commissioners on that ground. First, there is a finding that the taxpayer company continued for some time to sell off existing stocks, and therefore though it was then winding-up the trade it had not yet ceased, and one does not know how long that continued. Secondly, it might be said that the trade should be regarded as continuing until the factory was actually sold, but thirdly, and this to my mind is the most compelling reason, the admission is not really as I see it that the selling by the company of products manufactured and assembled by Martindill was the same business as the company carried on before the Martindill company was introduced but merely, possibly contrary to the true facts, that the company's business, if it did cease, went on to September, 1961, and not, as should have been found, some earlier date. If it were material the admission would, of course, preclude the Revenue from claiming that the succession was earlier than September, 1961, but I do not think it goes beyond that. B C D E

I turn now to the alternative proposition of counsel for the taxpayer company, which must proceed on the hypothesis that the trade during the nine months was different from that with which the taxpayer company started and with which it finished, but here it seems to me that it is not purely a question of fact. It is one of law, or at any rate partially of law, whether on the facts proved or found by the commissioners there was a permanent discontinuance within the meaning of the Income Tax Act, 1952. I refer to *Kirk and Randall, Ltd. v. Dunn* (14). The headnote reads as follows: F

"Up to the outbreak of the war in 1914 the appellant company was engaged in completing old contracts entered into by a firm of contractors whose business it had been formed to take over in 1912, but it obtained no fresh contracts. The business premises were closed down during the year 1913, and offered for sale without success until taken over and purchased by the War Office in December, 1914. From December, 1914, until February, 1920, the company had neither works nor plant, but during that period persistent efforts were made by its directors to obtain contracts. All negotiations, however, proved abortive until early in 1920 when, with the introduction of fresh capital into the company and the adoption of a different business policy, a number of profitable contracts were obtained, and fresh plant acquired. Throughout its existence the company retained a registered office and held its statutory meetings year by year, the secretary's salary and directors' fees were paid, and substantial payments made for expenses, including those incurred by the directors in connexion with their abortive efforts to obtain contracts. The Special Commissioners, on appeal held that there was no trade carried on by the company between 1914 and 1920, that the trade which was taken over by the company was discontinued in 1914, and that a fresh trade was set up and commenced in 1920." G H I

ROWLATT, J., said (15):

(12) (1962), 40 Tax Cas. 358.

(13) See p. 922, letter I, ante.

(14) (1924), 8 Tax Cas. 663.

(15) (1924), 8 Tax Cas. at p. 670.



- A "I agree with the contention put forward on behalf of the appellants. I think that really it is a question of law in the sense that SIR RICHARD HENN COLLINS, M.R., laid down in *Bell (Surveyor of Taxes) v. National Provincial Bank of England, Ltd.* (16), the finding is that upon the construction of the rule this case is not within it. It is not really a question of fact, or even of mixed law and fact. I think it is a question of law, because all the facts
- B are quite clearly stated as far as they are thought to be relevant and to have been acted upon in the Case."
- In the later case of *Gladstone Development Co., Ltd. v. Strick (Inspector of Taxes)* (17), where the question was whether the company had ceased trading, ATKINSON, J., said (18):
- C "It was suggested that it is really a question of law, but it is only a question of law in the sense in which that expression was used in *Bell (Surveyor of Taxes) v. National Provincial Bank of England, Ltd.* (19), where SIR RICHARD HENN COLLINS, M.R. said: 'The finding of the commissioners upon that part of the case is this: "The commissioners were of opinion that there was no succession within the meaning of the said 4th rule." That is, as MATHEW, L.J.,
- D has pointed out, not a finding in fact that there was no succession, but that the particular kind of succession which took place in this case was not a succession within the meaning of the 4th rule. That is not a finding of fact, but a finding of law.'
- E "But the question here is not of that character, and I think that I must seek guidance from *Hillerns and Fowler v. Murray (Inspector of Taxes)* (20), where the question was whether the appellants had ceased trading. LORD HANWORTH, M.R.,] said this (21): 'But a declaration of an intention by the persons charged will not do to secure immunity from the Income Tax Act. The question is: what is the character to be attributed to the acts done by the partners in relation to the Income Tax Act? The quality and the characteristics to be attached to the acts are all questions of fact, because they are
- F questions of degree. They are questions for the commissioners to determine. The short point is before us: were there any materials on which the commissioners could reach the conclusion to which they have come?' GREER, L.J., has a very helpful sentence which is very appropriate when one comes to consider the effect of the resolution relied on in the present case. He says (22): 'The decision as to the quality and effect of the facts established
- G in each particular case that is binding on the court is the decision of the commissioners.'"
- Now in the present case there is an express finding of fact in para. (11) of the Case dealing with the period after June, 1962, as follows:
- H "Its business thereafter was exactly the same as it had been prior to September, 1961, except that the components which it manufactured were plastic instead of rubber."
- Then in para. 15 (2) the commissioners decide or find that from June, 1962, onwards the taxpayer company has been carrying on a trade which so nearly resembles the trade it was carrying on prior to September, 1961, that "we would have had no doubt it was the same trade if we had not got the events of the
- I intervening nine months to consider."
- The submission of counsel for the taxpayer company is that the commissioners

(16) [1904] 1 K.B. 149; (1903), 5 Tax Cas. 1.

(17) (1948), 30 Tax Cas. 131.

(18) (1948), 30 Tax Cas. at p. 141.

(19) (1903), 5 Tax Cas. at p. 10; [1904] 1 K.B. at p. 161.

(20) [1932] All E.R. Rep. 814; 17 Tax Cas. 77.

(21) (1932), 17 Tax Cas. at p. 87; [1932] All E.R. Rep. at p. 817.

(22) (1932), 17 Tax Cas. at p. 89; [1932] All E.R. Rep. at p. 818.

misdirected themselves in law because they had found in para. 11 of the Case Stated (23) that the final trade was exactly the same as the first which was inconsistent with permanent discontinuance. They do not say that it was a similar business. Then in para. 15 (2) they consider themselves precluded from holding that it was the same trade because they have got the events of the intervening nine months to consider, but one must see how their judgment proceeds. Paragraph 15 (3) reads:

"Looking at the company's activities between September, 1961, and June, 1962, we find it was not during that period carrying on the trade it had carried on theretofore. It was not disputed that the activities amounted to trading, but in our view it was a new and different trade, set up and commenced in September, 1961, and discontinued in June, 1962. The question, as we see it, is whether the former trade was suspended (to be continued again after June, 1962) or whether it was permanently discontinued in September, 1961, and a new trade was set up in June, 1962. We have not found this easy to decide, but looking at all the evidence we have come to the conclusion that in September, 1961, the trade previously carried on was permanently discontinued, and that its activities since June, 1962, although very similar to its activities before September, 1961, constitute a new trade and not a continuation of the old trade."

It is to be observed that they there changed their expression and said that the activities were very similar.

If this were a pure question of fact I might well be in the same situation as on the first aspect of the matter, that I could not go behind the commissioners, but if it be a matter of law then I have to consider whether on all the facts found there was a permanent discontinuance within the meaning of the Income Tax Act, 1952. The facts found are that whilst there was a different trade during a not very long interim period, it was a period which was in many respects, if not wholly, experimental, and it was not like most of the cases where there was a complete or substantial disruption in identity of the trading because the same products were throughout being sold under the taxpayer's company's name to the same customers. There is the express finding in para. 11 that the business at the end was exactly the same as the business with which one began, and I find it an impossible conclusion in those circumstances that the business was permanently discontinued when this change of activity started in September, or it may be May, 1961. I hold that the facts lead inevitably to the inference that the business was suspended and not permanently discontinued. For those reasons I allow the appeal.

*Appeal allowed.*

Solicitors: *Courtenay, Croome & Finch* (for the taxpayer company); *Solicitor of Inland Revenue*.

[Reported by F. A. AMIES, Esq., *Barrister-at-Law*.]

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(23) See p. 922, letter E, ante.

A

## SIMPSON v. JONES (Inspector of Taxes).

[CHANCERY DIVISION (Megarry, J.), April 4, 5, 1968.]

*Income Tax—Deduction in computing profits—Debt—Estimate of probable loss—No entry made in accounts in respect of debt—Greater part of debt subsequently released—Accounts re-opened—Whether debt to be entered at the figure remaining payable after release or at the estimate of probable loss which would have been made at the time of preparation of the accounts which were being reopened.*

B

*Income Tax—Deduction in computing profits—Debt—Indebtedness set off against profits and subsequently released—Construction of enactment—Finance Act, 1960 (8 & 9 Eliz. 2 c. 44), s. 36.*

C

A bank obtained judgment in 1955 against the appellant for £34,000 odd. Early in 1956 the bank recovered £6,000 odd from others, reducing the amount of the judgment debt to £28,000 odd. In June, 1958, the bank released the appellant from the judgment debt, he covenanting to pay £3,000. The appellant was assessed under Case II of Sch. D on his profits as a solicitor for the year ending Mar. 31, 1956. No loss had been entered in the accounts of that year in respect of the judgment debt. If it had been, the amount to be entered according to normal accountancy practice would have been an estimate of the probable loss (i.e., £28,000). It was not in dispute that the accounts for the year must be re-opened. On the question whether the amount to be deducted in respect of the judgment debt on re-opening the accounts should be £28,000 or £3,000,

D

E

**Held:** applying the principle in matters of computation that where facts were available they were to be preferred to prophecies, the true amount of the debt (£3,000) should be included in the re-opened accounts rather than a figure (£28,000) that would be the imperfect estimate of loss that would have been made in March, 1956, when the true amount was not yet known (see p. 934, letter I, and p. 935, letters B and G, post).

F

*Bernhard v. Gahan; Bernhard v. Inland Revenue Comrs.* ((1928), 13 Tax Cas. 723) applied.

Dictum of LORD MACNAGHTEN in *Bullfa and Merthyr Dare Steam Collieries (1891), Ltd. v. Pontypridd Waterworks Co.* ([1900-03] All E.R. Rep. 600 at p. 603) applied.

G

*British Mexican Petroleum Co., Ltd. v. Jackson (Inspector of Taxes); British Mexican Petroleum Co., Ltd. v. Inland Revenue Comrs.* ((1932), 16 Tax Cas. 570) distinguished.

Observations on the construction of s. 36 of the Finance Act, 1960 (see p. 935, letter I, to p. 936, letter B, post).

Appeal dismissed.

H

[As to the re-opening of accounts for tax purposes, see 20 HALSBURY'S LAWS (3rd Edn.) 147-149, para. 261 and p. 240, para. 440; and for cases on the subject, see 28 DIGEST (Repl.) 28, 123; 32, 144; 95, 370; 422, 1864.

As to the application of accountancy principles, see 20 HALSBURY'S LAWS (3rd Edn.) 158, para. 277; and as to the valuation of debts, see *ibid.*, p. 128, para. 308.

I

For the Income Tax Act, 1952, Sch. D, Case II, see 31 HALSBURY'S STATUTES (2nd Edn.) 122. For the Finance Act, 1960, s. 36, see 40 HALSBURY'S STATUTES (2nd Edn.) 457.]

Cases referred to:

*Bernhard v. Gahan; Bernhard v. Inland Revenue Comrs.*, (1928), 13 Tax Cas. 723; 28 Digest (Repl.) 95, 370.

*Bradberry, Re, National Provincial Bank v. Bradberry; Re Fry, Tasker v. Gulliford*, [1942] 2 All E.R. 629; [1943] Ch. 35; 112 L.J.Ch. 49; 167 L.T. 396; 23 Digest (Repl.) 429, 4992.



*British Mexican Petroleum Co., Ltd. v. Jackson (Inspector of Taxes); British Mexican Petroleum Co., Ltd. v. Inland Revenue Comrs.*, (1932), 16 Tax Cas. 570; 28 Digest (Repl.) 28, 123. A

*Bullfa and Merthyr Dare Steam Collieries (1891), Ltd. v. Pontypridd Waterworks Co.*, [1900-03] All E.R. Rep. 600; [1903] A.C. 426; 72 L.J.K.B. 805; 89 L.T. 280; 11 Digest (Repl.) 136, 199. B

### Case Stated.

This was a Case Stated by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the High Court on Oct. 21, 1966. The appellant, Arthur Harry Simpson, appealed against an assessment to income tax for the fiscal year 1958-59 on the profits of his profession as a solicitor, practising under the name Simpson & Co. the assessment being raised under Case II of Sch. D in the sum of £3,000 less retirement annuity payment and superannuation. The only question was the amount which should properly be deducted in computing the profits of the practice by reason of a judgment dated July 19, 1955, entered in an action by the District Bank, Ltd. against the appellant for £34,863 16s. 8d. and costs, the amount of the costs being subsequently taxed and paid by the appellant to the bank. Following the judgment the appellant's affairs were subject to prolonged investigation, which established that the appellant was as much a victim of the transactions of an associate of his as was the bank. By deed dated June 18, 1958, made between the appellant of the one part and the bank of the other part the appellant agreed to pay the bank the sum of £3,000 by quarterly instalments and in consideration thereof the bank released the appellant from any further payment on account of the judgment debt. In the accounts of the appellant's professional practice for the year ended Mar. 31, 1956, which were prepared on Jan. 15, 1957, no entry was made in respect of the judgment debt to the bank. A note concerning it, and indicating that negotiations relating to a settlement were not yet completed, was made on the balance sheet of the accounts of the following year, which were prepared on June 11, 1958. In the accounts for the year ended Mar. 31, 1958, the profit and loss account was debited with a bad debt of the associate previously referred to in the sum of £34,863 16s. 8d.; and in the balance sheet at Mar. 31, 1958, the appellant's capital account was credited with abatement of the judgment debt, £31,863 16s. 8d., and the liability to the bank was shown as £3,000, these accounts being prepared on Jan. 29, 1959. C

The commissioners found that in accordance with normal accountancy practice any entry in the appellant's accounts to be made at the time when they were prepared would have been based on the loss likely to have been incurred by the appellant, having regard to such information bearing on the matter as was then available. The estimate of this loss would have taken into account not only the appellant's liability to the bank under the judgment debt but also the sums which might be recovered from two other debtors, a company and the associate previously mentioned. In so far as the bank recovered from these sources, the bank could not have enforced their claim against the appellant: if the appellant had been a wealthy man the bank might have recovered the judgment debt from him, and the appellant would then have been entitled to recover what he could from the associate or the company. This policy would, in that event, have been a factor to be taken into account in estimating the loss likely to be incurred by the appellant. Any provision for the loss likely to be incurred by the appellant which had been made in the accounts for the year ended Mar. 31, 1956, would on normal accountancy practice have been corrected in later accounts when the actual loss had been ascertained. That is to say, an entry would have been made in those later accounts to correct the over or under provision which had been made in the accounts for the year ended Mar. 31, 1956. D

The commissioners gave their decision in writing on Dec. 19, 1966. They stated that the appeal was argued before them on the footing that both parties E

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I

- A had admitted that for the purposes of computing the appellant's liability to income tax the accounts of his practice for the year ended Mar. 31, 1956, were not wholly accurate in that they made no provision in respect of his liability to the bank. The issue before the commissioners, accordingly, was solely as to the amount by reference to which those accounts should be corrected for income tax purposes. Having reviewed the evidence the commissioners found that in accordance with normal accountancy practice, any entry in the accounts for the year ended Mar. 31, 1956, made at the time when those accounts were prepared would have been based on the loss likely to have been incurred by the appellant, having regard to such information bearing on the matter as was then available; and thus in particular not only to the sum undoubtedly owed by him to the bank but also to sums which had been or might be recovered from the company and the associate. Any such entry in the accounts would only have been estimated and provisional. The commissioners held that such estimated and provisional entry would have been subject to correction when the actual loss incurred by the appellant could be ascertained. This loss was known at the time of their decision to have been £3,000. They held that for the purpose of computing the appellant's liability to income tax the profits shown by his account for the year ended Mar. 31, 1956, should be adjusted by allowing a deduction of £3,000 for the loss finally incurred by him in respect of his liability to the bank. The amount of the assessment on that footing not being in dispute, they determined the appeal accordingly. The appellant required the commissioners on Jan. 16, 1967, to state a case for the opinion of the High Court pursuant to s. 64 of the Income Tax Act, 1952. The question so stated was whether on the facts not in dispute and further facts found by the commissioners their decision was incorrect.

*G. B. Graham, Q.C., and T. H. Walton for the appellant.*

*H. Major Allen, Q.C., and J. R. Phillips for the Crown.*

**MEGARRY, J.:** This is a Case Stated by the Special Commissioners.

It raises a short point on accountancy in relation to the practice of a solicitor.

- F The assessment was made under Case II of Sch. D for 1958-59 on the profits of the solicitor's profession for the year ended Mar. 31, 1956. On July 19, 1955, judgment was entered in the Queen's Bench Division against the solicitor (whom I shall call "the appellant") by the District Bank, Ltd. (which I shall call "the bank") for the sum of £34,563 16s. 8d., together with a sum for costs which the appellant duly paid. This debt arose out of a series of transactions in which another solicitor (whom I shall call "X") had been engaged, together with certain companies in which X was interested. One of those companies, Sconering Estates, Ltd. (which I shall call "Sconering") was a defendant to the action, and judgment was also entered against it. X had, I understand, been the appellant's partner; but ultimately, after a number of unsuccessful business ventures, his career ended in bankruptcy and, I was told, in prison.
- H The appellant's debt to the bank resulted from his stopping the payment of uncleared cheques drawn on his clients' account in favour of Sconering. He did this in the belief that the transactions were fraudulent. After a prolonged investigation by the police and The Law Society, it was established that the appellant was not X's associate in delinquency, but was as much a victim of his transactions as was the bank. Early in 1956, the bank recovered £6,342 16s. 11d. from certain of X's associated companies, and it is common ground that this accordingly reduced the appellant's liability to £28,520 19s. 9d. For convenience, I shall refer to these two sums as £6,000 and £28,000 respectively, and to the judgment debt as £34,000.

The appellant is no longer under any liability to pay to the bank either the £34,000 or the £28,000; for after prolonged negotiations the bank executed a deed dated June 18, 1958, releasing the appellant from the judgment debt, and the appellant instead covenanted to pay the bank £3,000 by certain instalments. This release, it will be observed, was made over two years after the end of the

appellant's accountancy year which ended Mar. 31, 1956; and it is in respect of this year that the dispute arises. A

Both the appellant and the Crown agree that the profit and loss account for that year should be re-opened; for it failed to contain any entry in respect of the appellant's debt to the bank, even though that had become a judgment debt during the year in question. Where they differ is that the Crown say that the amount of the debit that should be made in respect of the debt to the bank is £3,000, whereas the appellant says that it ought to be the £28,000. In other words, the Crown are contending for the amount which subsequently became established as the appellant's true liability, even though it was not known during the year in question that this would be the case. The appellant, on the other hand, is contending for the full amount of the judgment debt that was established during the year in question, minus only the sum recovered from the companies during that year, and ignoring the release by the bank, which was not made until over two years after the end of that year. The commissioners held that the Crown were right. The accounts for the year ended Mar. 31, 1956, would, on normal accountancy practice, have been based on estimates of the probable loss, taking into account any sums likely to be recovered; and any such loss would have been provisional and subject to correction when the actual loss was ascertained. As the actual loss had been ascertained at £3,000, this was, in their view, the correct figure to enter. B C D

With refreshing and accustomed candour, counsel for the appellant laid claim to no merits whatever in his case. The gravamen of his argument was that the commissioners had failed to give effect to the decision of the House of Lords in the principal case cited to them, *British Mexican Petroleum Co., Ltd. v. Jackson (Inspector of Taxes)* (1). There, the tax-paying company incurred a large debt which was duly entered in its accounts for the year ending June 30, 1921. During the next accounting period, which was eighteen months to Dec. 31, 1922, the company obtained a release from some three-quarters of that debt. The House of Lords held, first, that the accounts for the first period ought not to be re-opened to give effect to the release; and, second, that the sum released ought not to be included in the accounts for the second period as a receipt. LORD THANKERTON (with whom VISCOUNT DUNEDIN and LORD ATKIN agreed) expressed himself succinctly. He said (2): E F

"My Lords, I am of opinion in the present case, that the account to June 30, 1921, cannot be re-opened, as the amount of the liability there stated was correctly stated as the finally agreed amount of the liability and the subsequent release of the respondents proceeds on the footing of the correctness of that statement." G

As for the second period, he said (2):

"I am unable to see how the release from a liability, which liability has been finally dealt with in the preceding account, can form a trading receipt in the account for the year in which it is granted." H

LORD MACMILLAN said (3) that the full amount of the debt

"was not entered as a sum paid, but as a trading debt admittedly incurred. That being so, the circumstance that the creditor subsequently forgave part of the debt and agreed not to exact the full amount of it affords no justification for re-opening the account for the year to June 30, 1921, and substituting for the amount then legally due the lesser amount which the creditor was subsequently content to accept. An account may be re-opened where an item has been omitted or some other error has occurred, or an account may be kept open by describing entries in it as provisional, but here it is agreed on all hands that there was no error in the accounts I

(1) (1932), 16 Tax Cas. 570.

(2) (1932), 16 Tax Cas. at p. 592.

(3) (1932), 16 Tax Cas. at p. 593.



A of the appellant company for the year to June 30, 1921, and that they were properly and finally drawn up so as to show the result of the year's trading." He also rejected (4) the claim to include the sum released as a credit item in the accounts for the second period

B "for the short and simple reason that the appellant company did not, in those eighteen months, either receive payment of that sum or acquire any right to receive payment of it. I cannot see how the extent to which a debt is forgiven can become a credit item in the trading account for the period within which the concession is made."

LORD WARRINGTON OF CLYFFE simply expressed his agreement with both speeches.

C One obvious difference between that case and this is that the House of Lords was dealing with a case in which the loss had been correctly entered in the accounts in question at the time: the question was whether the subsequent release was a ground for re-opening accurate accounts. Here, the accounts in question say nothing of the loss. It is common ground that the accounts are inaccurate in this respect, and the question is whether, on re-opening those accounts so as to insert the loss, the amount to be inserted is what would have been entered at the time, regardless of what has happened since, or whether that amount is the amount of the true loss known at the time of the insertion. The insertion is to be made *nunc pro tunc*: but in quantifying it, is the basis to be *tunc* or *nunc*?

E I abstain from pursuing this matter in any detail, because counsel for the Crown has disclaimed any desire to distinguish between cases where, as in the *British Mexican* case (5), the question is that of disturbing a correct account, and those where, as here, the question is that of what correction is to be made to an admittedly incorrect account. Instead, the main issue has been that of the nature of the debt in relation to the use of hindsight. Counsel for the appellant accepts that hindsight may be used to quantify a mere estimated liability: F but he contends that it should be excluded where there is a fixed, final and established liability. Here, he says, there was a judgment debt for a firm £34,000 reduced by a firm £6,000 to a firm £28,000. The release that substituted the £3,000 for the £28,000 was not the quantification of some uncertainty inherent in the £28,000, but came *ab extra*, so that the true liability to be inserted in the accounts was nonetheless a firm £28,000.

G Counsel for the Crown was content to meet counsel for the appellant on his own ground. His contention was that there never had been a fixed, final and established liability of the appellant for any sum. True, the bank had a judgment against him for £34,000; but that judgment was against Sconering as well, and the bank had also proved in X's bankruptcy for £35,000. The bank could not, of course, recover from all the sources put together more than the £34,000 due to it, H and in so far as it recovered any part of that sum from Sconering, from X, or from anyone else, it could not recover it also against the appellant. If the bank's claims against the others had yielded nothing, the bank could enforce the judgment against the appellant for the whole of the £34,000: if those claims had yielded the whole £34,000, the bank could not enforce the judgment against the appellant at all. The ceiling was £34,000, and the floor was nil. In fact, I the bank recovered £6,000 from the others, and so the appellant's liability was admittedly reduced to £28,000. This admitted reduction, said counsel for the Crown, demonstrated *per se* that, unlike the *British Mexican* case (5), what was here involved was not a fixed, final and established liability at all: the liability was uncertain, and so fell into the category where, even on the appellant's argument, hindsight was admissible. A case where the creditor has a solitary debtor

(4) (1932), 16 Tax Cas. at p. 593.

(5) (1932), 16 Tax Cas. 570.

who alone is liable will more readily yield a fixed, final and established liability A  
than a case where, as here, there are two or more debtors liable for the same debt,  
even though some of them are insolvent or worse.

Counsel for the appellant replied that if hindsight was admissible, it was  
admissible only to determine what the bank was entitled to recover. He dis-  
tinguished between the reduction of the £34,000 to £28,000, which he accepted,  
and the reduction of the £28,000 to the £3,000, which he rejected. The former B  
he accepted as being a proper quantification of the liability after considering  
its intrinsic uncertainties. The latter he rejected as being no quantification  
of anything intrinsic but as being a purely voluntary and extrinsic release from  
liability. The reduction from £34,000 to £28,000 was a reduction in what the  
bank was entitled to recover: the reduction from £28,000 to £3,000 was merely  
an independent transaction whereby the bank voluntarily agreed to forego C  
£25,000 out of what it was entitled to recover; and this, he said, ought not to  
be taken into account.

Counsel for the Crown met this point by citing *Bernhard v. Gahan*; *Bernhard*  
*v. Inland Revenue Comrs.* (6), where there was initially a debt of £22,410 to a bank,  
but ultimately the bank agreed to accept £8,000 in full settlement. The taxpayer  
contended that as at the end of the accounting period his debt was £22,410, that D  
was the correct amount which should appear in the accounts, and not the £8,000  
to which the debt was afterwards reduced. The reduction, he said, was an  
entirely new and separate matter, not arising out of the original transaction, and  
did not affect his liability at the end of the accounting period. The Court of  
Appeal rejected this contention, and held that as the revenue authorities had  
never accepted the £22,410 as a final figure, matters remained open, and £8,000 E  
was the correct figure to insert. Quite plainly, that was a case in which the  
accounts as made up had included the £22,410, and yet it was nevertheless held right  
to reduce that to £8,000 as a result of the extraneous release by the bank. If it is  
right to alter an existing figure by reason of an extraneous release of part of the  
debt, I cannot see why it should be wrong to take account of such a release when  
the debt is for the first time being inserted into the accounts. In that respect, F  
at least, this case seems to be a fortiori *Bernhard v. Gahan* (6).

In thickets so dense and statute-laden as the law of income tax, common-  
sense is, I suppose, a frail guide. Certainly it cannot become the master, for  
then it would usurp the function of the statute book. But in territory which  
remains unoccupied by either statute law or case law, I do not see why common-  
sense should be abjured. Here I have a situation in which it is accepted on all G  
hands that the accounts in question must be re-opened so as to include a debt.  
It is also beyond question that, although that debt was once £34,000, events have  
occurred which reduced it, first to £28,000 and then to £3,000. When the hand  
of accountancy now comes to write that debt into the accounts, counsel for the  
appellant tells me that what must be written is not the £3,000 that the debt  
truly is but the £28,000 that it has not been since June 18, 1958. If authority H  
tells me that for accountancy purposes I must here resurrect an extinct debt,  
I shall of course obey; but so far as I am aware, there is no such authority,  
and certainly the *British Mexican* case (7) does not bind me to do so. In the  
absence of any such authority, I refuse to countenance the insertion into the  
accounts for the year ended Mar. 31, 1956, of a debt of £28,000, when that is  
£25,000 more than I know the true debt to be. I can understand that some-  
times accounts may have to be left as they stand, despite supervening events. I  
can also understand that sometimes accounts may have to be re-opened so as  
to give effect to supervening events. But I find it difficult to appreciate a  
doctrine which binds an accountant who is re-opening the accounts to be selective  
in making corrections to a particular item, giving effect to some and rejecting  
others in order that he may substitute one incorrect figure for another. I am I

(6) (1928), 13 Tax Cas. 723.

(7) (1932), 16 Tax Cas. 570.

A not saying that hindsight is always one and indivisible. What I am saying is that once hindsight is let in, then unless there is some compelling reason to the contrary that hindsight ought to be comprehensive and not differential. In this case I have heard no such reason.

During the argument I ventured to refer to a further consideration of possible relevance. There is a general principle in the law that where facts are available  
B they are to be preferred to prophecies. This is sometimes called the *Bullfa* principle, from the well-known case of *Bullfa and Merthyr Dure Steam Collieries (1891), Ltd. v. Pontypridd Waterworks Co.* (8). If, on a compulsory acquisition, compensation depends on the value of minerals, the actual value of those minerals at the time when the compensation comes to be assessed is to be preferred to the estimate of that value which would have been made when the  
C notice to treat was served. Where a widow's damages under Lord Campbell's Act, 1846 (9), depends on her expectation of life, and she dies before damages come to be assessed, what is to be taken is her actual expectation of life at the time of her husband's death rather than her actuarial expectation then. If a testator's estate is insufficient to pay all the legacies in full, the abated capital sums payable in respect of testamentary annuitants who have died prior  
D to the time of assessment must be based on their actual expectations of life at the date of the testator's death and not on their actuarial expectations then. The authorities on these points, and other cases, will be found collected in *Re Bradberry, National Provincial Bank v. Bradberry; Re Fry, Tasker v. Gulliford* (10). I do not suggest that these authorities govern the case before me; but the principle at least seems to me to be consistent with the view that I take. In  
E LORD MACNAGHTEN's words in the *Bullfa* case (11), when an arbitrator assesses compensation it is his duty to

"avail himself of all information at hand at the time of making his award which may be laid before him. Why should he listen to conjecture on a matter which has become an accomplished fact? Why should he guess when he can calculate? With the light before him, why should he shut his eyes and grope in the dark?"

F I would apply the same principle to accounts, and tell the accountant who is re-opening any accounts that unless authority compels him to the contrary he should take into consideration all the vicissitudes which have afflicted a debt, so that the accounts will show not the imperfect estimates of the amount of  
G that debt which would have been made at the time but the true amount of that debt which has ultimately been established. Accountancy is difficult enough as it is, and I would deprecate a practice which might require accountants to clear their minds of today's knowledge so that they may act today on the prophecies which they would have made yesterday, if in a suitable state of ignorance of what the future then held.

H Finally, I might mention that the *British Mexican* case (12) no longer holds the field unchanged: for, twenty-eight years after it was decided, Parliament acted. The Finance Act, 1960, s. 36, provides that where in computing for tax purposes the profits or gains of a trade, profession or vocation "a deduction has been allowed for any debt" incurred for the purposes of the trade, profession or vocation, and after Apr. 5, 1960, the whole or any part of "that debt" is  
I thereafter released, the amount released is to be treated as a receipt of that trade, profession or vocation arising in the period in which the release is effected. The wording of this provision does not, perhaps, attain the ultimate in perfection. If a deduction of £28,000 is allowed for a debt of £34,000, and then the creditor

(8) [1900-03] All E.R. Rep. 600; [1903] A.C. 426.

(9) The Fatal Accidents Act, 1846 (9 & 10 Vict. c. 93).

(10) [1942] 2 All E.R. 601; [1943] Ch. 35.

(11) [1900-03] All E.R. Rep. at p. 603; [1903] A.C. at p. 431.

(12) (1932), 16 Tax Cas. 570.



releases £31,000 out of the debt of £34,000, it may be said that literally what must be treated as a receipt is the "amount released"; and this is £31,000. On this view, what ought to be a debt of £3,000 is transformed by statute into a net receipt of £3,000. However, even if the point were ever to be taken, it is difficult to imagine that the courts would permit the section to be read so as to produce such an unfair result. If instead of being framed in relation merely to the "debt" being released, the section had been phrased so as to relate to a release in respect of the debt "so far as allowed as a deduction", or in respect of "the deduction allowed for the debt", the matter would have been beyond argument. But the point in no way arises for decision, and I say no more about it.

In the result, I consider the decision of the commissioners to be plainly right, and I dismiss the appeal.

*Appeal dismissed.*

Solicitors: *Moodie, Randall, Carr & Miles* (for the appellant); *Solicitor of Inland Revenue.*

[*Reported by F. A. AMIES, ESQ., Barrister-at-Law.*]

# BOWATER PAPER CORPORATION, LTD. v. MURGATROYD (Inspector of Taxes).

## BOWATER PAPER CORPORATION, LTD. v. INLAND REVENUE COMMISSIONERS.

[COURT OF APPEAL, CIVIL DIVISION (Danckwerts, Salmon and Fenton Atkinson, LJJ.), May 9, 10, 13, 1968.]

*Income Tax—Double taxation—Relief—Credit of foreign tax against income tax—Computation—Tax borne by the body corporate—Attributable to proportion of "relevant profits" represented by dividends—Meaning of relevant profits—Profits in accounts of foreign body corporate or as assessed for foreign tax purposes—Income Tax Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 10), s. 347, Sch. 16, para. 9.*

The taxpayer company had a subsidiary company (the "Canadian company") which was resident in Canada and which derived its income from the dividends of other subsidiaries, some of which suffered Canadian tax and some United States tax on their respective profits. Under the double taxation conventions between the United Kingdom and Canada and the United States, having effect under the Income Tax Act, 1952, s. 347 and Sch. 16, the taxpayer company was entitled to credit against United Kingdom income tax in respect of Canadian and United States taxes paid on the profits of subsidiaries in those countries. The relevant foreign tax taken into account for that purpose was "that borne by the body corporate paying the dividend upon the relevant profits in so far as it is properly attributable to the proportion of the relevant profits which is represented by the dividend" (para. 9 of Sch. 16\*). The depreciation allowed by the taxing authorities abroad in computing the tax chargeable on the subsidiaries was greater than the amount actually deducted in the accounts of the companies, with the consequence that the profits computed for tax purposes were lower than those shown in the companies' accounts. Accordingly, if "relevant profits" were the lower profits as computed for foreign tax purposes and not the profits shown in the companies' accounts, a higher foreign tax credit would be obtained, as the fraction for which para. 9 provided would be larger.

\* Schedule 16, para. 9, so far as material, is set out at p. 940, letter C to letter H, post.

- A** **Held:** "the relevant profits" in para. 9 of Sch. 16 to the Income Tax Act, 1952, meant the profits as shown in the companies' accounts and not those on which foreign tax was charged, with the consequence that the smaller fraction of foreign tax only should be credited against United Kingdom income tax (see p. 941, letter F, and p. 942, letter F, post).
- B** Decision of Cross, J. ([1968] 1 All E.R. 868) affirmed.
- [As to the computation of credits for foreign tax against income tax under double taxation conventions, see 20 HALSBURY'S LAWS (3rd Edn.) 456-458, paras. 857-860; and for cases on the subject, see 28 DIGEST (Repl.) 305-308, 1335-1350.
- For the Income Tax Act, 1952, s. 347, Sch. 16, para. 9, see 31 HALSBURY'S STATUTES (2nd Edn.) 333, 541.
- C** For the Double Taxation Relief (Taxes on Income) (U.S.A.) Order, 1946, Schedule, art. XIII, see 11 HALSBURY'S STATUTORY INSTRUMENTS (First Re-Issue) 108; and for the Double Taxation Relief (Taxes on Income) (Canada) Order, 1946, Schedule, art. XIII, see *ibid.*, p. 120.]
- Case referred to:
- D** *Sterling Trust, Ltd. v. Inland Revenue Comrs., Inland Revenue Comrs. v. Sterling Trust, Ltd.*, (1925), 12 Tax Cas. 868; 28 Digest (Repl.) 452, 1947.
- Appeal.**
- The taxpayer company appealed to the Special Commissioners of Income Tax against an objection to its claim for an allowance by way of credit for foreign tax against United Kingdom income tax for the years of assessment 1958-59 to 1961-62, under para. 13 of Sch. 16 to the Income Tax Act, 1952, and also against the following assessments to income tax: 1958-59 £1,880,000 less £617,427 16s. 2d. tax credit relief; 1959-60 £2,400,000 less £880,000 tax credit relief; 1960-61 £3,000,000 less £931,000 tax credit relief; and 1961-62 £2,041,000 less £510,000 tax credit relief. The claim arose under the double taxation conventions with the United States of America and Canada, although no question arose of the interpretation of those conventions. The relevant provisions were as follows:
- F** Double Taxation Relief (Taxes on Income) (U.S.A.) Order, 1946\*, Schedule, art. XIII (2):
- "Subject to such provisions (which shall not affect the general principle hereof) as may be enacted in the United Kingdom, United States tax payable in respect of income from sources within the United States shall be
- G** allowed as a credit against any United Kingdom tax payable in respect of that income. Where such income is an ordinary dividend paid by an United States corporation, such credits shall take into account (in addition to any United States income tax deducted from or imposed on such dividend) the United States income tax imposed on such corporation in respect of its profits, and where it is a dividend paid on participating preference shares and representing both a dividend at the fixed rate to which the shares are entitled and an additional participation in profits, such tax on profits shall likewise be taken into account in so far as the dividend exceeds such fixed rate."
- H** Double Taxation Relief (Taxes on Income) (Canada) Order, 1946†, Schedule, art. XIII (1):
- I** "Subject to the provisions of the law of the United Kingdom regarding the allowance as a credit against United Kingdom tax of tax payable in a territory outside the United Kingdom, Canadian tax payable in respect of income from sources within Canada shall be allowed as a credit against any United Kingdom tax payable in respect of that income. Where such income is an ordinary dividend paid by a Canadian debtor, the credit shall

\* S.R. &amp; O. 1946 No. 1327.

† S.R. &amp; O. 1946 No. 1885.

take into account (in addition to any Canadian income tax chargeable directly or by deduction in respect of the dividend) the Canadian income tax payable in respect of its profits by the company paying the dividend . . ."

The relevant legislation was contained in the Income Tax Act, 1952, s. 347 and Sch. 16, paras. 1-3, 7, 8 and 9.

It was common ground (being so stated in para. 7 of the Case Stated) that in computing the credit which might be claimed against United Kingdom income tax under art. XIII (1) of the Double Taxation Agreement between the United Kingdom and Canada, the Canadian and United States taxes paid on the profits or income of subsidiary companies (viz., of the North America company) in Canada and the United States of America, from which the North America company received dividends, might be taken into account in addition to the tax suffered by the North America company by direct assessment or as a result of the withholding tax deducted from the dividends received from United States subsidiaries. The North America company itself suffered tax only to a small extent as it was primarily a holding company. Paragraphs 8-10 of the Case Stated were as follows:

"8. In computing their respective profits liable to Canadian or United States tax there was deducted the depreciation allowance made under the relevant tax legislation to the various subsidiaries. Those depreciation allowances differed from the provisions which these subsidiaries made for depreciation in their own books of account. The reasons for this divergence between tax and book depreciation are explained below.

"9. When the paper mill owned by Bowaters Southern Paper Corpn. came into operation in 1954, that company elected to amortise the cost of certain plant facilities over a sixty month period for U.S. Federal income tax purposes, under what is known as a certificate of necessity. The remaining fixed assets were depreciated for tax purposes on a reducing balance method. For accounts purposes however, the company has depreciated its fixed assets on a straight-line basis. Under U.S. tax law, a company which provides for depreciation on the straight-line basis, so as to write off the assets over their useful working life, is entitled to claim, tax depreciation on the reducing balance basis at twice the rate used in its accounts; this is known as the 'double declining balance' method. As a result of claiming this accelerated depreciation, the profit of Bowaters Southern Paper Corpn. assessable to U.S. tax in the relevant years has been substantially lower than the profit shown in the company's accounts. In accordance with recognised U.S. accounting practice, the company has charged the resultant tax saving against its profits and has set aside a corresponding amount for equalisation of future taxation. Bowaters Southern Paper Corpn. could not have shown the same rate of depreciation in its accounts as it was allowed to claim for United States tax purposes in the years in question, without showing very substantial losses which would not have been commercially true.

"10. In the case of the Canadian subsidiaries the difference between accounts and tax depreciation is due to the fact that tax allowances are computed on a reducing balance basis whereas, for accounts purposes, depreciation is charged on the straight-line method."

The taxpayer company contended before the commissioners as follows:

"(i) On the true construction of para. 9 of Sch. 16 'profits', in the expression 'relevant profits' means profits as computed for the purposes of foreign tax. (ii) In the alternative: on the principle of the decision in *Sterling Trust, Ltd. v. Inland Revenue Comrs.*\* the taxpayer [company] was entitled to claim that any dividend paid [by the North America company] should be deemed to have been paid primarily out of taxed profits, and

\* (1925), 12 Tax Cas. 868.



A not rateably out of taxed and untaxed profits. (iii) In the further alternative: 'profits' in the expression 'relevant profits' means profits as computed for the purposes of United Kingdom taxation."

The Crown contended before the commissioners as follows:

B "(i) On the true construction of para. 9 of Sch. 16, 'the relevant profits' means the profits shown by the [taxpayer] company's accounts to be available for distribution, before liability to the foreign tax; or in the case of sub-para. (b) of para. 9, the specified profits out of which the dividend in question is declared to be paid. (ii) There are no words in para. 9 to justify the construction contended for on behalf of the appellant and the view that 'profits' in this paragraph mean 'profits as computed for the purposes of foreign tax' is wholly inconsistent with the express provision of sub-para. (b), under which 'the relevant profits' may be a part of the total profits which has borne no tax at all. (iii) The expression 'the profits available for distribution' in the proviso to para. 9, means 'the relevant profits' referred to in sub-para. (a) or (c), less the amount of the foreign tax and any part of the net profits, after such tax, applied in some other way so as to reduce the amount remaining available for distribution. (iv) The effective rate of foreign tax for the purposes of calculating the credit due under para. 9 is arrived at by applying a fraction, the denominator of which is 'the relevant profits', as construed in contention (i) above, and the numerator of which is the tax properly attributable to those profits, bearing in mind that an assessment is the measure of what is taxed and not necessarily the actual amount of the profits charged to tax (*Neumann v. Inland Revenue Comrs.*\*). (v) Where the total amount of the foreign tax is paid on an assessment exceeding in amount 'relevant profits' as construed in (i) above, the amount of tax in respect of which credit may be given must be limited to the part of the foreign tax properly attributable to such 'relevant profits'. (vi) The provisions of sub-paras. (a), (b) and (c) of para. 9 make the principle of *Sterling Trust, Ltd. v. Inland Revenue Comrs.*† inapplicable to the ascertainment of 'the relevant profits' for the purposes of the paragraph."

The commissioners rejected‡ the contentions of the taxpayer company and dismissed its appeal. They determined the appeals on agreed figures as follows: 1958-59 assessment reduced to £1,700,104 (agreed tax credit relief £425,032 5s.); 1959-60 assessment reduced to £1,821,804 (agreed tax credit relief £391,500 7s. 8d.); 1960-61 assessment increased to £3,815,522 (agreed tax credit relief £1,043,291 3s.); 1961-62 assessment reduced to £1,991,064 (agreed tax credit relief £660,575 9s. 6d.).

G On Dec. 13, 1967, as reported at [1968] 1 All E.R. 868, Cross, J., dismissed the taxpayer company's appeal against that decision, holding that the "relevant profits" in para. 9 of Sch. 16 to the Income Tax Act, 1952, meant profits available for distribution as dividend, which were the profits shown in the accounts. H The taxpayer company appealed to the Court of Appeal.

*Heyworth Talbot, Q.C., H. Major Allen, Q.C., and Peter Rees* for the taxpayer company.

*Hubert H. Monroe, Q.C., and J. R. Phillips, Q.C.,* for the Crown.

I **DANCKWERTS, L.J.:** This is an appeal by the taxpayer company, Bowater Paper Corpn., Ltd., against a decision of Cross, J. (1) dated Dec. 13, 1967. He dismissed an appeal from the Special Commissioners against their decision of Jan. 1, 1964. The Case Stated by the Commissioners was dated

\* [1934] All E.R. Rep. 398.

† (1925), 12 Tax Cas. 868.

‡ The commissioners' decision is set out at p. 941, letter H, to p. 942, letter C, post.

(1) [1968] 1 All E.R. 868.

May 16, 1967. It is a case which involves the question of relief against double taxation. A

The taxpayer company has a Canadian subsidiary called Bowater Corp'n. of North America, Ltd. ("the Canadian company"). The matter arises originally, of course, under the order in council, the Double Taxation Relief (Taxes on Income) (U.S.A.) Order, 1946 (2). The question which we have to decide depends on the Income Tax Act, 1952, s. 347, but more particularly on Sch. 16 thereto, and entirely on para. 9 of that schedule. Indeed, it turns really on three words—"the relevant profits". Unfortunately, the legislators (as sometimes happens) have not expressed their intention very clearly, and the matter of solution gives a considerable amount of trouble. B

The parties have put forward four different possible constructions of the words in question. I had better read the paragraph in question. Paragraph 9 provides: C

"Where, in the case of any dividend, foreign tax not chargeable directly or by deduction in respect of the dividend is, under the arrangements, to be taken into account in considering whether any, and if so what, credit is to be allowed against the United Kingdom taxes in respect of the dividend, the foreign tax not so chargeable which is to be taken into account shall be that borne by the body corporate paying the dividend upon the relevant profits in so far as it is properly attributable to the proportion of the relevant profits which is represented by the dividend . . ." D

Then it proceeds with certain definitions which turn out not so helpful as one might expect:

"The relevant profits are—(a) if the dividend is paid for a specified period, the profits of that period; (b) if the dividend is not paid for a specified period, but is paid out of specified profits, those profits; (c) if the dividend is paid neither for a specified period nor out of specified profits, the profits of the last period for which accounts of the body corporate were made up which ended before the dividend became payable E

"Provided that if, in a case falling under sub-para. (a) or sub-para. (c) of this paragraph, the total dividend exceeds the profits available for distribution of the period mentioned in the said sub-para. (a) or the said sub-para. (c), as the case may be, the relevant profits shall be the profits of that period plus so much of the profits available for distribution of preceding periods (other than profits previously distributed or previously treated as relevant for the purposes of this paragraph) as is equal to the excess; and for the purposes of this proviso the profits of the most recent preceding period shall first be taken into account, then the profits of the next most recent preceding period . . ." F

Then there is another paragraph which I think I am right in saying did not make any difference to what we had to consider. G

The Canadian company had a number of subsidiaries both in Canada and in the United States. In making up the companies' accounts (i.e., the Canadian companies' accounts) in regard to depreciation, they adopted what is called the straight-line basis; i.e., a reduction in the value of the assets concerned was taken so that they would be exhausted (if I may use that phrase) in accordance with their useful working life. The United States and Canada in their taxation provisions, however, pursued a different course. The United States pursued a course called the double declining basis, which was about twice the rate of depreciation of that adopted by the company and would in fact work at such a rate that it was capable of producing, I gather, in the present case, or in certain circumstances perhaps, not a profit at all but a loss. The Canadian statutes also adopted the reducing balance basis. Consequently, it makes a considerable H

A difference whether the basis used by the United States and the Canadian legislation is adopted or whether the basis on which accounts were drawn up for the purpose of the Canadian company was adopted. Indeed, the matter is of great importance, obviously, not only because of the difficulty of the statutory provision which we have to consider, but also because the difference in the amount of the taxation which the taxpayer company may have to pay is over

B £841,000.

Four different possible solutions have been put forward, if I understand the arguments correctly. Counsel for the taxpayer company has put forward three, I think, altogether. The first, he says, is that profits, for the purpose of this paragraph, should be treated as for foreign tax. The second which he puts forward is that the dividend should be deemed to be paid primarily out of taxed

C profits, and he bases his contention on *Inland Revenue Comrs. v. Sterling Trust, Ltd.* (3), a decision of the Court of Appeal, given in 1925. I would say at once that I find it difficult to apply that decision to the circumstances of the present case, and I find, therefore, that it is not really the right one to apply.

The third solution was to adopt the basis used for computation for United Kingdom tax. That was, I think, rather a third choice by counsel for the

D taxpayer company, and not one which he favoured. The remaining construction is the one which is put forward on behalf of the Crown, and that is that the dividend should be taken from the profits shown by the taxpayer company's accounts as available for distribution.

Now, I do not propose to go into the facts because very little turns on the facts. It is simply a question, as I have said, of construing those three words "the relevant profits". Anyhow, the case is already reported (4) and I do not think

E it is necessary for me to repeat the Special Case (5).

The first contention on behalf of the taxpayer company has a certain appeal. It seems a natural and logical argument that, if one is calculating relief in respect of a foreign tax and the amount thereof one should take the basis on which those calculations, computations and so forth are made, producing, I suppose

F one might say, like to like. There is, therefore, something to be said for that view, and indeed I thought that the arguments of counsel for the taxpayer company had considerable force. On the whole I have come to the conclusion, however, that it will not really fit in in the present case, and the point which strikes me as of great importance is in sub-para. (c), where there is a reference to "the last period for which accounts of the body corporate were made up".

G If one is going to refer to the period of the accounts for the purpose of computing the allowances under this paragraph, it seems to me that it is logical to take the figures which were given by those accounts. Consequently, I think that that is the right basis. The matter has been very well stated by the Special Commissioners in their Case, where they say:

"In our view we have to decide what are 'relevant profits' [actually, it is

H 'the relevant profits'] for these are the profits with which para. 9 deals, and they are defined later in the same paragraph. We do not think we can pay little or no attention to the word 'relevant' where it occurs in the first paragraph of para. 9. We preface our consideration of the definition of relevant profits by noting that nowhere in para. 9 is there any qualification, 'as computed for the purposes of the foreign tax'; and that dividends are

I in fact paid out of profits available for distribution and not out of a notional figure of assessment. [Sub-paragraph] (a) of the definition provides that if the dividend is paid for a specified period, the relevant profits are the profits of that period. 'Specified period' must mean an accounting period, and in many cases such a period will not be an assessment period. There is no

(3) (1925), 12 Tax Cas. 868.

(4) [1968] 1 All E.R. 868; [1968] 2 W.L.R. 834.

(5) See [1966] 1 All E.R. at p. 871; [1968] 2 W.L.R. at p. 835. For a statement of the Special Case see p. 938, letter D, ante.



provision for apportioning the figure of assessment to an accounting period. In our view the 'relevant profits' in this clause must be the profits available for distribution as shown by the accounts. [Sub-paragraph] (b) of the definition provides that if a dividend is not paid for a specified period, but out of specified profits, the relevant profits are the specified profits. We think 'the specified profits' must again be the profits available for distribution as shown by the accounts."

I consider sub-para. (c) to be a very important provision. The commissioners say:

"[Sub-paragraph] (c) provides that if the dividend is paid neither for a specified period nor out of specified profits, the relevant profits are those of the last period for which accounts were made up ended before the dividend became payable. In this case it seems to us inescapable that the relevant profits are those we have described above. The proviso refers to 'profits available for distribution' for the first time in para. 9. We do not think that the appearance of this phrase in this place creates any difficulty about our views of the definition of 'relevant profits'."

Then they rejected the taxpayer company's contention.

Cross, J., in his judgment adopted very much the same lines, and I think that he came to the right conclusion. At the conclusion of his judgment he said (6):

"There are not, as I see it, two funds of profits here, the accounts profits, only part of which are taxed, and the assessed profits, all of which bear tax. What are taxed are, I think, the company's profits for the year, whatever they may be; but they are taxed according to a yardstick which may compute them at less or more than they appear in the taxpayer company's accounts."

He concludes that it is the taxpayer company's accounts that is the appropriate figure to go by. I think that the Special Commissioners and the judge (7) have reached the right conclusion, and therefore I would dismiss the appeal.

**SALMON, L.J.:** I agree with DANCKWERTS, L.J., and there is nothing that I wish to add.

**FENTON ATKINSON, L.J.:** I too agree, and there is nothing that I wish to add.

*Appeals dismissed. Leave to appeal to the House of Lords granted.*

Solicitors: *Allen & Overy* (for the taxpayer company); *Solicitor of Inland Revenue.*

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

(6) [1968] 1 All E.R. at p. 874.

(7) [1968] 1 All E.R. 868.

A

## HAMBLETON v. CALLINAN AND OTHERS.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Waller and Fisher, J.J.), May 15, 1968.]

B

*Drugs—Misuse—Unauthorised possession—Traces of amphetamine powder in urine—Whether in possession contrary to the Drugs (Prevention of Misuse) Act 1964 (c. 64) s. 1 (1).*

C

On appeal from the decision of justices who, in dealing with informations preferred by the appellant alleging offences of unauthorised possession contrary to s. 1\* of the Drugs (Prevention of Misuse) Act 1964, held that the respondents were not in possession of traces of amphetamine powder that had been found in samples of their urine,

**Held:** when something was consumed by an individual and changed in character, the consumer was not in possession of it for the purposes of s. 1 (1) of the Drugs (Prevention of Misuse) Act 1964; accordingly, the respondents had been rightly acquitted in relation to the amphetamine traced in the samples of their urine (see p. 945, letters B and F, post).

D

**Semble:** in future cases traces of a drug found in samples of urine may be regarded as evidence of possession of the drug by the individual immediately prior to its consumption by him (see p. 945, letter C, post).

Appeal dismissed.

E

[As to the law concerning misuse and unauthorised possession of drugs, see SUPPLEMENT TO 26 HALSBURY'S LAWS (3rd Edn.) para. 491A; and for cases, see DIGEST (Cont. Vol. B) 521, 522, 243a-243c.

For the Drugs (Prevention of Misuse) Act 1964 s. 1, see 44 HALSBURY'S STATUTES (2nd Edn.) 734.]

Cases referred to:

*Towers & Co., Ltd. v. Gray*, [1961] 2 All E.R. 68; [1961] 2 Q.B. 351; [1961] 2 W.L.R. 553; 125 J.P. 391; 46 Digest (Repl.) 167, 1115.

F

*Warner v. Metropolitan Police Comr.*, ante p. 356; [1968] 2 W.L.R. 1303.

**Case Stated.**

G

This was an appeal by way of Case Stated by justices for the county borough of Bournemouth in respect of their adjudication as a magistrates' court at Bournemouth on Nov. 9, 1967. On Oct. 21, 1967, informations were preferred by the appellant, Arthur Hambleton, against the respondents Michael Anthony Callinan and Michael Robert Farrier that they had in their possession a substance specified in the Schedule to the Drugs (Prevention of Misuse) Act 1964, to wit seventy-one Durophet tablets, and a quantity of amphetamine powder without being duly authorised. On Nov. 9, 1967, an information was preferred by the appellant against the respondent Terrence Christopher Graham, that the respondent had in his possession a substance specified in the Schedule to the Drugs (Prevention of Misuse) Act 1964, to wit, a quantity of amphetamine powder without being authorised. The offence in each case was charged as contravention of s. 1 of the Act of 1964. On Oct. 20, 1967, the respondents, Callinan, Farrier and Graham, were arrested by the police on suspicion of being in unlawful possession of drugs. They were asked for and gave to the police samples of urine which were placed in bottles, and immediately were sealed and labelled. The samples were not

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divided, nor were parts offered to the respondents. The respondents were not cautioned. The samples together with the seventy-one Durophet tablets were analysed. The tablets were found to be in the amphetamine group. Each of the samples was found to contain amphetamine powder and barbiturate. The tablets had a release period of twelve to fourteen hours, no trace being left after twenty-four hours, but the metabolism in individuals was different, making time estimates speculative. The justices found that subject to that element of speculation, the

\* The effect and terms of s. 1 (1), so far as material, are stated at p. 944, letter I, post.

amphetamine could have entered the body some twelve to fourteen hours earlier and that, although the estimated quantity found was in the milligram range in all three cases, it was not possible to say what quantity was at any time in the body or how the amphetamine came into the body. A

The appellants contended before the justices that Callinan and Farrier were both in possession of the seventy-one Durophet tablets and also of the amphetamine powder found in their urine samples, and that the respondent Graham was in possession of amphetamine by virtue of amphetamine powder having been found in his urine sample. It was contended before the justices for the respondent Farrier that he was not in possession of the tablets, and that he could not be said to be in possession of the amphetamine powder. B

The justices found that the respondents Farrier and Callinan were both in possession of amphetamine, so far as the Durophet tablets were concerned, but that, with regard to the part of the charge relating to amphetamine powder in the urine samples, that powder was not in their possession within the context of s. 1 (1) of the Act of 1964 because, among other reasons, once a capsule or tablet entered the blood stream it substantially changed its form, and subsequent urine analysis could deal only with traces of the original capsule or tablet, the amphetamine substance being isolated in the urine by the introduction of an oxalate and recovered as a salt. The justices accordingly found that there was no case to answer on that part of the charge against Farrier and Callinan relating to possession of amphetamine powder in their urine samples and directed that the words "and a quantity of amphetamine powder" be deleted from the charge. The respondent Graham had pleaded guilty, but the justices, having advised him to change his plea to one of "not guilty" found that he had no case to answer and dismissed the charge. C D E

The question for the opinion of the High Court was whether the justices were right in law in holding that the finding of amphetamine powder in a urine sample did not amount to possession, as that expression was used in s. 1 (1) of the Drugs (Prevention of Misuse) Act 1964.

*H. J. M. Tucker* for the appellants. F

*D. P. O'Brien* for respondent Callinan.

*G. W. Willet* for respondent Farrier.

*D. H. W. Vowden* for respondent Graham.

**LORD PARKER, C.J.**, having stated the nature of the appeal and referred to the justices' decision, continued: On Oct. 20, 1967, the respondents were arrested by the police on suspicion of being in unlawful possession of drugs. They were asked for and gave urine samples, and on analysis it was found that the urine samples contained traces of this amphetamine powder. It was also found that the Durophet tablets were in the amphetamine group. The prosecution's case was clearly that the amphetamine powder, traces of which were found in the urine, had come from consuming Durophet tablets. It is to be observed that, so far as this Case Stated is concerned, the prosecution's contention was that when there is found in a man's urine traces of amphetamine powder, he is in possession of that powder, contrary to s. 1 (1) of the Drugs (Prevention of Misuse) Act of 1964. That subsection provides that it shall not be lawful for a person to have in his possession a substance for the time being specified in the Schedule to the Act of 1964 G H I

"unless (a) it is in his possession by virtue of the issue of a prescription . . . for its administration by way of treatment to him, or to a person under his care; . . ."

and so on. It was contended by the prosecution, and it has been contended here, that a man can be in possession of a prohibited substance within the meaning of s. 1 of the Act of 1964 if he has traces of it in his urine, in his intestines or any other part of his body in which it can be found. The justices felt that that was a



A wholly artificial conception and that, once one had consumed something and its whole character had altered and no further use could be made of it, as in this case, a man could not be said to be in possession of the prohibited substance.

B For my part, there is little, I think, that can be said in the matter. I am quite satisfied that the justices were right. Counsel for the appellant has said that the may be cases where a man, as it were, consumes something, puts it in his mouth or swallows it, such as a diamond or a gold ring, in order to conceal it, when he may well be in possession of it. I entirely agree but when, as here, something is literally consumed and changed in character, it seems to me impossible to say that a man is in possession of it within the meaning of this Act, and accordingly I would dismiss this appeal.

C But before leaving the matter, I confess that I myself can see no reason why in another case the time when the possession is said to have taken place should not be a time prior to the consumption, because as it seems to me the traces of, in this case, amphetamine powder in the urine is at any rate *prima facie* evidence—which is all that the prosecution need—that the man concerned must have had it in his possession, if only in his hand prior to raising his hand to his mouth and consuming it. Accordingly, it seems to me that the possible difficulty that the decision in this case raises for the police does not arise in practice because the date of his possession can always be laid prior to the consumption.

E The court is in addition asked to indicate whether in cases such as this there ought to be a caution; whether there ought to be a provision for the splitting of samples and the giving of part to the arrested person; and generally the procedure to be employed. For my part I do not propose to give a ruling. I would only say, quite generally, that the police must act fairly in this and in my judgment that would entail enabling the accused, if he desired it, to have a part of the sample taken. I prefer, in a case which does not directly raise the matter, not to decide whether the absence of a caution or the absence of the giving of a sample would in any way vitiate a conviction.

F WALLER, J.: I agree.

FISHER, J.: I agree. In the recent case of *Warner v. Metropolitan Police Comr.* (1) decided by the House of Lords, LORD PEARCE said (2):

G “Again LORD PARKER, C.J., in *Towers & Co., Ltd. v. Gray* (3) after observing that the term ‘possession’ is always giving rise to trouble, and after considering various cases there cited, concluded, rightly as I think, that in each case its meaning must depend on the context in which it was used.”

H The context in the present case, as in *Warner’s* case (1), is the Drugs (Prevention of Misuse) Act 1964, and it seems to me to be perfectly clear that the word “possess” in that Act is not used in a sense which could cover the present case. One only has to look at s. 1, the list of exceptions, s. 3, the power to search for scheduled substances, and s. 4, the provisions for the disposal of substances in respect of possession of which offences have been committed.

*Appeal dismissed.*

I Solicitors: *Pearcock & Goldard*, agents for *Mooring, Aldridge & Haydon*, Bournemouth (for the appellant); *Harold G. Walker & Co.*, Bournemouth (for respondent Callinan); *Ellis, Belcher & Co.*, Bournemouth (for respondent Farrier); *Andrews, Weatherall & McQueen & Co.*, Bournemouth (for respondent Graham).

[Reported by OM. P. MIDHA, Barrister-at-Law.]

(1) Ante p. 356.

(2) Ante at p. 387, letter H.

(3) [1961] 2 All E.R. 68 at p. 71; [1961] 2 Q.B. 351 at p. 361.

## F. v. F.

[COURT OF APPEAL, CIVIL DIVISION (Danckwerts, Salmon and Fenton Atkinson, L.JJ.), April 25, 26, 1968.]

*Divorce—Custody—Estoppel—Adultery—Husband's allegation of adultery by wife with M. at holiday camp rejected at trial of divorce suit—Decree granted to husband on other grounds—Trial judge favourably impressed by M.'s evidence, unfavourably impressed by other witnesses, including husband and wife—Wife intending to marry M.—Subsequent custody proceedings concerning the child of the marriage, a boy aged nearly seven—Husband adduced in these further evidence of wife's adultery with M. at holiday camp—Whether this further evidence admissible notwithstanding doctrine of estoppel or res judicata.*

In a defended divorce action brought by the wife the trial judge, in the exercise of her discretion, granted the husband a decree of divorce on the ground of his wife's adultery, including one admitted act of adultery with M. The husband also alleged that other adultery occurred between the wife and M., at a holiday camp between July 16 and 23, 1966, but both the wife and M. denied this other adultery in evidence at the trial and the trial judge expressly found that it did not occur. The trial judge stated that she was very favourably impressed by M., and very unfavourably impressed by the husband, the wife and the woman whom the husband later married, and exercised her discretion in favour of the husband in order to enable the wife to marry M. In subsequent proceedings (which were heard by the trial judge) for the custody, care and control of the six year old son of the marriage, the husband sought to adduce further evidence of the alleged adultery at the holiday camp which the trial judge had expressly found did not occur, and of conspiracy by the wife and M. (who had married each other) to deceive the court about this adultery. On appeal by the wife against rejection of her plea of estoppel by res judicata and against a decision to admit this further evidence,

**Held:** the trial judge had a discretion to admit the further evidence, and had exercised that discretion properly, because—

(i) the further evidence was of a character likely to have a substantial effect on the decision as to custody (see p. 948, letter I, p. 949, letters A, B and I, and p. 950, letters A and I, post).

(ii) if the evidence of the alleged adultery at the holiday camp were true, there had been a deliberate attempt by the wife and M. to deceive the trial judge about this adultery, and evidence of it should not be excluded by estoppel or res judicata (see p. 948, letter I, and p. 950, letters G and I, post).

**Quaere** (per SALMON and FENTON ATKINSON, L.JJ.) whether or how far the principle of estoppel by res judicata applied in custody proceedings (see p. 950, letters D and I, post).

*Corbett v. Corbett* ([1953] 2 All E.R. 69) considered; *Hull v. Hull* ([1960] 1 All E.R. 378) doubted.

Appeal dismissed.

[As to estoppel as a bar to relief in matrimonial proceedings, see 12 HALSBURY'S LAWS (3rd Edn.) 294, para. 581; as to estoppel generally, see 15 HALSBURY'S LAWS (3rd Edn.) 176, para. 345; and for cases on the subject, see 27 DIGEST (Repl.) 374-378, 3088-3117.]

As to evidence admissible in custody proceedings, see 12 HALSBURY'S LAWS (3rd Edn.) 357, para. 761.

As to the admission of fresh evidence on appeal, see 12 HALSBURY'S LAWS (3rd Edn.) 421, para. 939.]

Cases referred to:

*Corbett v. Corbett*, [1953] 2 All E.R. 69; [1953] P. 205; [1953] 2 W.L.R. 1124; Digest (Cont. Vol. A) 783, 5570b.

- A *Hull v. Hull*, [1960] 1 All E.R. 378; [1960] P. 118; [1960] 2 W.L.R. 627; Digest (Cont. Vol. A) 804, 6310a.

### Interlocutory Appeal.

This was an appeal, by a wife, whose marriage had been dissolved, against the decision of LANE, J., given on Mar. 15, 1968, to allow her former husband to adduce certain further evidence in proceedings between them for the custody, care and control of their son, aged nearly seven; the evidence was directed to establishing adultery by the wife with a Mr. Mason at a holiday camp, and was sought to be adduced notwithstanding that, at the trial of the divorce suit, the allegations of adultery on this occasion had been rejected. The facts are stated in the judgment of DANCKWERTS, L.J.

- B *N. Lerron, Q.C.* and *Margaret Booth* for the wife.  
C *Eric Myers, Q.C.* and *A. B. Ewbank* for the husband.

DANCKWERTS, L.J.: This is an appeal from a decision of LANE, J., in interlocutory proceedings regarding custody, care and control, of a child who was born on July 20, 1961, and so is now a little under seven, and it arises as an aftermath of a decree nisi obtained in divorce proceedings which were started by the wife, Mrs. Frost, against her husband, Mr. Frost. They were married on Aug. 21, 1960, and the petition was filed on Sept. 20, 1965, in which it was alleged by the wife that the husband had committed adultery with a Mrs. Payne from 1964 inwards.

Originally as the petition was drafted the wife was not asking for discretion, but subsequently her petition was amended after the husband had put in his answer, and she did ask for discretion in respect of a single act of adultery with one of the three parties cited, Mr. Mason. Subsequently the husband put in a supplemental answer. Eventually, on Jan. 25, 1968, the divorce hearing was ended, after nine days. The judge made an order for a decree nisi on the husband's answer, and rejected the petition of the wife, for certain reasons which will appear so far as it is necessary to state them.

- F The judgment delivered by the judge was some thirty-three pages long. I have read it, and I do not propose to go into it more than is absolutely necessary. Of the general atmosphere it could be said that the persons who appear, and who were involved in matters which arose, were most of them members of an amateur dramatic society, and the sort of general atmosphere could be sufficiently indicated if I say that it was difficult to know who was in whose bed at any particular moment.

- G The judge made certain findings. She found that the husband left his wife in February, 1965, with a desire to live with Mrs. Payne. The husband, for his part, had said that the marriage had already broken up before that occurred. The second thing which the judge held was that the wife did in fact commit adultery with one of the parties cited, called Beverley, and that the husband had connived at it. She also held that the charge of adultery with one Vadim, another of the parties cited, was true, and the fourth point is that the judge found that there was one act of adultery by the wife with Mr. Mason, which appeared in the wife's discretion statement, but she rejected the allegation of adultery between Mr. Mason and the wife between July 16 and July 23, 1966, at a holiday camp somewhere near Chichester. Fifthly, the judge considered that Mr. Mason was a truthful witness, and formed, it appears, rather a good opinion of him. Sixthly, she held that the husband was morally responsible for the indiscretions of the wife, but gave him a decree and exercised discretion in his favour with the object of enabling Mr. Mason and the wife to marry, which was a rather unusual result, I would suppose, in divorce proceedings.

I That was the situation, and the judgment of the judge of Mar. 15, 1968, which was the judgment with which we were concerned, arose in the course of proceedings in regard to the custody, care and control, of Mark, the child of the marriage, to whom I have referred. We are not concerned with the outcome,



or with deciding the question of custody or care and control, but we are concerned with a certain matter which arose in the course of those proceedings. It was an unusual matter that arose. Affidavits were filed on behalf of the husband, suggesting that Mr. Mason had in fact committed adultery with the wife at the holiday camp in July, 1966, and, further, that there had been a deliberate conspiracy between Mr. Mason and the wife to deceive the judge into deciding as she did, that the adultery had not taken place in any way at the holiday camp.

On the question whether evidence of this should be admitted in the course of what I will call, for short, the custody proceedings, LANE, J., decided, on Mar. 15, 1968, that the evidence was not absolutely barred by *res judicata* or estoppel, and that it should be admitted because it was fresh evidence which could not have been discovered at the time of the hearing of the divorce petition and might affect her decision in regard to which of the two parties should have the custody or care and control of the child in question.

Two well-known authorities on this subject were cited to us; they were *Corbett v. Corbett* (1), a decision of the Court of Appeal, and *Hull v. Hull* (2), a decision of SACHS, J., in which he went very fully into this sort of question. The general result of those decisions is that if a matter has been decided in the divorce proceedings it is *res judicata* and cannot be reopened, except in very exceptional circumstances. The general rule about the admission of further evidence by the Court of Appeal, which is well recognised, requires also that two conditions shall be satisfied before further evidence shall be admitted, viz., first, that the evidence could not reasonably have been available at the time of the trial, and, secondly, that it must be of a character which would be likely to have a substantial effect on the decision of the relevant appeal.

The judge was satisfied that the evidence was fresh evidence in that sense, and, although I had some doubt about the matter, I am not prepared to disagree with her. She held that she had a discretion, and she exercised it in favour of admitting these affidavits, and gave certain consequential directions as a result of them.

The first point one has to consider is: was the matter *res judicata*? That is to say, was it an issue which had been decided in the divorce proceedings and not merely a matter which had been raised but not decided; and then, was it proper in the circumstances to consider the admission at all? If so, of course, the second question arises, whether it was right to admit it in the present case.

In this case it was quite clear that the question of whether or not adultery had been committed by the wife with Mr. Mason at the holiday camp was decided by the judge. She decided, adversely to the husband and in favour of the wife and Mr. Mason, that adultery had not taken place. This was in no way a basis for her decision in the divorce proceedings, for she decided to grant a decree nisi on other grounds. As it was not a ground for her decision, the husband could not have based an appeal on her decision on this point, because the decision had no result at all in regard to the outcome of the divorce suit. The question whether any estoppel or *res judicata* arose in the present case, is, therefore, rather a difficult question, but I find, for a reason which convinces me, that the evidence ought to be admitted. If the evidence which has been put forward is true, it would appear that there was a deliberate attempt by Mr. Mason, and I suppose on the part of the wife, to deceive the judge, and if in fact adultery had been committed at the holiday camp then it was a successful conspiracy to deceive the judge. Therefore it seems to me that the pleas of *res judicata* or estoppel are not effective in the present case.

I reach the conclusion that it is open to the court to admit this further evidence because, in particular, it might have—I put it no higher than that—important

(1) [1953] 2 All E.R. 69; [1953] P. 205.

(2) [1960] 1 All E.R. 378; [1960] P. 118.

- A results on the decision to which parent the little boy should go. It is important because Mr. Mason's character was so favourably considered by the judge in her judgment, and a somewhat unusual order was made, because she thought that Mr. Mason had the best character—I put it no higher than that—and would be likely to provide a good home and be a good husband to the wife, and to provide an atmosphere in which there might be a happy family in which the little child
- B was to be brought up. If that attitude was not correct, then, of course, the matter requires consideration, and I think that the learned judge was right in exercising her discretion to admit this evidence. Of course it is no indication as to what the ultimate result of the admission might be, but it seems to me not proper to exclude from the proceedings with regard to custody of the child, evidence which may have some importance in the circumstances.
- C I, therefore, would dismiss the appeal.

- SALMON, L.J.: I agree. The divorce case out of which these custody proceedings arise was of a most unsavoury character. The judge took a very unfavourable view of the husband and of the wife, and of Mrs. Payne, the husband's paramour. She thought that both the husband and the wife had
- D committed perjury, and as far as they were concerned, and Mrs. Payne was concerned, the judge thought—and I am not surprised having regard to the very careful judgment which I have read—that there really was nothing to choose between them. The one person who came out with flying colours was Mr. Mason, whom the wife wishes to marry. The judge really regarded him as a knight in shining armour. It is true that his armour was discarded on one occasion, under
- E the most extenuating circumstances; there was a single candidly admitted act of adultery committed between him and the wife.

- The question which faced the judge in the custody proceedings was, in reality, whether this little boy, the only child of the marriage, who was nearly seven years old and had lived most of his life with the wife, his mother—and no criticism was made of her as a mother—should go on living with his mother and with
- F Mr. Mason, after she married him, or whether the boy should be given into the care and control of his father—of whom no criticism could be made as a father—married to the former Mrs. Payne.

- One of the questions which a judge has to consider in deciding a troublesome, difficult, and most important, point of this kind is the character of the parties. On the matter as it stands, unless the judge is entitled to look at the
- G fresh evidence which the father desires to call, she would have to approach the problem on the basis that the one person of impeccable character is Mr. Mason; and this might have some effect on her mind. If everything else were nicely balanced, the scale might just be turned by the consideration that it is in the interests of the child to come under the influence of at least one person who is truthful and honest, and in every way a man of high character. If the evidence
- H which the father now wishes to produce is true it does show that Mr. Mason is far from a truthful witness. During the divorce proceedings he denied on oath that he had committed adultery at the holiday camp in the summer of 1966. He swore positively, as did the mother, that he had not been sleeping there with her during that period. If that evidence was untrue, it had obviously been concocted between them. This would mean that as far as truthfulness was
- I concerned Mr. Mason was very much in the same boat as the mother and father, and possibly Mrs. Payne, so instead of having three people, between whom there is nothing to choose, and one man of impeccable character, there would be four people between whom there is nothing to choose. Since the character of the parties is always an important matter in deciding issues of custody, and care and control, it would be quite wrong, in my view, for the judge to be forced to approach this case, as FENTON ATKINSON, L.J., said in the course of argument, in blinkers.

It is right that the fresh evidence should be before the judge unless there is

any legal ground for excluding it. I want to make it quite plain that I am not in the slightest expressing the view that, even if the evidence is true, it will determine the issue. If it is true it shows that the mother and Mr. Mason have behaved quite disgracefully, in committing perjury, but the father and Mrs. Payne have little to commend them from the moral point of view, and it by no means follows that this little boy of nearly seven, who has lived with his mother for most of his life, should now be transferred to his father's care and control. The fresh evidence however is a factor which is relevant, and which the judge thought she ought to consider, and I agree with DANCKWERTS, L.J., that it would be wrong for us to prevent her from doing so.

I wish to reserve the question whether the doctrine of *res judicata* can apply in any circumstances in custody proceedings. There is the authority of *Hull v. Hull* (3) in which, in a very careful judgment, the judge who decided that case came to the conclusion that it did apply to custody proceedings, in the sense that if an issue had been decided in the divorce suit between the father and mother, on which the judge decided either to grant a decree or to reject it, then both the father and the mother were bound by that decision even in the custody proceedings, and could not be heard to give any evidence to show that that decision was wrong.

All I desire to say is that I must not be taken as agreeing with that view. It may be right but I am inclined to doubt it. The paramount duty of the court in custody proceedings is to consider what is in the best interests of the child. Of course, in a sense it is a fight between the father and the mother, but the court does not decide it on the basis of whether the mother ought to win or the father ought to win, but chiefly on the basis of what is best for the child. If in such cases the court were to be precluded by the somewhat artificial doctrine of estoppel from considering all the relevant evidence, I think it would be a great pity. I do not think that the child's interests should be sacrificed on the altar of an estoppel existing between the father and mother, nor am I persuaded that the law calls for any such sacrifice.

I doubt whether the principles of public policy, on which the doctrine of *res judicata* is founded, have any real application in custody proceedings. I am however prepared to approach this case on the assumption that there is such an estoppel. I think that even if there is an estoppel the evidence which the father now seeks to adduce is admissible fresh evidence because it tends to show that the decision in relation to the alleged adultery at the holiday camp was procured by perjury and probably by a conspiracy to deceive the court. It was not available by reasonable diligence at the trial, and should now be admitted.

I repeat that even if the evidence is true, as the judge herself pointed out, it by no means decides this case in favour of sending the child away from his mother, but it is evidence which the judge is entitled to take into account. In her discretion she has considered that it is material and ought to be heard. I certainly would not disagree with her.

I would dismiss the appeal.

**FENTON ATKINSON, L.J.:** I agree with my lords and I would only add this, that, like SALMON, L.J., I would not at this stage wish to express any firm view as to how far the *res judicata* principle would apply in the custody proceedings.

I agree that the appeal should be dismissed.

*Appeal dismissed.*

Solicitors: *Lovell, White & King* (for the wife); *Herbert Reeves & Co.* (for the husband).

[Reported by HENRY SUMMERFIELD, Esq., Barrister-at-Law.]



A

## R. v. SALTER.

[COURT OF APPEAL, CRIMINAL DIVISION (Sachs, L.J., Cantley and Cusack, JJ.), April 2, 8, 9, May 6, 1968.]

B

*Bankruptcy—Offences Failure to give satisfactory explanation of manner of incurring substantial loss of part of bankrupt's estate—Bankrupt having been engaged in trade or business and having debts contracted in course of trade or business outstanding at date of receiving order—Whether absolute offence—Bankruptcy Act, 1914 (4 & 5 Geo. 5 c. 59), s. 157 (1) (c).*

C

Section 157 (1) (c)\* of the Bankruptcy Act, 1914, creates an absolute offence (see p. 955, letter E, post), viz., failure by a bankrupt, after being required in accordance with s. 157 (1) (c) to account for the loss of any substantial part of his estate within the statutory period, to give a satisfactory explanation of the manner in which the loss was incurred.

D

*R. v. Duke of Leinster* ([1923] All E.R. Rep. 187) followed.

Direction in *R. v. Phillips* ((1921), 85 J.P. 120) disapproved.

E

Accordingly in summing-up to a jury on a charge under s. 157 (1) (c) of the Bankruptcy Act, 1914, the jury should be directed that, if they are satisfied as regards the total sum of money constituting "the loss of any substantial part of" the bankrupt's estate that he had not at the time of the alleged failure given, with such reasonable detail as was appropriate in the circumstances, an explanation which was both reasonably clear and true of how that sum was made up, or of how it came to be lost, and where the money had gone, then the offence had been committed (see p. 958, letter G, post). Moreover, reasons for the failure to make explanation and the motive leading to the failure are irrelevant to the question whether the offence has been committed (see p. 958, letter I, post).

F

Per CURLIAM: Section 164 (3)† of the Bankruptcy Act, 1914, as amended, remains no more than an admonition or reminder to magistrates to take into account at committal proceedings any evidence tendered on behalf of the bankrupt under the numerous exculpatory provisos to be found in Part 7 of that Act (see p. 956, letter H, post).

G

[As to mens rea in bankruptcy offences, see 2 HALSBURY'S LAWS (3rd Edn.) 636, para. 1263; and for cases on the subject, see 5 DIGEST (Repl.) 1129, 9101, 1131, 9113.]

As to mens rea in statutory offences, see 10 HALSBURY'S LAWS (3rd Edn.) 273, 274, para. 508; and for cases on the subject, see 14 DIGEST (Repl.) 35-40, 48-95.

For the Bankruptcy Act, 1914, s. 157, see 2 HALSBURY'S STATUTES (2nd Edn.) 437.]

H

Cases referred to:

*Harding v. Price*, [1948] 1 All E.R. 283; [1948] 1 K.B. 695; [1948] L.J.R. 1624; 112 J.P. 189; 45 Digest (Repl.) 48, 160.

*Lim Chin Aik v. Queenan*, [1963] 1 All E.R. 223; [1963] A.C. 160; [1963] 2 W.L.R. 42; Digest (Cont. Vol. A) 23, \*166a.

*R. v. Dandridge*, (1931), 22 Cr. App. Rep. 156; 5 Digest (Repl.) 1125, 9063.

*R. v. Leinster (Duke of)*, [1923] All E.R. Rep. 187; [1924] 1 K.B. 311; 93 L.J.K.B. 144; 130 L.T. 138; 87 J.P. 191; 17 Cr. App. Rep. 176; 5 Digest (Repl.) 1129, 9101.

I

*R. v. Phillips*, (1921), 85 J.P. 120; 5 Digest (Repl.) 1131, 9113.

*Warner v. Metropolitan Police Comr.*, ante p. 356; [1968] 2 W.L.R. 1303.

### Appeal.

This was an appeal by Percy Horace Salter, a bankrupt, against his conviction

\* Section 157 (1), so far as material, is set out at p. 953, letters F and G, post.

† Section 164 (3), as amended, is set out at p. 955, letter I, post.

on a majority verdict at Bedfordshire quarter sessions on Nov. 24, 1967, before the deputy chairman (H. W. SABIN, Esq.) and a jury of an offence contrary to s. 157 (1) (c) of the Bankruptcy Act, 1914. The count charged that between June 1 and Dec. 2, 1966, the appellant, being a person who had been adjudged bankrupt and having been engaged in trade or business in the firm of Phoenix Heating and having outstanding at the date of the receiving order debts contracted in the course of and for the purposes of such trade or business, on being required by the Official Receiver and in the course of public examination by the court to account for loss of any substantial part of the appellant's estate, incurred within the period of a year next preceding the date of the presentation of the bankruptcy petition and between that date and the date of the receiving order, failed to give a satisfactory explanation of the manner in which such a loss was incurred, namely, the net loss of £10,569 5s. 10d. arising from carrying on business from Feb. 28, 1965, to Jan. 6, 1966. The appellant was sentenced to three months' imprisonment, against which he also appealed. The facts are set out in the judgment of the court (see p. 957, letter A, post).

The case noted below\* was cited during the argument in addition to those referred to in the judgment of the court.

*T. H. K. Berry* for the appellant.

*G. F. B. Loughland* for the Crown.

*Cour. adv. vult.*

May 6. **SACHS, L.J.**, read the following judgment of the court in which, after stating the appellant's conviction and the nature of the appeal, he continued: The essence of the prosecution case—to which fuller reference will be made in a later part of this judgment—was that the appellant had incurred a trading loss of some £10,500 in the short space of the six or seven months preceding September, 1965: that attempts were made on several occasions, including the various hearings of the appellant's public examination (the last being on Dec. 1, 1966) to obtain an explanation of how that loss was incurred; and that no explanation—or at least no satisfactory explanation—was furnished by the appellant in any account or narrative statement supplied by him. The defence in brief, as appears from the transcript of the summing-up, was that, whilst he realised

“it was my duty to do everything that Mr. Stephenson [the examiner] required of me and to show him how the loss of £10,500 had been sustained,”

he had a full time job that made it very difficult to produce the explanations and figures, and that he had done the best that he could to give accurate information.

Those being the respective cases for the prosecution and the defence, the learned deputy chairman directed the jury on the law as follows:

“The first matter that you might decide about is whether you are satisfied or not that he did fail, within this period, of course, between June 1 and Dec. 2, 1966, to give a satisfactory explanation. If you decide that he did, then you must go on to consider if [the appellant's] failure to provide a satisfactory explanation was with intent to deceive or in order to evade the provisions of the Bankruptcy Act. [Counsel for the prosecution] yesterday in his speech, and he confirmed it again to me this morning you remember, indicated that the prosecution was not suggesting [the appellant] had been guilty of an intention to deceive here and they were relying on the second leg of that and they say he was evading the provisions of the Bankruptcy Act—trying to evade the provisions of the Bankruptcy Act. So leave out any question of intent to deceive, don't trouble about that, and if you do find there was a failure to give a satisfactory explanation, then go on to consider whether he was trying to evade the provisions of the Bankruptcy Act, and whether that was his intention.”

\* *Sherras v. de Rutzen*, [1895-99] All E.R. Rep. 1167; [1895] 1 Q.B. 918.

- A In giving that direction as to the need to find either an intent to deceive or an intent to evade the provisions of the Act of 1914 before they could convict, the deputy chairman was adopting the direction given to a jury by the common serjeant in *R. v. Phillips* (1) as cited in para. 3666 of ARCHBOLD'S CRIMINAL PLEADING EVIDENCE AND PRACTICE (36th Edn., 1966). He next went on to explain the words "trying to evade the provisions of the Bankruptcy Act" by giving as an example the man who said in effect to the official receiver: "I don't care a fig for your Act; I'm not going to comply with it." He continued:

"But if you thought the reason was not that, but that it was just due to inadvertence, carelessness and not bothering, then, members of the jury, the prosecution would not have proved it in that case and you would find him not guilty."

- C The jury having convicted the appellant after being thus directed, he now appeals on a number of grounds, one of which is that there was no evidence of an attempt to evade the provisions of the Act, and another that, if he had done his best, then no offence had been committed.

- D [HIS LORDSHIP then briefly disposed of two points not material to this report, concluding that they were without substance, and continued:] It is now convenient to turn to the two main points of law which fall to be considered. The first is whether, in order to establish that an offence has been committed under s. 157 (1) (c) of the Bankruptcy Act, 1914, the prosecution has to prove that the accused had an intent to deceive, or to evade the provisions of the Act; or whether that subsection creates an absolute offence which is complete once it is shown that there has been no satisfactory explanation. The second is as to the correct meaning of the words "satisfactory explanation"; counsel for the appellant having submitted that an explanation is "satisfactory" if the accused has done his best, even if that best does not in fact result in there being an explanation. Section 157 (1) (c) provides:

- F "Any person who has been adjudged bankrupt, or in respect of whose estate a receiving order has been made, shall be guilty of a misdemeanour, if, having been engaged in any trade or business, and having outstanding at the date of the receiving order any debts contracted in the course and for the purposes of such trade or business, . . . (c) on being required by the official receiver at any time, or in the course of his public examination by the court, to account for the loss of any substantial part of his estate incurred within a period of a year next preceding the date of the presentation of the bankruptcy petition, or between that date and the date of the receiving order, he fails to give a satisfactory explanation of the manner in which such loss was incurred . . ."

- G The principles on which a court determines whether or not an absolute offence has been created by a statute have been much canvassed of recent years and are plain. Generally speaking there is a presumption (cf., *Lim Chin Aik v. Reginam* (2), in the Privy Council) against the creation of such an offence and in favour of some form of mens rea being required to be an ingredient of the offence. The court has to look, however, at the particular field of activity with which the statute is concerned, at the mischief which that statute seeks to prevent, at the language of the relevant section and, in many cases, at the language of adjacent sections—in other words at the structure of that part of the statute which is under interpretation. From a consideration of such of those matters as are in the particular case relevant the court may find it clear that an absolute offence has been created. As regards the first and second of those considerations, it is not necessary or practicable to list all the objectives with which the Bankruptcy Act, 1914, is concerned. Suffice it to mention that, amongst other things, it seeks to gather in

(1) (1921), 85 J.P. 120.

(2) [1963] 1 All E.R. 223; [1963] A.C. 160.



to the bankrupt's estate certain of the assets disposed of by him shortly before the bankruptcy (the sections dealing with fraudulent preferences and setting aside settlements are in point), to facilitate the tracing of those assets, to deter those who trade from so carrying on their business or from so dealing with its assets that creditors are deprived of the benefit of assets which in justice should have been available to them, and to ensure that the bankrupt co-operates fully and effectively with those concerned with the administration of his estate. A

It is against that background that Part 7 of the Act of 1914, "Bankruptcy Offences", which commences with s. 154, falls to be interpreted. That section and those which follow it, up to and including s. 160, are in the main devoted to creating a very considerable number of offences with a view to inflicting penalties on those who have acted in a way which has tended to defeat one or other of the objectives of the statute. It is relevant to examine the general structure and language of those seven sections. Section 154 (1)—"Fraudulent debtors"—contains sixteen paragraphs, each creating an offence or offences. Seven paragraphs, after setting out the ingredient of the offences, end "unless he proves that he had no intent to defraud", e.g., para. (6): B

"If he makes any material omission in any statement relating to his affairs, unless he proves that he had no intent to defraud:" D

Three paragraphs, after setting out the ingredients of the offence, end "unless he proves that he had no intent to conceal the state of his affairs or to defeat the law". The remainder, except for para. (7), contain provisions which clearly show that one form or another of mens rea is an ingredient in the offence.

Section 155 contains two paragraphs neither of which provides expressly for any form of mens rea, neither have a proviso of the types contained in some of the paragraphs of s. 154 (1), and one of which (s. 155 (a)) (obtaining credit to the extent of £10 or upwards) has been the subject of the well-known decision in *R. v. Duke of Leinster* (3), to which further references will be made. Section 156 ("Frauds by bankrupts, etc.") specifically refers in each paragraph to fraud or intent to defraud. Section 157 is the one under consideration by this court. Section 158 ("Bankrupt failing to keep proper accounts") (4) provides, in sub-s. (1) (b) for exculpation "if he proves that in the circumstances in which he traded or carried on business the omission was honest and excusable", and in *R. v. Dandridge* (5), it was held that to prove the omission was "honest" was not of itself enough if it was not shown to be also "excusable". Section 159 and s. 160 refer to absconding and false claims in terms which clearly show that mens rea is an essential ingredient in the offences they constitute. E

It is thus apparent that the legislature has exercised considerable care to specify the instances where mens rea is an ingredient of the offence and to make plain the instances where a bankrupt by discharging an onus laid on him can exculpate himself from what might otherwise be held to be an absolute offence. In *R. v. Duke of Leinster* (3), it was held that s. 155 (a) created an absolute offence and thus that, if the person giving credit to an undischarged bankrupt had not in fact received the information that he was giving credit to such a bankrupt, it was no defence for the bankrupt to show that he had told his agent to give that information to the person concerned and had reasonable cause to believe that this had been done. Counsel for the appellant submitted that that case was wrongly decided—or, alternatively, that it could be distinguished on the ground that s. 155 (a) imposed an affirmative duty to do an act, whilst s. 157 (1) (c) was concerned with a failure to do an act; in the latter behalf, he relied on passages in the judgment of LORD GODDARD, C.J., in *Harding v. Price* (6), which, however, have found no favour in the speech of LORD REID in the very recently decided case of F

(3) [1923] All E.R. Rep. 187; [1924] 1 K.B. 311.

(4) As substituted by the Bankruptcy (Amendment) Act, 1926, s. 7.

(5) (1931), 22 Cr. App. Rep. 156.

(6) [1948] 1 All E.R. 283 at p. 285; [1948] 1 K.B. 695 at p. 701. I

A *Warner v. Metropolitan Police Comr.* (7). He further submitted that the following directions given by the common serjeant in *R. v. Phillips* (8) were correct. In the report it is stated:

B “He [the common serjeant] thought it really came to this—the jury had still to consider whether this man knowingly and with intent to deceive or to evade the Act either made statements which were unsatisfactory in the sense that they were untrue or grossly exaggerated or intentionally evasive or statements which he made not caring one way or the other whether they were true or not. He further said he thought that this view of the section was correct because it was clear from s. 164 that a guilty intent was made a necessary ingredient in all misdemeanours under this Act.”

C It is at this stage convenient to note that s. 157 (1) has three paragraphs, of which para. (a) and para. (b) make it an offence for a bankrupt to have materially contributed to or increased the extent of the insolvency by gambling or by rash and hazardous speculations (unconnected with the bankrupt's trade) before the presentation of the bankruptcy petition, or thus to lose “any part of his estate” afterwards. In neither is there any language importing *mens rea*.

D Having examined the language of s. 157 (1) (c) in the light of the objectives of the Act of 1914 and the adjacent sections of Part 7 thereof, this court is unable to accept counsel for the appellant's submissions, considers it to be clear that *R. v. Duke of Leinster* (9) was correctly decided, and that the directions given in *R. v. Phillips* (8) (which has long been treated in more than one text book as of doubtful authority) were wrong. Section 157 (1) (c) creates an absolute offence, and to hold otherwise would result in introducing a proviso to this paragraph of a type which the legislature has carefully refrained from enacting. If the submissions of counsel for the appellant were correct, there would have been added words to the effect that the bankrupt could exculpate himself by showing that his failure was “honest and excusable”. That would, moreover, incidentally defeat the obvious intent of the paragraph and leave a glaring gap in the provisions of the Act, which are concerned with ensuring that no-one can go bankrupt and then fail without penalty to give some satisfactory explanation of what he has done with a substantial part of his assets.

E In relation to the absolute offence created by s. 157 (1) (c), it is to be observed that the bankrupt is fully protected against oppressive or officious prosecutions by the combined effects of s. 157 (2), which makes an order of the court a condition precedent to proceedings being taken; by the introduction into s. 161 (see s. 8 of the Bankruptcy (Amendment) Act, 1926) of the provision that, before an order issues, it must appear to the court, *inter alia*, “that the circumstances are such as to render a prosecution desirable”; and by s. 165, which designates and limits the potential prosecutors. There are thus ample safeguards against proceedings being taken by vindictive or over-eager creditors or being initiated when they would not be appropriate, e.g., if the failure flowed from loss of memory supervening as the result of some accident. Indeed, the court has learnt that prosecutions under this subsection are rare.

H At this point, it is convenient to mention that counsel for the appellant relied on s. 164 (3) of the Act of 1914. This, in its amended form, after the deletion (10) in 1933 of the obsolete provision relating to the Vexatious Indictments Act, 1859, somewhat oddly reads:

I “Every misdemeanour under this Act . . . and when any person is charged with any such misdemeanour before a court of summary jurisdiction the court shall take into consideration any evidence adduced before them tending to show that the act charged was not committed with a guilty intent.”

(7) *Ante*, at p. 364.

(8) (1921), 85 J.P. 120.

(9) [1923] All E.R. Rep. 187; [1924] 1 K.B. 311.

(10) By the Administration of Justice (Miscellaneous Provisions) Act, 1933, s. 10 (3) and Sch. 3.

This subsection was cited to the common serjeant in *R. v. Phillips* (11), and also to the Court of Criminal Appeal in *R. v. Dandridge* (12), as showing that some guilty intent was an ingredient in all the offences created by the various provisions of Part 7 of the Bankruptcy Act, 1914. That point caused the common serjeant to give the directions referred to in this judgment. It does not seem to have affected the judgment in *R. v. Dandridge* (12) it is to be noted that no attempt was made in *R. v. Duke of Leinster* (13) by counsel very experienced in the criminal law to place that subsection before the court as being relevant to the point there is issue.

Counsel for the appellant submitted that this subsection should be construed in the same way as if it did not contain the words "before a court of summary jurisdiction", and thus as if it provided that a guilty intent should be an ingredient in all offences created by the Act—contending that it could not be tenable that a guilty intent should be relevant in the magistrates' court but not in the court where the accused came to trial. This court, however, considers that there is a clear explanation for the apparently curious wording of that subsection which reads so oddly in its present truncated form. As counsel for the Crown pointed out in his careful and lucid argument, s. 164 (3) of the Act of 1914 is the lineal successor of s. 18 of the Debtors Act, 1869.

The Act of 1869 contained a series of provisions which, save for minor changes in language, are substantially the same as those of s. 154 of the Act of 1914 and the relevant offences could, by virtue of s. 20 of the Act of 1869, be tried at quarter sessions—but not by courts of summary jurisdiction. Section 18 of the Act of 1869 commenced with the same provision as was later embodied in s. 164 (3) of the Act of 1914, viz., that all the offences were subject to the provisions of the Vexatious Indictments Act, 1859. Thus, the latter part of s. 18 was clearly an admonition or reminder to magistrates that already at the stage of committal proceedings they should take into account any evidence tendered on behalf of the defence under those provisos which enabled a bankrupt to exculpate himself. When a number of the provisions of the Act of 1869 came to be replaced first by provisions of the Bankruptcy and Deeds of Arrangement Act, 1913, and then by provisions of the Act of 1914, no material change was made in what had originally been s. 18 of the Act of 1869 to meet the fact that the relevant offences became in 1913 triable summarily—but the meaning of s. 164 (3) on a correct interpretation did not alter. Later, the excision from s. 164 (3) of the provisions relating to the Vexatious Indictments Act, 1859, on the abolition of grand juries, served further to confuse anyone who was unaware of the previous history of the matter. It became an odd and superfluous remnant—but its meaning remained unaltered.

It is in those circumstances that this court has come to the clear conclusion that s. 164 (3) remains no more than an admonition or reminder—which would not be necessary in a modern statute—to magistrates to take into account already at committal proceedings any evidence tendered on behalf of the bankrupt under the numerous exculpatory provisos to be found in Part 7 of the Act of 1914. The subsection should thus be read as if the words "shall take into consideration" were followed by "where relevant". It thus has no effect on the correct interpretation of s. 157 (1) (c), any more than it had on s. 155 (a) in the *Leinster* case (13).

In view of the conclusion that the offence created by s. 157 (1) (c) is absolute, it is not necessary to consider the appellant's contention that there was no evidence on which the jury could reasonably conclude that he had an intention to evade the Act of 1914. How difficult it would have been for him to succeed on that point will, however, be plain from the recital of those facts which are relevant to the issue whether there was a failure to give a satisfactory explanation.

(11) (1931), 22 Cr. App. Rep. 156.

(12) (1921), 85 J.P. 120.

(13) [1923] All E.R. Rep. 187; [1924] 1 K.B. 311.



A Those facts now fall to be considered before dealing with counsel for the appellant's submission on the second main issue of law.

The appellant's bankruptcy arose out of his trading in partnership under the name of Phoenix Heating. That trading ceased about September, 1965; a receiving order was made on Jan. 6, 1966, and the adjudication was made on Jan. 17, 1966. The last full trading accounts of the business were prepared up to B Feb. 28, 1965, and showed a net profit. That the loss of about £10,500 occurred in the succeeding six or seven months was conceded by the appellant in the course of his public examination.

The preliminary examination took place on Jan. 10 and 11, 1966, and this was supplemented by narrative statements compiled by the appellant and dated Jan. 11 and Feb. 7. These latter documents accounted for the C failure of the business in very general terms. There followed the public examination, and this commenced on Mar. 24, 1966. The appellant and his partner were then ordered to lodge a statement of affairs within fourteen days, were offered assistance, and were warned to avoid delay, to reply to letters and they were warned also of the risks of not complying with the requirements of the Bankruptcy Act, 1914. After an unsatisfactory statement of affairs (disclosing the loss of more D than £10,000) which needed amendment had been lodged on Apr. 4, 1966, there was an adjourned public examination on June 2. On this occasion the appellant accepted that an explanation was required of the trading loss (by then found to be about £10,500) and that his co-operation and initiative was required for this purpose. Up to that date he had done no more in effect than blame the insolvency on the departure of the partners and a salesman, and to suggest that much of the E financial loss was due to his having in kindness retained too long in his service canvassers and others (a point much stressed by his counsel on the hearing of this appeal).

It is not necessary to embark in detail on the course of the subsequent proceedings which included adjourned public examinations on Aug. 18, Oct. 27 and Dec. 1, 1966. Suffice it to say that, despite further directions given to the F appellant on June 2, 1966, he did not between June 2 and Aug. 18, 1966, reply to letters and did not during that period, apart from going to see the trustee on Aug. 4, do anything as he put it beyond "scratching his head and scratching about with bits of papers". Despite his assertions that he had been unable to conform to the directions, he was warned on Aug. 18, 1966, that he was running a risk of being prosecuted under s. 157. Although an order for a cash account was in effect withdrawn, a stern warning was given against lack of industry and laziness in complying to the order to produce satisfactory material which it was G recommended should include this cash account.

October 27, 1966, was an occasion when there was an adjournment after an amended statement of affairs had been lodged and a cash account has been received on Oct. 26, which, however, went no further than June 23, H 1965, and showed that, at that date, so far as the cash account was concerned, the receipts had exceeded the outgoings. On Oct. 27, reference was made to the fact that, despite the incompleteness of the cash account there had been something of a change of heart and that it appeared that some attempts were then being made to lodge some account which supported the enormous trading loss; it was for this reason that the further adjournment to I Dec. 1, 1966, was given to enable them to put things in order. Advice was given to get immediately into touch with the examiners. On Nov. 16, 1966, the appellant was sent a letter reminding him of his obligations, fixing an appointment for Nov. 24, 1966, and offering an earlier appointment if he so wished. The appellant, however, did not reply to the letter though a franked envelope had been enclosed, nor did he keep the appointment, though on the last-mentioned date he did telephone and suggest a later meeting. At the further adjourned public examination of Dec. 1, 1966, the appellant admitted that all that he had done since the last hearing was to write to the trustee for some cancelled cheques and to obtain

a statement from the bank for the period June 23 to July 23, 1965—something which he could well have done very much earlier. In fact, on Dec. 1, 1966, he had supplied no further information to the official receiver or the court. A

The position on Dec. 1, 1966, can thus be summarised as follows. Despite the lengthy period during which the appellant's affairs had been under examination, despite the appellant having been repeatedly reminded of the requirement to given an explanation of the loss of the £10,500, and despite having been from time to time offered the assistance of officials in the matter, the only account which he had produced was a cash account that did not cover an important part of the relevant period and which, moreover (to the limited extent that a cash account can go), showed that, despite the inclusion in it of all disbursements to salesmen and canvassers, there was some surplus at the end of the period covered; there was no account showing how the loss was composed or where the money had gone to; and no material had been produced on which it could be checked whether the suggestion that the continued employment of an excessive number of salesmen and canvassers might account for some part of the loss—and at best that excessive employment could not on the figures available have constituted more than a partial explanation of the loss. There was thus on Dec. 1, 1966, in substance no real explanation at all of how the loss was composed and had been incurred, or of where the money had gone—and there was ample material on which a jury could find that the appellant had been, at least, extremely lacking in diligence despite his contention that he had made every effort to comply with the requirements of the registrar. B C D

Counsel for the appellant, however, drew attention to the absence from the summing-up of any precise direction as to how far the jury might take into account the fact that the appellant might well have been "doing his best" as a defence to a charge of having failed to give an explanation. He submitted that, in connexion with the issue whether the appellant had given a satisfactory explanation, the jury should have been directed that they could apply the test previously mentioned, viz., that, if the bankrupt has done his best to supply an explanation but has been unable to provide one, then he has not failed to give a satisfactory explanation even if, in the result, he has given no explanation at all. The court rejects that submission. A jury should be directed that, if they are satisfied as regards the total sum of money constituting "the loss of any substantial part of his estate" that the bankrupt had not at the time of the alleged failure given, with such reasonable detail as was appropriate in the circumstances, an explanation which is both reasonably clear and true of how that sum was made up (for the loss may be composed of more than one component), of how it came to be lost, and of where the money has gone, then the offence has been committed. The degree of particularity required of the bankrupt may vary greatly according to the facts of the case; sums which are really small in relation to "the substantial part of the estate" need not of course be traced, but an explanation unsupported by sufficient detail can be very unsatisfactory indeed. E F G H

Section 157 (1) (c) intends to and does, in the interests of the business community as a whole, put in peril the man who goes bankrupt without having so conducted his affairs as to be able satisfactorily to explain why some substantial loss has been incurred. It is as well to make it plain that, as the offence is absolute, it follows that, once a prosecution has been initiated, no issue arises before verdict as to the reasons why the failure has occurred or as to any motive which led to that failure. Thus, questions such as whether the failure was due to lack of diligence or occurred despite diligence or whether at the material time the bankrupt was simply being stupid when dealing with the inquiry, or on the other hand had an intention to conceal something or was motivated by a desire to flout the provisions of the Bankruptcy Act, 1914, only arise after verdict when sentence is under consideration. Passages in the summing-up by the common serjeant in I

A *R. v. Phillips* (14) which express a contrary view stem from his erroneous conclusion as to the effect of s. 164 (3) of the Act of 1914; they should not be followed.

In conclusion, there is one further point to be noted. On the one hand counsel for the Crown rightly submitted that s. 157 as a homogeneous whole was clearly designed to protect the interests of the business community, and called the attention of the court to the fact that sub-s. (1) (a) in effect created a "retrospective offence" (by causing that which was not criminal at the time it was done to become criminal if it so happened that the person who did it became bankrupt within the next two years). He put the point in issue under sub-s. (1) (c) in lay terms: "If you lose a substantial part of your estate and go bankrupt you had better have and give a satisfactory explanation." As against that, he disclaimed any suggestion that, sub-s. (1) (c) should be interpreted as *eiusdem generis* with sub-ss. (1) (a) and (b) to the extent that the true explanation would not be "satisfactory" if the loss was due to unsatisfactory conduct parallel to that of gambling and hazardous speculation, e.g., wanton extravagance when he knew he was going bankrupt, or wilful destruction of assets to prevent them from falling into the hands of some disliked creditor. That point, of course, is one that does not arise in the present case and the court is thus not concerned to consider it.

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In the upshot, this court considers for the reasons already given that the summing-up was wrong in law in so far as it followed a long-standing precedent based on an erroneous view of s. 164 (3); but for that very reason the summing-up was unduly favourable to the appellant and, had it been correct in law, the jury must have even more inevitably returned a verdict of guilty. There is, accordingly, no good ground for disturbing that verdict and the appeal against conviction was thus dismissed on Apr. 9, 1968.

The appeal having been dismissed and the reasons for so doing having been formulated before the decision of the House of Lords in *Warner v. Metropolitan Police Comrs.* (15), it is as well to add that this court, having considered the speeches delivered in that case, finds nothing in them that is inconsistent with the above reasons and much that supports them. It has, moreover, been noted that LORD REID cited (16) *R. v. Duke of Leinster* (17) without any indication of adverse comment (16).

As regards the application for leave to appeal against sentence, if a court comes to the conclusion that the bankrupt's failure to give a satisfactory explanation is due to his deliberately flouting the Act of 1914, there is nothing wrong in principle with imposing a custodial sentence. In the present case, however, the appellant, who had been allowed bail which took effect just over a month after his conviction, must have suffered prolonged anxiety during the pendency and hearing of this appeal. It was for this reason that the court decided that the application be granted; and that the hearing having by consent been treated as the appeal, it would be clement to reduce the sentence to one month's imprisonment.

Appeal dismissed. Sentence varied. The court refused to certify under s. 1 of the Administration of Justice Act 1965, that a point of law of general public importance was involved.

Solicitors: Registrar of Criminal Appeals (for the appellant); Director of Public Prosecutions (for the Crown).

[Reported by N. P. METCALFE, ESQ., Barrister-at-Law.]

(14) (1921), 85 J.P. 120.

(15) Ante p. 356.

(16) Ante at p. 363.

(17) [1923] All E.R. Rep. 187; [1924] 1 K.B. 311.



## Re 22, ALBION STREET, WESTMINSTER.

## HANYET SECURITIES, LTD. v. MALLETT AND ANOTHER.

[COURT OF APPEAL, CIVIL DIVISION (Harman, Russell and Widgery, L.JJ.),  
May 21, 22, 1968.]

*Moneylender—Memorandum Contents—Element of machinery for effecting transaction, not essential term of contract—Loan to be secured on lease—Borrower to pay premium for lease—Part of loan intended to be used, and used, to meet premium—Premium in fact paid, and lease obtained, by lender's solicitor as agent for borrower's solicitor before loan completed—Memorandum not stating that premium to be met out of loan—Whether memorandum complied with Moneylenders Act, 1927 (17 & 18 Geo. 5 c. 21), s. 6 (2).*

Although the memorandum required by s. 6 of the Moneylenders Act, 1927, must "contain all the terms of the contract" for the repayment of the money lent, it need not specify mere matters of machinery by which those terms are to be carried into effect (see p. 965, letter E, and p. 967, letters B and I, post).

A borrower who wished to purchase a lease for a premium of £500, to be paid to the lessor, arranged a loan of £2,000 from a registered moneylender, to be secured on the lease. It was contemplated by the parties that part of the £2,000 would be used by the borrower to pay the £500 for the lease, and the borrower's solicitor's costs on the lease, and it was eventually arranged by their solicitors that the moneylenders' solicitor should, as agent for the borrower's solicitor, pay the £500 and obtain the lease. The moneylenders' solicitor did this, and then completed the loan by completing the necessary documents and paying the balance of the £2,000 as directed by the borrower. The memorandum of the contract signed by the borrower\*, as required by s. 6 of the Moneylenders Act, 1927, stated the borrower's willingness to execute a legal charge of the property comprised in the lease as security for the loan, but did not state that part of the loan was to be used to pay the premium on the lease. In an action by the moneylenders for repayment of the loan and interest, and possession of the leasehold property charged as security, the trial judge held that the whole contract was unenforceable because the memorandum did not state that part of the loan was to be used to pay the premium, and so did not "contain all the terms of the contract" as required by s. 6 (2)† of the Act of 1927. On appeal by the moneylenders,

**Held:** although the use of part of the loan to pay the premium enured for the moneylenders' benefit, it was not on the facts a term of the contract (payment of the premium out of the loan not having been insisted on by the moneylenders) but was merely part of the machinery used to enable the borrower to charge the lease as security, and so did not need to be specified in the memorandum (see p. 966, letter E, and p. 967, letters C and I, post).

*Egan v. Langham Investments, Ltd.* ([1938] 1 All E.R. 193) distinguished. Decision of PENNYCUIK, J. ([1967] 3 All E.R. 943) reversed.

[As to the form of a memorandum of a moneylender's contract, see 27 HALSBURY'S LAWS (3rd Edn.) 32, 33, para. 50; and for cases on the subject, see 35 DIGEST (Repl.) 241-243, 401-426.]

For the Moneylenders Act, 1927, s. 6, see 16 HALSBURY'S STATUTES (2nd Edn.) 386.]

Case referred to:

*Egan v. Langham Investments, Ltd.*, [1938] 1 All E.R. 193; [1938] 1 K.B. 667; 107 L.J.K.B. 337; 159 L.T. 118; 35 Digest (Repl.) 242, 417.

\* The memorandum is set out at p. 962, letter I, to p. 963, letter C, post.

† Section 6 (2), so far as material, is set out at p. 961, letter F, post.

**A Appeal.**

This was an appeal by the plaintiff moneylenders, Hanyot Securities, Ltd., against the judgment of PENNYCUICK, J., dated Oct. 26, 1967, and reported [1967] 3 All E.R. 943, dismissing their action for £2,000 money lent, and interest thereon, and for possession of leasehold premises charged as security for the loan, against the borrower, Mrs. Olga Mallett, and the guarantor of the loan, Robert Winston Dawson. The facts are set out in the judgment of WIDGERY, L.J.

*B. Finlay, Q.C., and Guy Seward* for the plaintiff moneylenders.

*A. Garfitt* for the defendants, the borrower and the guarantor.

**WIDGERY, L.J.**, delivered the first judgment at the invitation of HARMAN, L.J.: The plaintiff company are registered moneylenders and by the originating summons in this matter they claim, against the first defendant, the borrower, as principal debtor and the second defendant as guarantor, the repayment of a loan consisting of a principal sum of £2,000 and interest. Further, they claim against the borrower possession of leasehold premises known as 22, Albion Street, Westminster, which were charged as security for the loan. In the court below (1) a variety of defences was raised by the defendants against this claim, but of those defences only one succeeded. The successful defence was that the whole contract was unenforceable against the defendants by virtue of s. 6 of the Moneylenders Act, 1927, owing, it was said, to the absence from the memorandum of agreement of one of the terms of the contract. The term of the contract alleged to be missing was a term to the effect that of the £2,000 advanced part should be applied in paying a premium on the acquisition of the leasehold property at 22, Albion Street which was the security for the loan.

I look briefly at s. 6 before going further. Subsection (1) provides that no contract for the repayment by a borrower of money lent by a moneylender and no security in respect of the loan shall be enforceable unless a note or memorandum in writing is duly prepared and signed. Subsection (2) provides:

“The note or memorandum aforesaid shall contain all the terms of the contract, and in particular shall show the date on which the loan is made, the amount of the principal of the loan, and, either the interest charged on the loan expressed in terms of a rate per cent. per annum . . .”

or otherwise as there provided.

The judge below, with some reluctance, accepted (2) the submission that the term to which I have referred was a term of the contract, and it being not within the terms of the memorandum he dismissed the moneylenders' claim. It is from that order that the moneylenders now appeal.

The borrower, the first defendant, is the former wife of a Mr. George Dawson, who is also the father of the second defendant, the guarantor. In November, 1965, Mr. George Dawson, who at all material times was an undischarged bankrupt, required a loan of money (and £2,000 seems to have been the figure which he had in mind), and since he was an undischarged bankrupt he required some other nominee to act as (as it has been said) a “front” for him. It is clear that the borrower had no interest in this matter except to be a nominee for Mr. George Dawson. She did as he told her; she signed documents that he put before her; but it was Mr. George Dawson who carried out all the negotiations on her behalf. First of all it seems that he approached a Mr. Halsall for this loan. Mr. Halsall was a man to whom he already owed £550. Mr. Halsall declined to make a further loan to Mr. George Dawson, but put him in touch with the plaintiff moneylenders. It is not, I think, necessary to go in any detail into the part which Mr. Halsall played in this affair, but as the hearing continued and as the court was told more and more about Mr. Halsall it became apparent that he had had a very close interest in the matter. Indeed, not only did he approach the moneylenders

(1) [1967] 3 All E.R. 943.

(2) [1967] 3 All E.R. at p. 950.

asking them as a favour to him to make this loan to Mr. George Dawson, or to the borrower on Mr. George Dawson's behalf, but it seems quite clear that he saw in this a means of being repaid the £550 which he was already owed, and apparently at some stage at any rate he put up some collateral security for the moneylenders to secure this loan. However that may be, it is quite evident that an agreement was made between Mr. George Dawson and the moneylenders for the making of the loan in question. One of the reasons, undoubtedly, why Mr. George Dawson wanted money was because he sought to complete a transaction with the Church Commissioners under which he was to be granted a lease of 22, Albion Street for a period of 10 $\frac{3}{4}$  years at a rack rent and in consideration of a premium of £500. It seems quite clear that Mr. George Dawson had not got £500, nor had the borrower, and that one of the objects in trying to secure this loan was to put Mr. George Dawson in funds to pay this premium. In the outcome, and largely as a result of a oral negotiations between Mr. George Dawson and Mr. Halsall, an agreement was made. The substance of that agreement was that the moneylenders would lend the borrower £2,000 at forty-five per cent. interest, that sum being secured in three ways: first by a charge on the lease of No. 22, Albion Street, secondly by a post-dated cheque which the borrower was to provide on the making of the loan, and thirdly by a guarantee by the guarantor, Mr. R. W. Dawson.

For the purposes of this judgment I assume without hesitation that it was at all times known by all persons concerned that Mr. George Dawson required to use £500 out of this loan for the purpose of paying the premium on the lease. That that was a factor known to everyone, whether it strictly concerned them or not, I think is clearly established by the evidence to which we have been referred. The initial negotiations were conducted orally. The first written record of the progress of the transaction is contained in a letter dated Nov. 24, 1965, written by Mr. Greene—who was the solicitor for the moneylenders and also, incidentally, for Mr. Halsall—to a Mr. Martelli, who was acting as solicitor for the borrower. The letter is headed “22, Albion Street, W.2”, and the material paragraphs read as follows:

“Our clients [the moneylenders] have arranged, subject to contract, to advance to your client [the borrower] the sum of £2,000 on the security of the above property and at the specific request of Mr. George Dawson we have today forwarded to him the legal charge for execution by [the borrower] together with memorandum under the Moneylenders Act and authorisation as to the proceeds of the advance. We enclose copies of all three documents for you . . . You will see that on completion of the advance the sum of £537 9s. 6d. will be payable to you to enable you to complete the grant of the lease of the property and the payment of your costs and disbursements. We shall of course wish to attend on completion and will provide a banker's draft payable to the Church Commissioners for England or to whoever else will require the purchase monies and a separate cheque for your costs.”

The point is understandably made that when Mr. Greene wrote that letter he was clearly fully informed as to the need which the borrower had to pay the premium for the lease out of the £2,000 proposed to be advanced.

The documents sent with that letter were three in number. The legal charge requires no further comment, because it was in common form. The memorandum under the Moneylenders Act, 1927, was subsequently amended in some particulars, and I will refer to its finally amended form as it was signed by the borrower on Dec. 7, 1965. It is addressed to the moneylenders. It reads:

“I, Olga Mallett of 24, Spring Gardens, Rayleigh, Essex, feme sole, am willing to borrow from you on Dec. 9, 1965, the principal sum of £2,000 to be repaid on Apr. 9, 1966. Interest will be charged at the rate of forty-five per centum per annum and shall be payable on Apr. 9, Aug. 9, and Dec. 9 in each year commencing on Apr. 9, 1966. As security for the said principal



A sum and interest I am willing to execute under seal in your favour a legal charge of my leasehold property known as 22, Albion Street, London, W.2. As further security for the said principal sum and interest I have today handed to you a post-dated cheque for £2,300 dated Apr. 9, 1966, being as to £2,000 in respect of the principal monies and £300 in respect of interest for the period from the date of the loan to Apr. 9, 1966. As further security B for the said principal sum and interest Robert Winston Dawson will enter into a guarantee in the terms of the document annexed hereto for repayment by me of the said principal sum and interest. The said legal charge shall contain a covenant for repayment of the principal sum aforesaid and shall also contain the terms and be in the form annexed hereto. Signed by Olga Mallett Dec. 7, 1965, before the loan is made and before the security is given."

C The third document, which is the authorisation, is quite short, and it is in these terms. It is signed by the borrower; it is addressed to the moneylenders.

"With reference to the loan being made to me upon the security of 22, Albion Street, London, W.2, I hereby authorise you to pay the said loan to the following persons in the sums hereinafter mentioned: £550 to Stephen D Anderton Halsall; £537 9s. 6d. to B. A. Martelli my solicitor of 90, Oakeley Street, S.W.3; £912 10s. 6d. to George Dawson: total £2,000."

It is, I think, clear that that last document on its face does not appear to be a contractual document at all. The moneylenders having agreed to lend this money to the borrower, would naturally not be prepared to pay it to anyone else without her authority, and on the face of it this document is merely an authorisation to E the moneylenders to pay the £2,000 as directed therein. The sum of £537 9s. 6d. to be paid to Mr. Martelli in fact represents £500 paid for premium on the lease and £37 9s. 6d. for his costs.

It cannot, in my judgment, be said in this case that the whole of this authorisation is in any sense incorporated in the contract of loan; nor, I think, in fairness to counsel for the defendants, did he attempt so to argue. It has never been contended that the direction for payment of £912 10s. 6d. to Mr. George Dawson F was in any sense a term of the contract of loan, and although an attempt was made in the court below to say that the payment of £550 to Mr. Halsall was a contractual term, the judge found otherwise (3), and there is no appeal to this court on that point. Accordingly, the question is whether the payment of £537 9s. 6d. to Mr. Martelli, for the purposes to which I have referred, was a term of the G contract of loan, and, therefore, a term which should have found its place in the memorandum. The defendants say that it was a term of the agreement, and the judge found (3), as I understand his judgment, that that was so, on the footing that it had been incorporated into the contract of loan by oral discussions between Mr. George Dawson and Mr. Halsall. The possibility of its being an implied term does not appear to have been raised, and the decision below, as I understand it, H was on the footing of an express oral term.

So far as evidence of that express oral term is concerned, there is a startling lack of it. This is not a reflection on counsel who conducted the case below, because they were no doubt somewhat preoccupied with the many other issues which concerned the court at that stage. In fact it is, however, a startling thing, as counsel for the moneylenders submits, if the defendants rely on an oral agreement I made between Mr. George Dawson and Mr. Halsall, or indeed any other of the moneylenders' witnesses, that no attempt was sought to be made to elucidate that fact in the evidence. It was not suggested to Mr. Greene or Mr. Forland, the director of the moneylenders, that any specific oral agreement making this a term of the contract had been reached; and Mr. George Dawson, who would have been a party to any such agreement, was not invited to give evidence on it when examined in chief. Indeed, after a meticulous consideration of such evidence as

there was, it is clear that the only oral evidence which really touches on this point at all and which has been described as the high-water mark of the defendants' case so far as the existence of an oral agreement is concerned, is a passage from the evidence of Mr. Greene, the moneylenders' solicitor. He was asked:

"You did not think it was your duty on behalf of the [moneylenders] to find out something about these borrowers? A.—My capacity was purely to complete a loan which had been negotiated before I was ever instructed—to do the conveyancing. Q.—Was it within your knowledge that for the purpose of this loan it was important that the loan of £2,000 should be applied in a certain manner? A.—Certainly. Q.—For instance, that Mr. Halsall should get his £550 back? A.—Yes. Q.—And also that the premium on the lease held by [the borrower], £500, should be paid out of that? A.—That was inherent in the whole transaction. We could not have a mortgage unless the lease was granted, because the mortgage was on the lease. Q.—It was important that the £2,000 was applied in a certain manner, was it not? A.—Yes. Q.—You never thought of embodying anything to that effect—how the £2,000 was to be applied—in the memorandum? A.—It is not necessary to do that, in my opinion."

There was, of course, affidavit evidence in addition to the oral evidence, and in Mr. George Dawson's affidavit he does canvass the possibility that this was a term of the contract which should have appeared in the memorandum, but he does no more than draw attention to the letter of Nov. 24, 1965, which I have read, and does not, therefore, in any sense, himself set up the existence of an oral agreement.

The judge was reluctant to find for the defendants on this point but felt compelled to do so, and his conclusions were in these words (4):

"The memorandum does not, however, contain any reference to the application of part of the loan in payment of £550 to Mr. Halsall and in payment of £500 to the Church Commissioners on the grant of the lease of 22, Albion Street. That is dealt with by the authorisation, which admittedly did not form part of the memorandum. Counsel for the defendants says that these are terms of the contract of loan and should have been included in the memorandum. So far as concerns the £550 paid to Mr. Halsall, that payment represented, I think, a simple application by [the borrower] of part of the free proceeds of the loan, the payment being made directly by the lender to Mr. Halsall, not by virtue of any term of the contract alone, but under a mandate by [the borrower]. I do not see any reason why the memorandum should have included any reference to this application.

"The £500 paid on the grant of the lease is in quite a different position. The purpose and effect of this payment was to acquire for [the borrower] the leasehold property which was to constitute the security for the entire £2,000 loan. This was an essential term of the arrangement between [the borrower] and the [moneylenders], operating for the benefit of the [moneylenders] as well as that of [the borrower]. The payment cannot, it seems to me, be regarded as a simple application of part of the free proceeds of the loan."

It is in those words that the judge distinguished between the payment to Mr. Halsall and the payment of the amount of the premium to secure the lease of 22, Albion Street. Later in his judgment (I need not refer to the words in detail) he pointed out (5) that a distinction between these two payments lies in the fact that the payment representing the premium on the lease enured (as he put it) for the benefit of the moneylenders.

I ought, for completeness, to say a word or two about the method by which this

(4) [1967] 3 All E.R. at pp. 949, 950.

(5) [1967] 3 All E.R. at p. 951, letter B.

A contract was completed, because it has been referred to at some length in the argument. Following the letter from Mr. Greene to Mr. Martelli which I have already read, it was necessary to complete as quickly as possible, because the Church Commissioners were anxious to complete the transaction for the grant of the lease. It is, I think, of interest to note that Mr. Martelli, on behalf of the defendants, on Nov. 27, 1965, wrote to Mr. Greene making suggestions as to the manner in which completion should take place. Without reading the letter in full, he was suggesting that he should be given £500 out of the loan in advance so that he might complete the transaction with the Church Commissioners through the post and on his undertaking to deliver the completed lease to Mr. Greene within a period of fourteen days. Mr. Martelli is not making that suggestion as a matter of right but is canvassing it as a sensible and convenient possible way of completing the transaction. Mr. Greene originally was minded to fall in with some such arrangement, but in the end, for reasons which do not matter, Mr. Martelli appointed Mr. Greene as his agent for the purpose of completing this transaction, and then Mr. Greene, having obtained a banker's draft for £500 payable to the Church Commissioners, sent his clerk with that draft to the Church Commissioners' solicitors, picked up the lease, and then completed the remaining documents and drew the appropriate cheques in favour of Mr. Martelli, Mr. Halsall and Mr. George Dawson, strictly in accordance with the terms of the authorisation. As a matter of fact, therefore, the transaction was completed by a direct payment from the moneylenders' solicitors to the solicitors for the Church Commissioners in order to obtain delivery up of the lease.

Now, in my judgment, although the memorandum under the Act of 1927 must contain all the terms of the contract, it need not specify mere matters of machinery by which those terms are to be carried into effect. The question here, as I see it, is whether the common understanding that the premium should be paid out of the money advanced was a term of the contract in the sense that it involved obligations which the parties were bound to perform, or whether it was mere machinery invoked for the defendants' convenience. As a matter of first impression the arrangement does not strike me as one which was a term of the contract. The moneylenders were prepared to lend £2,000 on the security set out in the memorandum, and if that security was duly furnished to them it was a matter of no concern to them what the borrower or Mr. George Dawson did with the money when it was received. If the borrower had been able to borrow £500 from some other source in order to pay the premium and had then repaid this loan on receipt of the £2,000 advanced by the moneylenders, the moneylenders could have had no possible objection, because the matter would have been of no concern to them. Of course, the moneylenders would not part with that money, the £2,000, until the lease had been acquired and the charge executed, and the Church Commissioners would not hand over the lease until the premium had been paid; but this apparent difficulty is merely an administrative problem with which solicitors are entirely familiar and a problem which they constantly solve when required to effect the simultaneous completion of two related transactions. The parties to an arrangement of this kind do not bargain with one another as to the manner in which their solicitors will complete the transaction. Having agreed on the essential terms of the bargain itself, they know full well that their solicitors are skilled in effecting the necessary administrative arrangements and they leave it to their solicitors. In an ordinary case of this kind it would, in my judgment, not be a matter on which the parties would contract: that is to say, they would not contract to determine the method or machinery by which their intentions were to be carried into effect. I cannot see anything in this case which makes it differ from the normal. It seems to me that, in the absence of any special oral agreement, as to which there is absolutely no evidence at all, this is the normal case, and on the face of it the arrangement as to how the transaction was to be completed was not a matter of bargain at all. Mr. Greene, I know, in his evidence which I have read, described the payment of the



premium as coming from the advance and said that this was "inherent in the transaction". As far as he was concerned, so it was; he was the conveyancer and was responsible for carrying the transaction through. The fact that he had to arrange that the money coming from the advance could be used to finance payment of the premium was clearly the preoccupation which affected him; but I can see nothing in Mr. Greene's evidence, strongly relied on as it is, to suggest that this was other than the normal case that I have endeavoured to describe. I do not see any reason to suppose that the borrower could not have resiled from the understanding which existed if she had wanted to and paid the premium from another source if some happy chance had made another source available to her.

The case must be distinguished sharply from those where the lender has an interest in the disposal of the money which he lends and where the lender imposes stipulations on the borrower accordingly. Thus, if the lender requires part of the loan to be employed in payment of a pre-existing debt the payment of which he cannot otherwise secure, this may well be a term of the contract of loan itself (6). In the present case, however, the lender was fully protected, as long as the lease and the charge were executed before he lost control of the money to be loaned. It mattered not to him whether the premium came out of the loan or from another source, as long as there was no risk of his being deprived of both the loan and the security.

Counsel, who has taken every point that is available on behalf of the defendants in this case, has stressed the undoubted fact that the arrangement whereby the premium was to be financed out of the loan was in the minds of the parties throughout, but, as I have endeavoured to show, this does not avail him if, as I think, it was not a part of the bargain or contract between the parties but a mere conveyancing device to suit the convenience of the defendants, who could not raise the amount of the premium elsewhere.

The judge thought (7) that the payment of the premium differed from the payment of the debt to Mr. Halsall because it enured to the benefit of the moneylenders. With respect to his view, I do not agree. It seems to me that the fact that the premium was paid in this way did not affect the rights of the moneylenders under the contract in any way at all. The moneylenders were entitled at the end of the day to have their loan secured in accordance with the terms of the memorandum, and they could retain the payment of the loan unless and until suitable mechanism had been devised to enable that to be done.

Accordingly, as it seems to me, the evidence in this case discloses no defect in the memorandum; and I would allow the appeal.

**HARMAN, L.J.:** It seems to me to be the essence of this transaction that the appellant moneylenders would lend to the borrower £2,000 on having as security, first, a charge on the lease of the house of which she was then negotiating the purchase from the Church Commissioners, namely 22, Albion Street, Westminster, second, a post-dated cheque signed by herself, and third, a guarantee of the loan by the second defendant, her son. It seems probable that the borrower had not any other resources from which she could find the £500 necessary to acquire the lease than the money that she was borrowing from the moneylenders. At least it was assumed on all hands that it was in that way that she would be able to put herself into a position to get the loan. It was an essential term of the contract of borrowing that she should be the owner of a leasehold interest which she should charge, but it does not seem to me to have been a contractual term imposed by the moneylenders that the money must be found out of the £2,000 and from no other source. It was a matter of indifference to the moneylenders how the borrower acquired the lease so long as she did acquire it in time to give an

(6) As in *Egan v. Langham Investments, Ltd.*, [1938] 1 All E.R. 193; [1938] 1 K.B. 667.  
(7) [1967] 3 All E.R. at p. 951, letter B.

A unencumbered charge to secure the loan. The judge started (8) his judgment by stating at the outset that it was a basic term of the loan that the moneylenders should out of the money advanced pay the premium on the lease. This, with respect to him, is to beg the whole question. If it was such a basic term, then it is conceded here, as it was below, that the moneylenders cannot succeed because one of the terms of the contract does not appear in the memorandum. Whether

B it is such a term is the question to be decided, and I conclude that it is not. It seems to me to have been part of the conveyancing machinery by which the tripartite transaction, namely the acquisition of the lease, the charge on it to the moneylenders and the loan by them was carried into effect. In my opinion the utilisation of £500 part of the loan in paying the premium on the lease was only a part of the contract if it was a term insisted on by the moneylenders. If this

C were so the case would be parallel to that of *Egan v. Langham Investments, Ltd.* (9), on which the judge relied, but there was no evidence here to support this proposition. It was hardly mentioned by Mr. George Dawson, who negotiated the loan, and its only support came from Mr. Greene, the moneylenders' solicitor, who did say in his evidence, in answer to a question, what WIDGERY, L.J., has read out (10). Mr. Green was, as he said there, in charge of the conveyancing machinery but he

D had nothing to do with settling the contract. His answer was that he only knew that this was the way in which it was proposed that the transaction should be carried out. To a similar effect is the letter of Nov. 24, 1965, which WIDGERY, L.J., has also read (11). I do not think that these two statements show that this was a contractual term insisted on by the moneylenders as a condition of the loan: they are merely part of the machinery devised and it was not necessary that they

E should be mentioned in the memorandum. Indeed if that were so it seems to me that the whole of the contents of the authorisation ought to have appeared there, and although it was rather faintly suggested below that the repayment to Mr. Halsall was part of the contract it was nowhere there suggested that the payment of the balance to Mr. George Dawson stood on the same footing.

In this court counsel for the defendants did suggest that the whole of the terms

F of the authorisation should be in the memorandum—that is to say that they were all part of the contractual terms between the parties. I do not take that view. I think that they all stand on the same footing: none of them is meant to be contractual and none of them needs to be in the memorandum, which was therefore perfect and there is no obstacle to the success of the moneylenders in this action.

RUSSELL, L.J.: The only question in this court is whether there was a

G term of the contract for the loan that £500 part of the loan *must* be used to acquire the leasehold interest that was to be charged, or that the lender was *obliged* to advance the money in a manner or by a method which would enable the borrower to use it to acquire the lease. It is quite plain that there was no written contract to that effect. It is equally plain that there was no express oral agreement to that effect: neither the defendants nor Mr. George Dawson suggested it:

H it was not suggested in cross-examination, either to Mr. Forland or to Mr. Halsall. What can be left? Is there an implied agreement? It would be quite impossible to imply an agreement by the borrower that she should not use any other money she might have available to acquire the lease. Of course, a term of the loan was security of the leasehold: but the fact that the borrower would or might have to spend money in acquiring it is not an additional term. Nor do I think that it

I can possibly be said that there was an implied agreement by the lender that he would advance the money in such a manner as would enable the borrower to acquire the leasehold therewith. It may have been assumed that the mechanics that would in fact be adopted in the completion of the contract would probably be those that were adopted; but that is not the same thing as a tacit contractual

(8) [1967] 3 All E.R. at p. 946, letter A.

(9) [1938] 1 All E.R. 193; [1938] 1 K.B. 667.

(10) See p. 964, letters B to D, ante.

(11) See p. 962, letters F to H, ante.

term. Suppose that the borrower's solicitor had at the completion produced his own banker's draft for the amount of the premium to hand to the lessor, and the lender's solicitor had immediately handed £500 (as was authorised by the borrower) to the borrower's solicitor in exchange for the lease and the charge, no one could dream of saying that the parties had departed from the terms of the contract.

I too would allow the appeal.

*Appeal allowed. Judgment for moneylenders against defendants jointly for payment of covenanted sum with interest. Order for possession within twenty-eight days of service of order. Leave to appeal to House of Lords refused.*

Solicitors: *Max Bitel, Greene & Co.* (for the moneylenders); *Cochrane & Cripwell* (for the borrower and the guarantor).

[Reported by HENRY SUMMERFIELD, ESQ., Barrister-at-Law.]

## GABLE CONSTRUCTION CO., LTD. v. INLAND REVENUE COMMISSIONERS.

[CHANCERY DIVISION (Goff, J.), March 7, 8, April 10, 1968.]

*Stamp Duty—Bond, covenant or instrument—Deed varying rent reserved by a lease—Deed not itself a lease or tack for the purposes of charge to stamp duty—Chargeable as bond, covenant etc.—Amount chargeable nevertheless limited to what would be chargeable if deed of variation were a lease or tack—Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 77 (5), Sch. 1.*

A deed of variation of two long leases, each granted in consideration of a substantial premium and a large rent, provided that each premium should be varied and that for the *reddendum* in each lease there be substituted: "Paying therefor in respect of the ending on Jan. 20, 1963, the rent of one peppercorn if demanded and in respect of the period ending on Dec. 25, 1963, the yearly rent of £1,500 (£500 in the case of the second lease), and in respect of the period ending on Dec. 25, 2013, the yearly rent of £2,700 (£800), the said yearly rent rising by a further £960 (£240) at the expiration of each fifty years thereafter...". The deed was assessed to stamp duty by charging *ad valorem* lease duty (amounting to £3,096 10s.) on the amount of the increase in the average rents, on the basis that it operated as a surrender of the two leases and a grant of new leases for terms equal to the unexpired residues of the original terms. On appeal,

**Held:** (i) (a) the deed of variation operated to increase the rents but not as a surrender of the original leases, whose demises remained subsisting; accordingly the deed of variation was not a "lease or tack" (see p. 973, letter F, post).

*Donellan v. Read* ([1824-34] All E.R. Rep. 639) distinguished.

(b) the deed of variation was, however, chargeable under the heading "Bond, Covenant etc." in Sch. 1 to the Stamp Act, 1891, because the exception from that charge in respect of a "rent reserved by a lease or tack" did not extend to the rent increased by virtue of the deed of variation, as that deed was not a lease or tack and the words of exception referred to the document (*viz.*, the deed of variation) not to the transaction of increasing the rent (see p. 973, letter G, post).

Dictum of MACNAGHTEN, J., in *Associated London Properties, Ltd. v. Williams (Inspector of Taxes)* ([1947] 2 All E.R. at p. 475) applied and the decision on appeal ([1948] 1 All E.R. 442) considered.

(ii) the amount *prima facie* chargeable under the heading "Bond, Covenant etc." (£37,006) was limited by s. 77 (5) of the Stamp Act, 1891, to the amount



- A that would be payable on the deed of variation if it were a lease or tack (viz., £3,096 10s.), as s. 77 (5) was a relieving provision and the reference in it to rent reserved "by a lease or tack" referred to rent that could be reserved if the instrument were a lease or tack (see p. 974, letter B, post); alternatively the reference in s. 77 (5) to rent reserved by a lease or tack applied to the rent reserved by the original leases as varied by the deed of variation (see p. 974, letter D, post).
- B

[As to the meaning of "Bond, covenant or instrument", the limitation of charge thereunder to increases of rent, and the meaning of "Lease or tack" chargeable to stamp duty see 33 HALSBURY'S LAWS (3rd Edn.) 344, 345, para. 602, and 23 *ibid.*, pp. 453-459, paras. 1059-1069; and for cases on the subject, see 39 DIGEST (Repl.) 317-320, 631-651; 300, 301, 464, 465; 303, 477; 335-338, 732-753.

For the Stamp Act, 1891, s. 77 (5) and Sch. 1 ("bond, covenant or instrument", and "lease or tack") see 21 HALSBURY'S STATUTES (2nd Edn.) 633, 662, 663, 676, 677.]

Cases referred to:

- D *Associated London Properties, Ltd. v. Williams (Inspector of Taxes)*, [1947] 2 All E.R. 474; *affd.* C.A., [1948] 1 All E.R. 442; 30 Tax Cas. 57; 28 Digest (Repl.) 9, 27.
- Domellan v. Read*, [1824-34] All E.R. Rep. 639; (1832), 3 B. & Ad. 899; 1 L.J.K.B. 269; 110 E.R. 330; 31 Digest (Repl.) 238, 3724.
- Fenner v. Blake*, [1900] 1 Q.B. 426; 69 L.J.Q.B. 257; 82 L.T. 149; 21 Digest (Repl.) 459, 1598.
- E *Inchiquin (Lord) v. Lyons*, (1887), 20 L.R.Ir. 474; 31 Digest (Repl.) 62, \*694.
- Longdon-Griffiths v. Smith*, [1950] 2 All E.R. 662; [1951] 1 K.B. 295; 32 Digest (Repl.) 187, 1998.
- R. v. Bates*, [1952] 2 All E.R. 842; *on appeal* sub nom. *R. v. Russell*, [1953] 1 W.L.R. 77; 44 Digest (Repl.) 444, 480.
- F *Westminster (Duke) v. Store Properties, Ltd.*, [1944] 1 All E.R. 118; [1944] Ch. 129; 113 L.J.Ch. 157; 171 L.T. 7; 17 Digest (Repl.) 483, 290.

### Case Stated.

The appellant presented a deed of variation of two leases\* to the Commissioners of Inland Revenue for adjudication of the amount of stamp duty chargeable thereon under Sch. 1 to the Stamp Act, 1891. The appellant submitted that the deed was not chargeable as a lease or tack under Sch. 1 or by virtue of s. 77 (5) and should bear a stamp duty of 10s. only. The commissioners were of opinion† that the deed operated as a surrender of the leases and a grant of new leases for terms equal to the unexpired residue of the original terms and accordingly that the deed of variation was a lease. If it was not a lease, they were of opinion that it fell within the heading "bond covenant or instrument", being the only or principal or primary security for sums of money at stated intervals, in Sch. 1 to the Stamp Act, 1891, not being rent reserved by a lease or tack. On that view s. 77 (5) of the Act of 1891 would be inapplicable; alternatively s. 77 (5) applied to limit the duty to that which would have been chargeable had it been a lease. The duty chargeable under the heading "Bond" etc. would amount to £37,006. The commissioners assessed the deed to duty ad valorem as a lease at a total amount of £3,096 10s..

*J. Mills Q.C.*, and *R. Body* for them appellant.

*E. I. Goulding, Q.C.*, and *J. P. Warner* for the Crown.

*Cur. adv. vult.*

\* The terms of the deed so far as relevant are set out at p. 970, letters C to H, post.

† the terms of the commissioners' decision are set out at p. 970, letter I, to p. 971, letter C, post.

Apr. 10. **GOFF, J.**, read the following judgment: In this case the appellant holds certain properties under two long leases, each of which was granted in consideration of a substantial premium and at a large rent, and duly stamped accordingly. Each lease was made between the lessor of the one part, certain sureties (the same persons in each case) of the second part, and the appellant of the third part. Between the two leases the freehold reversion changed hands, but nothing turns on that.

By a instrument dated July 1, 1963, described as a deed of variation made between the landlords of the first part, the sureties of the second part and the appellant of the third part, and expressed to be supplemental to the two leases, it was provided as follows. Recital (2):

"The parties hereto have agreed to enter into this deed to vary the terms of the first and second leases in manner hereinafter appearing. Now this deed witnesseth as follows."

Then, para. 1 varied the premium under the first lease. Paragraph 2:

"In lieu of the *reddendum* in the first lease there shall be substituted the following words 'Paying therefor in respect of the period ending on Jan. 20, 1963, the rent of one peppercorn if demanded and in respect of the period ending on Dec. 25, 1963, the yearly rent of £1,500 and in respect of the period ending on Dec. 25, 2013, the yearly rent of £2,700 the said yearly rent rising by a further £960 at the expiration of each fifty years thereafter to be paid by two equal half yearly payments . . .'"

Then, para. 3 varied the premium under the second lease. Paragraph 4:

"In lieu of the *reddendum* in the second lease there shall be substituted the following words 'Paying therefor in respect of the period ending on Jan. 20, 1963, the rent of one peppercorn if demanded and in respect of the period ending on Dec. 20, 1963, the yearly rent of £500 and in respect of the period ending on Dec. 25, 2013, the yearly rent of £800 the said yearly rent rising by a further £240 at the expiration of each fifty years thereafter to be paid by two equal half yearly payments . . .'"

Paragraph 5 provided:

"The said substituted considerations in the first and second leases totalling £68,000 shall (subject to the provisions of the first and second leases) be payable by the tenant to the landlord in sixty-eight equal instalments of £10,000 each of which shall be payable "

as therein mentioned.

Finally, by para. 6:

"The landlord hereby covenants with the tenant and the sureties and the sureties and the tenant hereby covenant with the landlord that they will respectively perform and observe the several covenants agreements and conditions contained in the first and second lease as if the same covenants agreements and conditions had been herein repeated in full with such modifications only as are necessary to give effect to this deed."

This deed of variation was submitted for adjudication, and, as appears from para. 8 of the Case Stated:

"The commissioners were of the opinion that the adjudicated instrument, on its true construction, operated as a surrender of the first and second leases and a grant of new leases for terms equal to the unexpired residue of the original terms. They were accordingly of the opinion that the adjudicated instrument was a lease and that s. 77 (5) [of the Stamp Act, 1891] applied. If, on its true construction, the adjudicated instrument was not a lease, it was, in the commissioners' opinion, chargeable under the heading 'Bond, covenant, or instrument of any kind whatsoever' in Sch. 1 to the Stamp Act, 1891, being the only or principal or primary security for sums of money

A at stated periods, not being rent reserved by a lease or tack. On this view s. 77 (5) was inapplicable because the sums of money so secured were not rent within the meaning of that word in that subsection. Alternatively s. 77 (5) applied to limit the duty on the adjudicated instrument to that with which it would have been chargeable had it been a lease."

B Paragraphs 9 to 12 of the Case Stated read as follows:

C "9. The commissioners accordingly assessed the adjudicated instrument to duty as follows: Ad valorem lease duty on the amount of the increase in the average rents . . . [this was calculated and totalled £3,096 10s.]. 10. The amount of the duty with which the adjudicated instrument was chargeable if it was chargeable under the heading 'Bond, covenant, or instrument of any kind whatsoever', and s. 77 (5) did not apply, was £37,006. 11. The appellant being dissatisfied with the assessments made and having paid the stamp duty in accordance therewith has required the commissioners to state and sign a Case setting out the questions on which their opinion was required and the assessments made by them, and the commissioners do hereby state and sign this Case accordingly. 12. The question for the opinion of the court is (a) whether the adjudicated instrument is chargeable with the duty assessed by the commissioners. (b) if not, with what duty is it chargeable."

D Counsel for the appellant submitted that s. 77 (5) is not a charging but a relieving section, and that it does not say that an instrument coming within the description in the opening words of that subsection is to be charged as if it were a lease or tack though it be not such, but only if it be. He said, further, that the deed of variation was not a lease or tack because it did not increase the term or demise any further land. Then he said that it was not within the heading, "Bond, covenant, or instrument", etc., because that expressly excluded "rent reserved by a lease or tack". It followed, so he submitted, that the only stamp duty exigible on this deed was the ordinary 10s. duty.

E F Counsel for the Crown, on the other hand, submitted that the deed of variation must be either a new lease, causing a surrender of the old leases by operation of law, or a collateral contract, for which he relied on the old case of *Donellan v. Read* (1) and in particular this passage in the judgment of the court (2):

G "The only way in which it could be taken to be rent would be that this contract creates a new demise at an increased rent and that therefore, by operation of law, the old lease is surrendered by such a new demise."

H Founding himself on that premise, he said that, if it be a new lease, cadit quaestio, and if it be a collateral contract then duty is exigible under the heading, "Bond, covenant, or instrument", etc., possibly without the benefit of s. 77 (5) but at worst for him back in the same position under that subsection as if the true view were that the deed of variation was a lease.

I I do not think that the position is quite as simple as counsel for the Crown would have it, but nevertheless I have reached the conclusion that the adjudication was right. In *Donellan v. Read* (1) the tenant held under a lease for the residue of a term of twenty years, which could not be varied by a parol agreement, which was all that the agreement for the increased rent was in that case. Therefore, as the court said, the only way in which it could be taken to be rent was if it created a new tenancy. Where, however, the tenancy is one which does not require to be in writing so that it can be varied by parol, or where, as here, the variation is itself effected by deed, then in my judgment it is possible to create additional rent in the strict technical sense without a surrender of the old tenancy explicitly or by operation of law and a new lease. There is in my view ample

(1) [1824-34] All E.R. Rep. 639; (1832), 3 B. & Ad. 899.

(2) [1824-34] All E.R. Rep. at p. 640; (1832), 3 B. & Ad. at p. 905.



authority for this proposition. First, I find this in FOA ON LANDLORD AND TENANT (8th Edn.) at p. 635: A

"Moreover, the mere fact of payment and acceptance of a diminished rent will not amount to a surrender, where it does not of itself imply a new demise; and the same holds good of an increased rent payable upon alteration or improvements. But in both cases such payment may be evidence of a surrender and new tenancy."

Then, in *Associated London Properties, Ltd. v. Williams (Inspector of Taxes)* (3) MACNAGHTEN, J., had said in the court below (4): B

"There is no difficulty about the parties to a lease, after the lease has been executed, agreeing that the rent should be increased or reduced."

It is true that SOMERVELL, L.J., said (5): C

"I understand that the cases with regard to the meaning of 'rent', under common law or in a statute, unless there is some definition or some special wording in the statute which gives it a different meaning, were not cited to the General Commissioners or to MACNAGHTEN, J. If they had been, I feel that there are certain observations in the latter's judgment which he probably would not have made", D

but I think that that must be regarded as a criticism of the generality of MACNAGHTEN, J.'s words, for there is both English and Irish authority for the limited proposition which I have stated.

In *Fenner v. Blake*, (6) CHANNELL, J., said:

"It is by no means uncommon for a landlord and tenant to agree by parol to a variation of the terms of an existing tenancy, such as an alteration in the amount of the rent, and at all events in cases where the tenancy was such that the contract creating it was not required by law to be in writing, as in the case of a tenancy from year to year, a parol variation of the terms as to the rent would be perfectly good and sufficient in point of law."

Again, in *Lord Inchiquin v. Lyons* (7), where there had been a notice to quit following an increase of rent, which notice was sufficient if the original tenancy remained but bad if it had been surrendered and replaced by a new one, SIR MICHAEL MORRIS, C.J., (8): E

"The second argument put forward, and which was the principal one relied on by the Exchequer Division, was that founded on the increase of rent. That raises the net question, does an increase of rent by an arrangement during the year of tenancy per se operate as the creation of a new tenancy? Now, in the textbook cited, which I refer to as showing what is the opinion of the profession on the subject, and which, when I was at the Bar, was considered a standard work—ADAMS ON EJECTMENT, p. 106—it is laid down that 'No new tenancy is created by a mere agreement between landlord and tenant for an increase of rent in the middle of the year of a tenancy'. That is the exact state of facts here: there was an arrangement in the middle of the year of tenancy that the rent should be increased; and here there is this additional element, that the increase of rent was to relate back to the previous gale-day, and was not to begin only on Nov. 1, which was the first gale-day after the arrangement was entered into. G

"I am not aware of any case deciding, as an abstract proposition, that in no case can a landlord and tenant agree to raise the rent without creating a new tenancy. That would lead to extraordinary consequences. More generally there is a reduction of rent; and suppose a reduction is made to a tenant, and an arrangement that he is to hold on at the reduced rate, and H

(3) [1948] 1 All E.R. 442.

(5) [1948] 1 All E.R. at p. 448.

(7) (1887), 20 L.R.Ir. 474.

(4) [1947] 2 All E.R. 474 at p. 475.

(6) [1900] 1 Q.B. 426 at p. 428.

(8) (1887), 20 L.R.Ir. at pp. 478, 479. I

A that such reduced rate is to relate back to a previous period, would that create a new tenancy? I presume that if an arrangement to increase the rent would ipso facto create a new tenancy, an agreement for a reduction would have the same effect. The consequences of that are, at all events, worthy of consideration. I am not aware that such proposition has ever been decided, and I think it is contrary to the ordinary right that two persons are to be prevented from entering into an agreement, which is not immoral or against public policy, viz., that the rent is to be increased or diminished, without putting an end to the old tenancy."

In the same case, FITZGIBBON, L.J., said (9):

C "One circumstance pressed the Lord Chief Baron in favour of the defendant, from which I draw a different conclusion. As the increase of rent related back to the previous gale-day, the Lord Chief Baron treated the increase as not rent at all; but I cannot distinguish between the £22 10s. and the original rent of £168 10s. I think the increase was rent accruing by contract under the old tenancy running back, as is frequently the case in leases, to a previous gale-day; in all respects the old tenancy was continued, except that each half-yearly gale of rent was, from and after the day when the increase was agreed on, £22 10s. more than the amount reserved under the previous contract. I concur in the verdict of the jury as the true conclusion. The question when the new tenancy commenced was incapable of any answer consistently with the facts, because there was, in truth, no new tenancy at all, but only the old one, with an alteration in the amount of the rent, calculated from the gale-day before the date at which the increase was agreed on."

In my judgment, if I am free to decide, as it appears to me on the authorities I am, that the deed of variation could operate to increase the rent and yet leave the original leases subsisting, I must hold, as I do, that that is what it did. I can see no intention here to create a new tenancy, rather the reverse.

F That, however, is not the end of the matter, for on that view, whilst it follows in my judgment that the deed of variation is not a lease or tack, it follows equally that it is *prima facie* chargeable under the heading, "Bond, covenant", etc. Counsel for the appellant, as I have observed, said that it is protected from the effect of that heading by the exception therein contained in these words, "nor rent reversed by a lease or tack". In my judgment, however, that is wrong, because the Stamp Act, 1891, is concerned not with transactions but with documents, and counsel is seeking in this exception to look not at the deed which creates the periodical sum of money but at the transaction which results from varying the original leases. It would, I think, be strange to give the expression "lease or tack" in this heading a different meaning from that in the heading "Lease or tack", and to look in the one case to the result of the joint effect of the instruments and in the other to the deed of variation alone.

H I find strong support for my view in what was said by BENNETT, J., in *Duke of Westminster v. Store Properties, Ltd.* (10). True he there applied *Donellan v. Read* (11) and held that the sum in question was not rent but a collateral payment, but he made pertinent observations as to the meaning of the expression "rent reserved" in the War Damage Act, 1943, which in my view apply even more forcefully to the expression "rent reserved by a lease or tack" in the "Bond, covenant", etc., heading of the Stamp Act, 1891. His Lordship said: (10)

"It is clear, I think, that the annual sum payable under the licence is not rent in the technical meaning of that term. A money rent is a sum reserved by a lessor on the occasion of a demise of land . . ."

(9) (1887), 20 L.R.Ir. at p. 484.

(10) [1944] 1 All E.R. 118; [1944] Ch. 129 at p. 131.

(11) [1824-34] All E.R. Rep. 639; (1832), 3 B. & Ad. 899.

Again (12):

"A sum payable to a landlord by a tenant by virtue of a collateral agreement containing no demise cannot, I think, properly be referred to as a rent reserved."

Then s. 77 (5) fits into place as a relieving provision limiting the higher duty which would be payable as a bond or covenant to the lesser amount attributable to a lease or tack for the amount of the increase in rent. So applied, it is in my judgment legitimate and correct, even in a taxing Act, so to read the subsection. It would be altogether fanciful to treat it as giving complete exoneration because the instrument is not a lease or tack. In that context, in my view, the subsection must mean that the instrument shall be chargeable as if it were a lease or tack. For these reasons, in my judgment the adjudication was correct and the appeal fails, and I am fortified that in conclusion by the difference in language between sub-s. (5) and all the other subsections of s. 77, which speak of a lease or agreement for a lease.

That is sufficient to dispose of the case, but I should add perhaps that, if I am wrong in the view which I have taken of the expression "rent reserved by a lease or tack", it can only be because it is right there not to consider the deed of variation alone but in relation to its effect on the original leases; but if so, then it seems to me that one must do the same in construing s. 77 (5). On this view of the matter, although the deed of variation does not destroy the old leases and create new ones, it is a lease or tack within the meaning of s. 77 (5) because it creates for the first time a lease at the new rent, a lease which is not covered by the *ad valorem* duty paid on the original, unaltered lease.

Counsel for the Crown did mount a further argument, that s. 77 (5) might be construed directly as saying that every instrument whereby the rent reserved by any other instrument chargeable with duty and duly stamped as a lease or tack (which are the opening words of the section) as is increased is liable to duty a lease or tack whether it be such or no, independently of any question of limiting liability otherwise payable under the "Bond, covenant" heading; and he craved in aid to some extent the marginal note to s. 11 of the Customs and Inland Revenue Act, 1876, in which the present s. 77 (5) first appeared. I would find it difficult so to construe a taxing Act, and I do not think I ought to have regard to that marginal note having regard to what is said in *MAXWELL ON INTERPRETATION OF STATUTES*, (11th Edn.) p. 42, and by SLADE, J., in *Lougdon-Griffiths v. Smith*, (13), and DONOVAN, J., in *R. v. Bates* (14). But having regard to my conclusions on the other points, I need not pursue this further. For these reasons, in my judgment the appeal fails.

*Appeal dismissed.*

Solicitors: *John Trapnell & Co.* (for the appellant); *Solicitor of Inland Revenue.*

[*Reported by F. A. AMIES, ESQ., Barrister-at-Law.*]

(12) [1944] 1 All E.R. at p. 119; [1944] Ch. at p. 132.

(13) [1950] 2 All E.R. 662 at pp. 671, 672.

(14) [1952] 2 All E.R. 842 at p. 844.



**A** FLEMING (Inspector of Taxes) v. LONDON PRODUCE CO., LTD.  
INLAND REVENUE COMMISSIONERS v. LONDON PRODUCE  
CO., LTD.

[CHANCERY DIVISION (Megarry, J.), March 27, 28, 29, 1968.]

**B** *Income Tax—Non-resident—Assessment in name of agent—Exemption for broker and “general commission agent”—Meaning of “general commission agent”—Company virtually sole agent of non-resident—Lack of generality of custom—Many non-broker like activities—Income Tax Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 10), s. 370, s. 373 (1), proviso.*

**C** An “agreement for sale of output” between the taxpayer company  
“and/or their nominees” and a New Zealand company was to run for eight  
years from Oct. 1, 1952, the taxpayer company, however, having the “right  
of cancellation at any time after four years on giving six months’ notice”.  
That agreement was cancelled as from Sept. 30, 1955, by a second agree-  
ment dated Mar. 16, 1955, in almost identical terms, which was to run for  
ten years from Oct. 1, 1955, with a similar right of cancellation after five  
**D** years. Under the agreements the taxpayer company agreed to take over  
all the New Zealand company purchases of stock, i.e., meat, wool and pelts  
at the actual cost price, and the New Zealand company agreed to carry out  
all necessary processing (slaughtering, freezing, felling, curing, placing f.o.b.,  
etc.) at a charge which, after payment of operating expenses, etc., would  
leave it an annual profit of £15,000. A resolution of the directors of the  
**E** taxpayer company on Aug. 23, 1955, “put on record that the nominees  
mentioned in the [first] contract . . . are the purchasers”, the K. company.  
The taxpayer company accounted to the K. company for all the profits of the  
trading under the agreements, receiving only a commission for its work.  
But the taxpayer company itself paid the freight from New Zealand and  
arranged and paid the marine insurance, held the bills of lading and delivered  
**F** them to the purchasers (sales on c.i.f. terms), paid the New Zealand company  
the cost price and arranged with its own bank for letters of credit in New  
Zealand, invoiced the customers and collected the money, and finally held  
the money for the K. company on a general account to be drawn on as the  
K. company wished. Ninety-five per cent. of the taxpayer company’s  
**G** turnover was for business with the K. company, covering the whole of the  
English end of that company’s business. On the other hand the taxpayer  
company acted for other principals, twenty in 1958-59 and 1959-60 and  
over fifty in 1960-61, though all doing business with the New Zealand  
company. The taxpayer company was assessed to tax for the years 1955-56  
to 1959-60 on the basis that the profits under the agreements arose from  
trading by the taxpayer company as principal, and alternatively, in all  
**H** years except the first, was assessed on the basis that the profits arose from  
its acting as agent for the K. company, which was a company incorporated  
and resident in South Africa. The assessments on the taxpayer company  
as agent for the K. company showed the description of income assessable  
generally as “meat salesmen” but in one case as “agents”. The General  
**I** Commissioners of Income Tax found that the profits arose from trading  
by the taxpayer company not as principal but as agent for the K. company,  
and that the K. company was exempted from liability (under s. 370 of the  
Income Tax Act, 1952) as a non-resident company chargeable in the name  
of a broker (including a general commission agent) by the proviso to s. 373  
(1)\* of the Income Tax Act, 1952. On appeal from the discharge of both  
assessments,

**Held:** (i) the decision of the commissioners discharging the assessments

\* Section 373 (1) is set out at p. 982, letters G to I, post.

on the taxpayer company as principal would be upheld (see p. 982, letter D, post) because the facts found by the commissioners provided ample support for their conclusion that the taxpayer company acted as agent for the K. company and not as principal (see p. 981, letter F, post); further, the court would not, in the exercise of its discretion, remit the case to the commissioners for further evidence and findings, the Crown having already had opportunity to elicit the relevant points (see p. 982, letters B and C, post).

(ii) s. 373 (1), and the proviso thereto, of the Act of 1952 did not relieve the K. company from being assessed to tax in the name of the taxpayer company as its agent under s. 370, because the taxpayer company was not a "general commission agent" (which term was included in the definition of "broker" for the purposes of s. 373 (1)) for the reasons indicated in (iii) below; and accordingly the commissioners' decision to discharge the agency assessments would be reversed (see p. 986, letters C and F, post).

(iii) to be a general commission agent for the purposes of s. 373 (1) an agent (a) must have sufficient broker-like qualities to make it reasonable for Parliament to have provided that the term "broker" should include him, (b) should be employed by the non-resident in the ordinary way, even if regularly, and (c) must hold himself out as being ready to work for clients generally and not confine his activities to one principal or an insignificant number of principals (see p. 985, letter I, to p. 986, letter A, and p. 986, letter B, post); but the taxpayer company did many acts not characteristic of brokers, was lacking in generality of custom, and was little more than the English end of K. company's business and so, as stated in (ii) above did not qualify as a general commission agent for the purposes of s. 373 (1) (see p. 986, letter D, post).

(iv) in an assessment on the taxpayer company as "agents for" the K. company, the description of the income assessable as "agents" was not so gross and misleading an error as to be incapable of cure by s. 514\* of the Income Tax Act, 1952, accordingly the assessment was valid (see p. 987, letter D, post).

Per CURIAM: in preparing cases stated it is to be remembered that over-lengthy paragraphs are inconvenient, and that a system of numbering or lettering each paragraph and sub-paragraph is warmly to be commended (see p. 981, letter D, post).

Appeal allowed on (ii) above.

[As to relief to non-residents from being charged to income tax in the name of a broker, see 20 HALSBURY'S LAWS (3rd Edn.) 298, 299, para. 545; and for cases on the subject, see 28 DIGEST (Repl.) 258-264, 1147-1176.

For the Income Tax Act 1952, s. 373 (1), see 31 HALSBURY'S STATUTES (2nd Edn.) 356.]

Cases referred to:

*Belfour v. Mace*, (1928), 13 Tax Cas. 539; 138 L.T. 338; 28 Digest (Repl.) 261, 1161.

*Gavazzi v. Mace*, *Gavazzi v. Inland Revenue Comrs.*, *T. L. Boyd & Sons, Ltd. v. Stephen*, (1926), 10 Tax Cas. 698; 135 L.T. 634; 28 Digest (Repl.) 262, 1162.

*Tillyard v. Page*, (Mar. 15, 1968), unreported.

#### Case Stated.

The taxpayer company appealed to the Commissioners for the General Purposes of the Income Tax for the City of London against the following assessments to income tax made on it under Case I of Sch. D to the Income Tax Act, 1952, 1955-56 (one assessment) person assessed London Produce Co., Ltd. (the taxpayer company), description of income assessable meat salesmen, £80,000 (additional); in each of the successive years 1956-57 to 1959-60 inclusive two assessments,

\* Section 514, so far as material, is set out at p. 986, letters H and I, post.

**A** one on London Produce Co., Ltd., simply, description of income assessable meat salesmen and the other alternative assessment on London Produce Co., Ltd., as agent for Kaiapoi Trading Co. (Proprietary), Ltd., the description of income assessable being meat salesmen in each case except in 1956-57 when it was agents. The amounts of tax assessed were (the same for both assessments in each year): 1956-57 £80,000 (additional—as agents not additional); 1957-58 £120,000 (additional—as agents not additional); 1958-59 £85,000 (additional—as agents not additional); 1959-60 £85,000. It also appealed against assessments to the profits tax in which similar issues were involved. Kaiapoi Trading Co. (Proprietary), Ltd., was for the purpose of the proceedings admitted to be incorporated and resident in the Union of South Africa.

**C** A preliminary question for determination was whether the profits in question arose from the sale of meat by the taxpayer company trading on its own account, as contended by the Crown, or only from its acting as agent for the Kaiapoi company as contended by the taxpayer company. In the event of the commissioners accepting the contention of the taxpayer company, two further questions arose (i) whether having regard to the provisions of s. 370 and s. 373 (1) of the Income Tax Act, 1952, the taxpayer company was assessable as agent for the Kaiapoi company as the Crown contended, or was not so assessable by reason of the proviso to s. 373 (1), and (ii) whether the Kaiapoi company was exempt from United Kingdom taxation under the terms of the Double Taxation Relief (Taxes on Income) (South Africa) Order, 1947\*. The taxpayer company contended before the commissioners as follows:

**E** “(i) That on the evidence the assessments made on the [taxpayer] company as meat salesmen in its own right were incorrect. (ii) That as regards the alternative assessment as ‘agent for Kaiapoi’, (a) the business for [the Kaiapoi company] as meat salesmen is carried on in the U.K. through [the taxpayer company], being a bona fide broker or general commission agent acting in the ordinary course of its business as such, and is not therefore within the term ‘permanent establishment’ in art. 11 (1) (j) of the Schedule to the Double Taxation Relief (Taxes on Income) (South Africa) Order, 1947; with the result that the trade of [the Kaiapoi company] is exempt from taxation in the U.K. (b) Alternatively, that [the Kaiapoi company] is not liable to assessment under s. 370, Income Tax Act, 1952, by reason of the proviso to s. 373 (1) of the said Act in that the evidence shows that [the taxpayer company] was at all material times a person carrying on bona fide the business of a broker in the United Kingdom (which expression includes a general commission agent) and received in respect of the business of Kaiapoi which was transacted through it remuneration at a rate not less than that customary in the class of business in question. (c) Alternatively as regards the assessment made upon [the taxpayer company] for 1956-57 ‘as agents for Kaiapoi’ in respect of the profits of [the Kaiapoi company, the Kaiapoi company] had never carried on such a trade and the assessment was accordingly bad in law and should be discharged.”

**H** The Crown contended before the commissioners: (i) That the assessments made upon the taxpayer company as “meat salesmen” on its own account were correct in principle because: (a) under the provisions of the agreements of 1953 and 1955 the taxpayer company was the principal and not an agent in the transactions with the North Canterbury Sheepfarmers’ Co-operative Freezing, Export and Agency Co., Ltd., a New Zealand company. (b) The taxpayer company sold the products despatched to London by the New Zealand company in the London meat markets on its own behalf. (c) No genuine transactions were carried out by the taxpayer company on behalf of the Kaiapoi

\* S.R. & O. 1947 No. 315.



company but the moneys remitted to the Kaiapoi company were merely remittances by the taxpayer company of its own funds. (d) The Kaiapoi company took no part in the transactions in question and was a mere recipient of those funds. (ii) Alternatively, the assessments made on the taxpayer company as agents for Kaiapoi were correct in principle in that neither the proviso to s. 373 (1) of the Income Tax Act, 1952, nor the similar provisions contained in art. 11 (1) (j) of the Double Taxation Relief (Taxes on Incomes) (South Africa) Order, 1947, applied because:—(a) there was no evidence to support the contention of the taxpayer company that it was carrying on bona fide the business of broker or general commission agent in the United Kingdom within the meaning of those provisions; (b) even if it was held that the taxpayer company was carrying on bona fide the business of a broker or general commission agent within the meaning of the said provisions, the transactions in question were not carried out in the ordinary course of its business as such; (c) the rate of remuneration received by the taxpayer company in respect of the sales transacted on behalf of the Kaiapoi company was less than that customary in that class of business; (d) the specimen shipping and commercial documents were neutral as to the question whether the taxpayer company was bona fide carrying on the business of a broker or general commission agent or whether it was solely the authorised agent carrying on the regular agency of the Kaiapoi company; (e) the advertising extracts did not support the taxpayer company's contention that it was acting as a broker or general commission agent; (f) the "various sales" referred to in the evidence were insignificant in relation to the trade of the taxpayer company as a whole and were irrelevant to the issue of whether the taxpayer company was carrying on bona fide the business of a broker or general commission agent. (iii) That the assessment for the year 1956-57 was valid despite the erroneous description of the profits, and such an error did not render the assessment void, having regard to the provisions of s. 514 of the Income Tax Act, 1952.

The commissioners found on the evidence before them that the proceeds from the sales of the goods in question were received by the appellant (London Produce Co., Ltd.) the taxpayer company, a company registered in the United Kingdom, on behalf of the Kaiapoi Trading Co. (Proprietary) Ltd., (a company incorporated in the Union of South Africa and not resident in the United Kingdom) and that the profits derived therefrom were not profits of the trade carried on by the taxpayer company. They also found from the evidence that the goods were sold on the London meat market through the taxpayer company as authorised agent for the Kaiapoi company. They held that the taxpayer company was at all material times carrying on the regular agency of the Kaiapoi company within sub-s. (1) (a) of s. 373 of the Income Tax Act, 1952.

On the contention on behalf of the taxpayer company that the Kaiapoi company was not chargeable to income tax in the name of the taxpayer company in respect of such profits of the Kaiapoi company by reason of the proviso to the said s. 373 (1), they found on the evidence and with regard to the words of the proviso, that the taxpayer company as agent carried out the sales in question on behalf of the Kaiapoi company in the ordinary course of its business as such, and that the taxpayer company was a person carrying on bona fide the business of a broker or general commission agent in the United Kingdom within para. (i) of the proviso. They also found that in the relevant period the taxpayer company received in respect of the business of the Kaiapoi company transacted through it remuneration by way of commission at the rate of 1-1¼ per cent. which on the evidence was at a rate not less than that customary in the London meat market and that, therefore, proviso (ii) of s. 373 was also satisfied.

They also considered the arguments on behalf of the parties regarding the Double Taxation Relief (South Africa) Order, 1947. They accepted that in the relevant periods the Kaiapoi company was a "Union enterprise" within art. 11 (1) (h) and held on the facts that the business dealings of the Kaiapoi company

A were carried on in the United Kingdom through the taxpayer company, a bona fide broker or general commission agent acting in the ordinary course of its business as such, and that the Kaiapoi company had not within art. 11 (1) (j) a permanent establishment in the United Kingdom so as to make the profits in question liable to United Kingdom taxes under art. 111 (2) thereof. Accordingly, they held that the Kaiapoi company was not chargeable in the name  
B of the taxpayer company in respect of the profits or gains arising from the sales in question. They did not accept the contention made on behalf of the taxpayer company that the assessment for 1956-57 made on the taxpayer company as agents for Kaiapoi Trading Co. (Proprietary), Ltd., in which the profits of trade assessed were entered as "agents" was bad in law. The commissioners' decision, which was applicable also to the profits tax assessments, was given in  
C principle at the request of the parties, leaving the assessments to be dealt with in accordance therewith in due course. In due course it was reported to the commissioners that figures had been agreed between the parties on the basis of their decision in principle, and on Nov. 14, 1966, they determined the appeals by discharging all the income tax assessment.

The Crown appealed by way of Case State to the High Court.

D *R. L. A. Goff, Q.C.*, and *J. R. Phillips* for the Crown.  
*H. Major Allen, Q.C.*, and *B. Pinson* for the taxpayer company.

MEGARRY, J.: This is a Case Stated by the Commissioners for the General Purposes of the Income Tax for the City of London. It relates to appeals against a series of assessments for the years 1955-56 to 1959-60 on the taxpayer company,  
E London Produce Co., Ltd. Some of these assessments were made on the taxpayer company as principals; others, in the alternative, were made on the taxpayer company as agents for a South African company called Kaiapoi Trading Co. (Proprietary), Ltd., which I shall call the Kaiapoi company. One other company is concerned, viz., a New Zealand company entitled North Canterbury Sheep-farmers' Co-operative Freezing, Export and Agency Co., Ltd., which I shall call  
F the New Zealand company. In the barest of outlines, the case concerns the tax consequences of quantities of New Zealand lamb sent by the New Zealand company to the United Kingdom and sold by the taxpayer company, with a subsequent accounting by the taxpayer company to the Kaiapoi company. The income assessable has in all cases save one been put under the description of "meat salesmen". The exception is an assessment for 1956-57 on the taxpayer  
G company as agents for the Kaiapoi company, where the description was "agents".

The commissioners held, first, that the taxpayer company had received the proceeds of sale as agents for the Kaiapoi company, and that the profits derived therefrom were not profits of a trade carried on by the taxpayer company. They accordingly discharged all the assessments on the taxpayer company as principal. Secondly, they held that the sales made by the taxpayer company as the Kaiapoi  
H company's agent fell within the proviso to s. 373 (1) of the Income Tax Act, 1952, so that the Kaiapoi company was not chargeable in the name of the taxpayer company in respect of any of the agency assessments. The commissioners accordingly discharged all these assessments as well. The question of law is stated as being whether there was evidence on which the commissioners could properly arrive at their decision, and whether on the facts found by them their  
I decision was correct in law.

There is a further Case Stated in relation to the profits tax, but this has not been separately argued, and it is common ground that the result in that case will follow the result in the income tax case. Questions of double taxation relief also arise, but again it has been agreed that a decision on the main issue will dispose of these questions as well. Accordingly, I say no more about them.

The facts are fully set out in the Case Stated, and I propose to refer to them in this judgment only so far as is necessary to resolve the issues before me. I take the first point first, viz., the assessments on the taxpayer company as

principals. In the forefront of the argument by counsel for the Crown were two agreements between the New Zealand company and the taxpayer company. The Kaiapoi company, who, counsel for the taxpayer company contends, were the principals, were not named as parties to these agreements. The essential question is whether the taxpayer company were principals, as counsel for the Crown contends, or merely agents for the Kaiapoi company, as counsel for the taxpayer company says. I will read the first agreement. It is undated, but may have been made on either Feb. 20, 1953, or Mar. 18, 1953. It is headed, "Agreement for sale of output", and it runs as follows:

"1. The parties are the [taxpayer company] and/or their nominees and the [New Zealand company]. 2. The term of the agreement is to be for eight (8) years commencing on Oct. 1, 1952, the [taxpayer company] having the right of cancellation at any time after four years on giving six months' notice. 3. The [taxpayer company] agrees to take over all the [New Zealand company] purchase of stock—i.e., meat, wool and pelts—at the actual cost prices. The [New Zealand company] will carry out all necessary processing at such a charge for slaughtering freezing together with felling and curing charges and placing F.O.B. as with any other operations by the [New Zealand company] will after payment of all such operating expenses and costs of repairs and renewals and depreciation on works and plant up to the limit permitted as a deduction by the Land and Income Tax Acts of New Zealand or the Commissioner of Inland Revenue's usual practice for the time being in force or ruling leave the [New Zealand company] an annual profit of £15,000."

The second agreement, which condescends to date itself Mar. 16, 1955, is almost identical; but the term of the agreement is expressed to be ten years commencing on Oct. 1, 1955, the right of cancellation is after five years, and a sentence at the end runs: "This contract cancels as from Sept. 30, 1955, the previous contract dated Mar. 18, 1953."

During the argument these agreements have been described as being "businessmen's agreements"; and I do not think this too harsh a term. Each, indeed, is in one sense a businessman's dream, namely, an agreement written on a single sheet of paper. But not for the first time, nor the last, has the businessman's dream become the lawyer's nightmare. Unidentified nominees who did not sign the agreement are expressed to be contracting parties either in addition to or in substitution for the taxpayer company. There is nothing to indicate by whom the agreement is determinable (or when), whether this constitution of the parties is to be cumulative or alternative, and, if the latter, which of the alternates is to be the party at any given time. It was suggested that the idea was that the taxpayer company should be able to nominate some other person to replace themselves as principals, and that the Kaiapoi company were in fact nominated. In support of this, I was referred to a certified copy of a resolution of the directors of the taxpayer company made on Aug. 23, 1955. This reads as follows:

"It was also resolved to put on record that the nominees, mentioned in the contract with [the New Zealand company] dated Feb. 20, 1953, for the sale of the output for eight years, are the purchasers Kaiapoi Trading Co. (Pty.), Ltd."

This document heightens the obscurity. What in effect is being said by the directors of the taxpayer company is this: "Last March we made our 1955 ten years 'agreement for sale of output' which in just over five weeks will supplant our 1953 eight years 'agreement for sale of output'. Therefore, we now record that the nominees under our moribund 1953 eight years agreement are [the Kaiapoi company], but we carefully abstain from saying anything about the nominees under the 1955 agreement which will soon begin to run for ten years from Oct. 1 next." It is not, I suppose, beyond possibility that



**A** there was some sound business reason for doing this; but, if so, that reason is remarkably well concealed.

If under the agreement of 1953 the Kaiapoi company was duly nominated and substituted for the taxpayer company, the operation of the agreement has further curiosities. By cl. 2, it is the taxpayer company, not the Kaiapoi company, which by name is given the right of cancellation. Further, by cl. 3, which has a certain tortuous obscurity of grammar about it, it is "the purchasing company", **B** a term which cl. 1 seems to apply to the taxpayer company and not the nominees, which agrees to take over all the New Zealand company's purchases of stock. I can well understand the puzzlement which para. 6 (f) of the Case Stated seems to suggest that the commissioners felt about these agreements and the appointment of the Kaiapoi company as nominees; nor does it surprise me to find **C** that the effect of these documents is not there stated with complete accuracy. In order to avoid possible confusion, I should at this stage interpose that the paragraph numbered 6 in the Case Stated in fact consists of fourteen paragraphs spread over more than three pages of brief-size paper, and for ease of reference during the argument I caused these fourteen paragraphs to be lettered from (a) to (n). My reference to para. 6 (f) is thus to the resultant sub-paragraph. The **D** paragraph numbered 9 is more modest, for it contains only seven paragraphs, and these have been lettered from (a) to (g). I would add the general comment that it would be welcome if, in preparing Cases Stated, commissioners would remember that over-lengthy paragraphs are inconvenient, and that a system of numbering or lettering each paragraph and sub-paragraph is warmly to be commended.

**E** I am wholly unconvinced by the contention that these lame and inept agreements established and maintained the taxpayer company as principals throughout the years of assessment in question. Agreements, when intelligible, may indeed confer legal rights; but whatever may be the legal rights, one must not avert one's gaze from what in fact was done. The facts found by the commissioners seem to me to provide ample support for their conclusion that the taxpayer **F** company acted as agent for the Kaiapoi company and not as principal. In particular, the taxpayer company merely received a commission for its work, and it accounted to the Kaiapoi company for all the profits of the trading. I can see no justification for interfering with the conclusion of the commissioners, even if I thought it wrong; and I do not.

**G** I may add that I am extremely doubtful what legal effect, if any, the agreements had. Many business transactions are based on agreements which would not hold water as legally enforceable contracts. As I said in a recent case on very different facts, *Tillyard v. Page* (1):

**H** "Much business is transacted on a well-founded faith that whatever legal imperfections there may be each party will in good faith carry out the spirit of the transaction: and in the great majority of cases such transactions are carried to a satisfactory conclusion, despite the inability of the parties on either side to enforce them in a court of law. Where by reason of death, insolvency or otherwise the transaction is halted in mid-course it may become necessary to analyse the legal consequences of what has been done, and it may then be found that the parties were bound to each other in honour and in business probity but not by law. Even these businessmen who fully realise **I** this may engage in this practice undeterred by what they regard as no more than a fair business risk."

In the present case the agreements may have sufficed to establish some business understanding, based on the general drift of the documents without paying undue attention to their language; but they cannot destroy the effect of what was done.

(1) (Mar. 15, 1968), unreported.

Counsel for the Crown asks me to send the case back to the commissioners under s. 64 (6) and (7), both for further findings on the evidence already given and for further evidence to be adduced. The burden of his complaint is that there is nothing to show whether the New Zealand company assented to the taxpayer company trading not as a principal but as agent for the Kaiapoi company, though (his brief summary does scant justice to the five questions which he formulated in writing. I do not think it right to remit the case under either subsection. The inspector of taxes has had his day before the commissioners, and can hardly complain if he omitted any attempt to elicit the points on which he now wants to have the case remitted; and it is not suggested that he made the attempt and failed. In any case, if in the United Kingdom the taxpayer company traded throughout as agent for the Kaiapoi company, behaving towards it as an agent behaves to his principal, I am not at all sure that the fact that the New Zealand company regarded the taxpayer company as its principal would, if established, alter the fact that the taxpayer company conducted the transactions here as agent for the Kaiapoi company. At all events, in the exercise of the discretion which in this respect I admittedly have, I do not send the case back. Accordingly, I uphold the decision of the commissioners discharging the assessments of the taxpayer company as principal.

I turn, then, to the second point, viz., that under s. 373 (1). The starting point is s. 370. This reads:

"A non-resident person shall be assessable and chargeable in respect of any profits or gains arising, whether directly or indirectly, through or from any factorship, agency, receivership, branch or management, and shall be so assessable and chargeable in the name of the factor, agent, receiver, branch or manager."

This catches a wide range of persons; and although (perhaps somewhat oddly, in view of s. 373) there is no express mention of "brokers", they are admittedly included in the term "agent".

From this sweeping embrace, s. 373 (1) proceeds to make two exceptions, one in the body of the subsection and the other in the proviso. The proviso, instead of performing a proviso's usual function of modifying or reducing the ambit of the substantive subsection and the exception that it makes, in fact adds an additional exception. The explanation seems to be that the proviso operates as a proviso not to the subsection as a whole but to certain words in the subsection reducing its scope, and prevents these words of reduction from operating in the case mentioned in the proviso. The subsection reads as follows:

"(1) Nothing in this Part of this Act shall render a non-resident person chargeable in the name of a broker or in the name of an agent not being—

(a) an authorised person carrying on the regular agency of the non-resident person; or

(b) a person chargeable under this Part of this Act as if he were an agent, in respect of profits or gains arising from sales or transactions carried out through such a broker or agent:

Provided that where sales or transactions are carried out on behalf of a non-resident person through a broker in the ordinary course of his business as such and the broker—

(i) is a person carrying on bona fide the business of a broker in the United Kingdom; and

(ii) receives in respect of the business of the non-resident person which is transacted through him remuneration at a rate not less than that customary in the class of business in question,

then, notwithstanding that the broker is a person who acts regularly for the non-resident person as such broker, the non-resident person shall not be chargeable in the name of that broker in respect of profits or gains arising from those sales or transactions.

In this subsection, 'broker' includes a general commission agent."

- A The origin of the substantive part of this subsection is the Finance (No. 2) Act, 1915, s. 31 (6), which later became r. 10 of the All Schedules Rules of the Income Tax Act, 1918. What is now the proviso did not appear until it was introduced by the Finance Act, 1925, s. 17 (1). The general effect of the subsection proper seems to be that s. 370 is not to bite in the case of brokers (including general commission agents) and agents where they are not the non-resident's regular
- B agents but only act for him casually. Non-residents would therefore not be deterred by thoughts of tax liability under s. 370 from bringing their business to casual brokers (including general commission agents) and agents.

- One likely consequence of this provision seems to be that irregularity was encouraged and constancy penalised. An agent or broker might well find that, however ably he satisfied his non-resident clients, thoughts of tax liability would
- C sooner or later impel them to leave him for others. A dog-like fidelity to one agent might be costly; better the eclectic bee, flitting from flower to flower. This may at least be part of the reason for the enactment in 1952 of the predecessor to the proviso. This proviso is much narrower than the substantive subsection. It is confined to brokers (including general commission agents), and does not apply to other agents. It also lays down three prerequisites for its
- D application: (i) the sales or transactions must be carried out through a broker "in the ordinary course of his business as such"; (ii) the broker must be a person carrying on the business of a broker in the United Kingdom; and (iii) in respect of the non-resident's business transacted through him, the broker must receive remuneration at a rate not less than that customary in the class of business in question.

- E The issue before me turns on the proviso. Section 370 admittedly brings the taxpayer company within the net, and the question is whether the proviso lets the taxpayer company out of it. The commissioners held that it did, and counsel for the taxpayer company seeks to sustain that decision. Counsel for the Crown, on the other hand, says that it does not. It is now not questioned that the conditions of the proviso are satisfied, including the requirement that the remuneration should be at a rate not less than that customary in the class of business in question. The only real issue is whether the taxpayer company was a
- F "broker" within the proviso, remembering that the subsection states that " 'broker' includes a general commission agent ".

- There has been much discussion about the somewhat puzzling and undefined expression, "general commission agent". I am not the first judge to be troubled
- G by it. In *Gavazzi v. Mace* (2) ROWLATT, J., referred to the Finance (No. 2) Act 1915, s. 31 (6), and r. 10 of the All Schedules Rules in the Act of 1918 (the predecessors of the substantive part of s. 373 (1) of the Act of 1952) and to the phrase

- "a non-resident shall not be chargeable in the name of a broker or general commission agent, or in the name of an agent not being an authorised person",

- H as it then stood. He said (3):

- "I find great difficulty in quite understanding the fabric of this enactment. First of all, I do not quite see why you want the words 'broker or general commission agent' at all, because a broker or general commission agent is an agent who is not an authorised person carrying on a regular agency
- I of the non-resident person, and therefore they would be protected without being mentioned at all. But they are put in, I suppose, as a sort of indication of the line on which the draftsman's mind is travelling before he comes to the phrase which supersedes those words, and expresses a larger idea which includes them."

(2) (1926), 10 Tax Cas. 698 at p. 744.

(3) (1926), 10 Tax Cas. at p. 744.



On the facts of the case, he held that the United Kingdom agents were not brokers or general commission agents as they were really working for the non-resident firm: but that was before the Act of 1925 had introduced what is now the proviso. ROWLATT, J., referred (4) to the fact of the agents accepting a bill of exchange which enabled the sellers to get their money in advance, and said that this

“differentiates them entirely, and must differentiate them, from the position of a general commission agent. It was contended, as I understand it, that because they were remunerated by a commission, and by the full commission which is earned in this trade, therefore there was no consideration for them being anything else, they were merely general commission agents. I do not think that is possible. I think they were doing something clearly outside the scope of general commission agents; and if, it is said that at Liverpool people, who are there called commission agents, do this work, I am afraid the only result of it is that I must hold that what is understood by ‘general commission agents’ by those people is not what the Act of Parliament means; because I think it means that a general commission agent is not a man, within the meaning of this Act of Parliament, who brings that sort of advantage to his principal.”

In *Belfour v. Mace* (5) ROWLATT, J., again referred to s. 31 (6), of the Act of 1915 in relation to a firm called Messrs. Bernasconi. He said (6):

“I think this agent is assessable—he is not in receipt of the profits or gains, but I do not think he is a general commission agent within the meaning of this sub-s. (6). He is doing Messrs. Bernasconi’s entire business in most of their goods; he only has six other employers, and he has precluded himself from acting for any other manufacturer in goods that compete with Messrs. Bernasconi; and he gets commission, as was pointed out to me (and really it is not immaterial) from Messrs. Bernasconi on orders which customers place with Messrs. Bernasconi by going to Cernobbio where they live and giving these orders there. He is not a general commission agent. He is Messrs. Bernasconi’s agent, I think, clearly within the meaning of this subsection and it seems to me that he is also an agent and an authorised person carrying on the non-resident’s regular agency. I do not quite know what that means, but so far as Messrs. Bernasconi want things done in this country, this gentleman does them all including the posting on of the acceptances of the orders. I do not want to say too much about those words, they seem to me rather obscure, but I think this gentleman is not excluded by this subsection from being assessed . . .”

This decision was affirmed on appeal (7), where, however, this point did not arise. This passage seems to indicate that in deciding whether a man is a general commission agent one factor that must be considered is how many principals he has or is willing to have. On this footing, “general” seems to be used in relation to the agent holding himself out to the public. On the other hand, counsel for the Crown forcefully urged that “general” is used in relation to markets. Brokers, he said, have recognised markets, such as wool brokers, tea brokers, rubber brokers and the like. In the end, however, he somewhat shifted his ground, without abandoning any territory, and contended that the term “general commission agent” was inserted to cover (a) those who would be brokers if there were a recognised market for the goods in which they deal, and (b) those who deal in a broker-like way with several commodities but because of the generality of their dealings are not usually described as brokers. Further or alternatively, he submitted that “general” was used as meaning that the agent must have a generality of customers and not merely act for only one principal.

(4) (1926), 10 Tax Cas. at p. 746.

(5) (1928), 13 Tax Cas. 539 at p. 552.

(6) (1928), 13 Tax Cas. at p. 552.

(7) (1928), 13 Tax Cas. at p. 560.

**A** On the facts of the present case, counsel for the Crown accordingly said that the taxpayer company was not a general commission agent for two reasons. First, it did many acts uncharacteristic of brokers or general commission agents. He listed seven of these acts. (i) The taxpayer company paid the freight from New Zealand to the United Kingdom. (ii) The taxpayer company both arranged and paid for marine insurance; and neither of these activities, he pointed out, **B** was connected with the sale of the goods, but both were connected rather with their procurement. (iii) By inference, he said, at some stage it appeared that the taxpayer company held the bills of lading and so partook of the nature of factors rather than of brokers. (iv) Again by inference, he said, the taxpayer company delivered the bills of lading to the purchaser; and he pointed out that the sales were on c.i.f. terms. (v) The taxpayer company paid the New Zealand company the cost price of the goods and arranged with its bank for letters of credit in New Zealand. (vi) The taxpayer company apparently invoiced the customers itself, and also collected the money. (vii) After the transaction was completed the taxpayer company held the money for the Kaiapoi company on a general account, to be drawn on as the Kaiapoi company wished. Of these seven acts, he said, Nos. (iii), (iv) and (vi) were also to be found in *T. L. Boyd & Son, Ltd. v. Stephen* (8) which is reported with *Guazzi v. Mace* (8), to which **D** I have already referred. Secondly, counsel for the Crown pointed to the fact that ninety-five per cent. of the taxpayer company's turnover was for the Kaiapoi company; see para. 6 (d) of the Case and document 17. The taxpayer company was in fact, he said, little more than the Kaiapoi company's factotum: it did the whole of the English end of Kaiapoi's business, and was in no real sense of the word "general" in relation to its clientèle. **E**

Counsel for the taxpayer company, on the other hand, pointed out that in fact the taxpayer company acted for a substantial number of other principals, as documents 14 and 15 showed. For 1958-59 and for 1959-60 there were over twenty, and for 1960-61 over fifty. Even though the contribution of these other principals came to a mere five per cent. of the total turnover, neither their number **F** nor the number of the carcasses which they consigned to London was negligible. He also provided a general counter to the arguments of counsel for the Crown by saying that, where there is a commercial term such as "general commission agent" which is not a term of art, few tribunals could be better fitted to apply it than the Commissioners for the General Purposes of the Income Tax for the City of London; and he urged that time had not stood still since ROWLATT, J., had **G** considered the term.

Helpful though counsel have been, I do not find myself in a position from which I can advance with any great alacrity to the task of defining or explaining the term "general commission agent". I feel little temptation in the process of defining each of the words separately and then adding the bits together; for such an operation is notoriously unreliable, as, indeed, the Holy Roman Empire and the Lord Privy Seal have long testified. But I do derive some assistance from the context in which the expression is used. First, s. 373 (1) provides that "In this subsection, 'broker' includes a general commission agent". Parliament may, of course, do anything; but in the absence of any indication to the contrary, I begin with the assumption that when a statute provides that "'A' includes 'B'", "B" has a meaning which is ejusdem generis with "A", or at least appears **H** to be suitable for inclusion as an expanded form of "A". Whatever the urge to brevity, I would not expect "black" to be defined as including "white", nor the "United Kingdom" as including "Europe". Accordingly, I consider that a "general commission agent" must have sufficient broker-like qualities to make it reasonable for Parliament to provide that "broker" should include him. After all, brokers are essentially negotiators for commission.

Second, the general trend of the proviso is to confer exemption on non-residents

who merely employ brokers for broking in the ordinary way, even if they regularly employ the same one. The words "ordinary course of his business", "carrying on bona fide the business" and "a rate not less than that customary in the class of business in question" seem to me to be significant; in relation to broking the proviso is redolent of ordinariness. Third, the word "general" in the phrase "general commission agent" itself must have some import; and in the context I think that the most likely sense is that of a commission agent who holds himself out as being ready to work for clients generally, and who does not in substance confine his activities to one principal, or an insignificant number of principals. This, perhaps, is another facet of his broker-like qualities; he must be broker-like in his receipt of custom.

If that view is right, then in my judgment the only possible conclusion that the commissioners could reach on the primary facts found by them is that the taxpayer company was neither a broker nor a general commission agent. It did many acts not characteristic of brokers; and it was sadly lacking in generality of custom. Even the principals who contributed to the five per cent. of the taxpayer company's turnover did their business through the New Zealand company, who handled the carcasses in the same way as their own, and received the payments for them from the taxpayer company. I think that counsel for the Crown was right in his submission that the taxpayer company was little more than the English end of the Kaiapoi company's business, doing all that had to be done for that company, and far more than is truly broker-like. I do not think it is within either the letter or the spirit of the section that a non-resident should be able to escape taxation by virtue of the proviso if in substance what is done is that he carries on business within the United Kingdom through the medium of an agent who is virtually a sole agent, running the entire business for him and merely sending him remittances on request. In my judgment, such transactions fall outside an exemption intended for the protection of genuine transactions of a brokerage type. Accordingly, I reverse the decision of the commissioners so far as it relates to the agency assessments.

Finally, I must deal with a short point which counsel for the taxpayer company took with becoming diffidence. As I have mentioned, there is one assessment of £80,000 for 1956-57 in which the description of the income assessable is "agents", and the person assessed is described as the taxpayer company "as agents for" the Kaiapoi company. But, says counsel for the taxpayer company, the Kaiapoi company does not act as agent and has no income as such, and therefore that assessment must be bad. With a glance at counsel for the Crown, he then added that s. 514 (2) and (3) were not ample enough to preserve counsel for the Crown from this abyss. These subsections are as follows:

"(2) An assessment, charge, warrant or other proceeding which purports to be made in pursuance of this Act shall not be quashed, or deemed to be void or voidable, for want of form, or be affected by reason of a mistake, defect or omission therein, if the same is in substance and effect in conformity with or according to the intent and meaning of this Act, and if the person or property charged or intended to be charged or affected thereby is designated therein according to common intent and understanding.

"(3) An assessment or charge made upon an assessment shall not be impeached or affected (a) by reason of a mistake therein as to—(i) the name or surname of a person liable; or (ii) the description of any profits or property; or (iii) the amount of the tax charged; or (b) by reason of any variance between the notice and the certificate of charge or assessment."

Then there is a proviso which I need not read. However apt these provisions might be for minor deviations such as mis-spellings of names, slight inaccuracies in the descriptions of sources of income and the like, they could not, it is said, rescue assessments based on categorical departures in which names or sources of income were wholly misdescribed; and "agents" could by no feat of forensic dexterity



A be made to appear as merely a minor variation of "meat salesmen". That is the contention.

I shall not attempt an exegesis of the subsections. I would be slow to accept that they provide an impervious coverlet for gross errors. One may observe the form of para. (a) of sub-s. (3); what this saves from impeachment is a mistake in an assessment "as to" the name or surname of a person liable, and so on. This

B suggests that, for example, something recognisable as the true name of the person liable must appear in the assessment, and only if it does is any mistake as to that name cured by the subsection. Faulty spelling is an obvious example. I think the subsection would apply if "McGarry" appeared in place of "Megarry", as in other contexts it often has: but it would be otherwise if the substitute were "Allen" or "Goff". The likelihood of the recipient being deceived or misled

C would also be an important factor.

In the present case, however, counsel for the Crown points out that it would be wrong to divorce the word "agents", as the description of the income assessable, from the taxpayer company "as agents for" the Kaiapoi company, as the description of the person assessed: and, I would add, the reference to "£80,000" as the amount of the assessment should also be included. One may

D ask whether an assessment of £80,000 on the taxpayer company as agents for the Kaiapoi company is so gross and misleading an error as to be incapable of cure under s. 514 merely because the income assessable is described as "agents". In my judgment, one has only to ask the question for it to answer itself. The commissioners rightly gave short shrift to the taxpayer company's contention on this point: what I give, though longer in words, is shorter in spirit.

E *Appeal allowed.*

Solicitors: *Solicitor of Inland Revenue; Lovell, White & King* (for the taxpayer company).

[Reported by F. A. AMIES Esq., Barrister-at-Law.]

F

## DURHAM FANCY GOODS, LTD. v. MICHAEL JACKSON (FANCY GOODS), LTD. AND ANOTHER.

[QUEEN'S BENCH DIVISION (Donaldson, J.), May 3, 29, 1968.]

G *Company—Name—Use of name—Bill of exchange—Incorrect description of drawee company by drawer—Acceptance signed by director of drawee company on bill containing incorrect description—Whether director personally liable for amount of bill—Whether plaintiffs estopped from enforcing liability—Companies Act, 1948 (11 & 12 Geo. 6 c. 38), s. 108 (1) (c), (4).*

H The plaintiff company drew a ninety-day bill of exchange on a company whose correct name was "Michael Jackson (Fancy Goods), Ltd.", but which was referred to in the bill and the form of acceptance prepared by the plaintiff company as "M. Jackson (Fancy Goods), Ltd.". J., a director and the secretary of the drawee company at the time, signed the acceptance of the bill without correcting the error in the name of his company. The bill was dishonoured on maturity, J. having severed his connexion with the drawee company and it having gone into liquidation. In an action in which  
I it was sought to make J. personally liable on the bill by virtue of s. 108\* of the Companies Act, 1948,

**Held:** although the name attributed to the drawee company in the bill of exchange was a misdescription and J., by signing the bill on behalf of the drawee company, had contravened s. 108 of the Companies Act, 1948, and rendered himself personally liable under that section on the bill, the plaintiff company was estopped from enforcing that liability, since they themselves

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\* Section 108, so far as material, is set out at p. 989, letter H, post.

were responsible for the wrong description and had impliedly represented that they would treat acceptance in that form as being regular and not giving rise to personal liability (see p. 990, letter F, and p. 991, letter E, post).

Principle stated by LORD CAIRNS, L.C., in *Hughes v. Metropolitan Ry. Co.* ([1874-80] All E.R. Rep. 187 at p. 191) applied.

Per CURIAM: although the plaintiff company was estopped, the civil liability created by s. 108 would have been available to any other holder who was unaffected by the equitable defence (see p. 991, letter E, post).

[**Editorial Note.** It may be emphasised that there was no pre-existing contractual relationship between the director of the drawee company who signed the acceptance and the plaintiff company, so that the principle stated by LORD CAIRNS is extended in the present case to a non-contractual relationship (see p. 991, letter B, post).

As to the legal requirements regarding the use of a company's name on a bill of exchange, see 3 HALSBURY'S LAWS (3rd Edn.) 231, 232, para. 520; 429, para. 830, and for cases on the subject, see 1 DIGEST (Repl.) 747, 748, 2873-2881.

For the Companies Act, 1948, s. 108, see 3 HALSBURY'S STATUTES (2nd Edn.) 543.]

Cases referred to:

*Atkins & Co. v. Wardle*, (1889), 58 L.J.Q.B. 377; 61 L.T. 23; *affd.*, 5 T.L.R. 734; 9 Digest (Repl.) 530, 3493.

*Dawson Line, Ltd. v. Aktiengesellschaft Adler Für Chemische Industrie of Berlin*, [1931] All E.R. Rep. 546; [1932] 1 K.B. 433; 101 L.J.K.B. 57; 146 L.T. 187; 41 Digest (Repl.) 277, 955.

*Hughes v. Metropolitan Ry. Co.*, [1874-80] All E.R. Rep. 187; (1877), 2 App. Cas. 439; 46 L.J.Q.B. 583; 36 L.T. 932; 42 J.P. 421; 21 Digest (Repl.) 392, 1221.

*Penrose v. Martyr*, (1858), E.B. & E. 499; 28 L.J.Q.B. 28; 120 E.R. 595; 1 Digest (Repl.) 747, 2873.

*Sheffield Corpn. v. Barclay*, [1904-07] All E.R. Rep. 747; [1905] A.C. 392; 74 L.J.K.B. 747; 93 L.T. 83; 69 J.P. 385; 1 Digest (Repl.) 763, 2989.

*Stacey & Co., Ltd. v. Wallis*, (1912), 106 L.T. 544; 1 Digest (Repl.) 748, 2880.

*Tool Metal Manufacturing Co., Ltd. v. Tungsten Electric Co., Ltd.*, [1955] 2 All E.R. 657; [1955] 1 W.L.R. 761; Digest (Cont. Vol. A) 1250, 1872a.

### Action.

This was an action brought by Durham Fancy Goods, Ltd., on a bill of exchange, dated Sept. 18, 1967, drawn on the defendant company but in the name M. Jackson (Fancy Goods), Ltd., and signed by Mr. Michael Jackson, the second defendant, by way of acceptance of the bill. The defendant company was in compulsory liquidation. The facts are set out in the judgment.

*J. S. Hobhouse* for the plaintiffs.

*K. S. Rokison* for the second defendant, Mr. Michael Jackson.

The first defendants, the company, were not represented.

*Curr. adv. vult.*

May 29. DONALDSON, J., read the following judgment: This is a cautionary tale which should, perhaps, be required reading for all directors of companies.

Michael Jackson and Florence Jackson were the sole directors and shareholders of a Manchester company, Michael Jackson (Fancy Goods), Ltd., to whom I will refer as "Jacksons". Mr. Jackson was also the company secretary. Durham Fancy Goods, Ltd., the plaintiffs, a London company, had business dealings with Jacksons who, in the course of those dealings, were variously referred to as "Michael Jackson (Fancy Goods), Ltd.", their proper name, and as "M. Jackson (Fancy Goods), Ltd.". The nomenclature adopted at any particular point of time was fortuitous and devoid of significance to anyone concerned.

**A** On Sept. 18, 1967, the plaintiffs drew a ninety-day bill of exchange on Jacksons, no doubt in settlement of a business transaction. It was drawn on the printed letter paper of the plaintiffs and the following words were typed on the right hand side of the paper:

“£740 17s. 6d. 18.9.67. At 90 (ninety) days after date pay to our order the sum of seven hundred and forty pounds seventeen shillings and sixpence only for value received. For and on behalf of DURHAM FANCY GOODS, LTD.”

**B** Then there was a sixpenny stamp cancelled with an illegible signature, and the bill continued: “To: M. Jackson (Fancy Goods), Ltd., 263, Bury New Road, Manchester”. On the left hand side of the paper the following words were typed:

“Accepted payable: Westminster Bank, Ltd., 110, Regent Road, Salford,

**C** 5. For and on behalf of M. JACKSON (FANCY GOODS), LTD., Manchester.”

This was the form of the draft when it left the plaintiffs and when it was received by Jacksons. On receiving it, Mr. Jackson added his signature in the appropriate place, namely below the words “For and on behalf of M. Jackson (Fancy Goods), Ltd., Manchester” and returned the bill to the plaintiffs. The bill should have been honoured not later than Dec. 20, 1967, but before that date both Michael **D** Jackson and Florence Jackson sold all their shares in Jacksons and resigned from their respective positions as director/secretary and director. The bill was dishonoured on maturity and Jacksons are now in liquidation.

Thus far, I am confident, neither the plaintiffs, Jacksons nor Mr. Michael Jackson had ever given a thought to s. 108 of the Companies Act, 1948, if indeed any of them had ever heard of it. In this they were surely not alone. However, **E** that happy state did not continue and the plaintiffs, in reliance on the section, now contend that when Mr. Michael Jackson signed the form of acceptance prepared by them he committed a criminal offence punishable with a fine of up to £50 and, more important, he made himself personally liable on the bill. Exercising their new found knowledge of the law, they say that he should either have returned the bill to them with a request that they re-address it to Michael Jackson (Fancy **F** Goods), Ltd., and amend the form of acceptance or he should have accepted it “M. Jackson (Fancy Goods), Ltd., p.p. Michael Jackson (Fancy Goods), Ltd., Michael Jackson”.

Section 108 of the Companies Act, 1948, has a respectable pedigree which can be traced back at least as far as The Joint Stock Companies Act, 1856, but there has been no reported case on the topic for over half a century. The section, so far **G** as it is material, is in the following terms:

“108. (1) Every company— . . . (c) shall have its name mentioned in legible characters . . . in all bills of exchange . . . signed by or on behalf of the company . . . (4) If an officer of the company or any person on its behalf— . . . (b) . . . signs . . . on behalf of the company any bill of exchange . . . wherein **H** its name is not mentioned in manner aforesaid . . . he shall be liable to a fine not exceeding £50, and shall further be personally liable to the holder of the bill of exchange . . . for the amount thereof unless it is duly paid by the company.”

Counsel for Mr. Jackson submits that there was sufficient compliance with the section in the present case because (a) the bill made it clear that the acceptors **I** were a limited company and (b) there was no confusion as to their identity. In support of the first of these submissions he relied on *Penrose v. Martyr* (1), in which CROMPTON, J., stated that the purpose of the corresponding statutory provision

“was to prevent persons from being deceived into the belief that they had a security with the unlimited liability of common law, when they had but the security of a company limited . . .”



and on the judgment of SCRUTTON, J., in *Stacey & Co., Ltd. v. Wallis* (2), A affirming this view and deciding that "Ltd." was an acceptable abbreviation for "Limited". Unfortunately for Mr. Jackson, the second submission is unsupported by authority. Indeed it is contrary to the tenor of the decision of DENMAN, J., and of the Court of Appeal in *Atkins v. Wardle* (3). There the drawer of the bill was a shareholder in "The South Shields Salt Water Baths Company Limited" B but he drew on "Salt Water Baths Company Limited, South Shields" and the directors accepted on behalf of "South Shields Salt Water Baths Co." which was equally incorrect. No question of confusion as to identity or as to the status of the drawers as a limited liability company could have arisen. Nevertheless the directors were held to be personally liable, LORD ESHER, M.R., pointing out that the statute did not require the misdescription to be material.

Counsel for Mr. Jackson also submitted that just as "Ltd." was an acceptable C abbreviation for "Limited", so "M" was an acceptable abbreviation for "Michael". This I do not accept. The word "Limited" is included in a company's name by way of description and not identification. Accordingly a generally accepted abbreviation will serve this purpose as well as the word in full. The rest of the name, by contrast, serves as a means of identification and may be compounded of or include initials or abbreviations. The use of any abbreviation of D the registered name is calculated to create problems of identification which are not created by an abbreviation of "Limited". I should therefore be prepared to hold that no abbreviation was permissible of any part of a company's name other than "Ltd." for "Limited" and, possibly, the ampersand for "and". However it is not necessary to go as far as this. Any abbreviation must convey the full word unambiguously and the initial "M" neither shows that it is an abbreviation E nor does it convey "Michael".

I have therefore no doubt that Mr. Jackson committed an offence under s. 108 of the Act of 1948, although a court might well decide to impose no penalty. I have also no doubt that he is liable to the plaintiffs who are admitted to be the holders of the bill of exchange since this is what the statute says; but can the plaintiffs enforce that liability? That is a different question. F

This case is distinguished from all previous cases under the earlier statutory versions of the section in that here it was the holders of the bill of exchange who inscribed the words of acceptance, who chose the wrong words and who now seek to rely on their own error, coupled it is true with the defendant's failure to detect and remedy it, as entitling them to relief. Common sense and justice seem to me to dictate that they shall fail. If I am right, thus far I should be surprised if G the law compelled me to find in the plaintiffs' favour because, contrary to popular belief, the law, justice and common sense are not unrelated concepts.

In my judgment the principle of equity on which the promissory estoppel cases are based is applicable to and bars the plaintiffs' claim. This principle was formulated by LORD CAIRNS, L.C., in *Hughes v. Metropolitan Ry. Co.* (4), in these words: H

"... it is the first principle upon which all courts of equity proceed if parties, who have entered into definite and distinct terms involving certain legal results, certain penalties, or legal forfeiture, afterwards by their own act, or with their own consent, enter on a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or I held in abeyance, that the person who otherwise might have enforced these rights will not be allowed to enforce them where it would be inequitable, having regard to the dealings which have taken place between the parties."

The application of this principle has been the subject of criticism in relation to commercial transactions when there has been no more than acts of indulgence

(2) (1912), 106 L.T. 544.

(3) (1889), 58 L.J.Q.B. 377; *affd.*, (1889), 5 T.L.R. 734;

(4) [1874-80] All E.R. Rep. 187 at p. 191; (1877), 2 App. Cas. 439 at p. 448.

A 'see speech of Viscount SIMONDS in *Tool Metal Manufacturing Co., Ltd. v. Tungsten Electric Co., Ltd.* (5)), and there are various other limitations on its application in relation to statutory provisions (see 15 HALSBURY'S LAWS (3rd Edn.), p. 176, para. 345) but none of these considerations seems to me to apply to the present case.

B LORD CAIRNS in his enunciation of the principle assumed a pre-existing contractual relationship between the parties, but this does not seem to me to be essential, provided that there is a pre-existing legal relationship which could in certain circumstances give rise to liabilities and penalties. Such a relationship is created by (a) s. 108 of the Companies Act, 1948, (b) the fact that Mr. Jackson was a director of Jacksons and (c) whatever contractual arrangement existed between the plaintiffs and Jacksons which led to the plaintiffs drawing a ninety day bill on Jacksons. The relevant liability is to guarantee the payment of the bill at maturity, contingent on its being accepted by Mr. Jackson on Jacksons' behalf without mentioning their name on the bill. Against this background, the plaintiffs did not, as one would have expected, send the bill to Jacksons without words of acceptance, but instead inscribed words of acceptance including a name which was deceptively similar to, but not the same as, that of Jacksons. In saying that D the name was deceptively similar, I intend only to state what is an obvious fact and wish to emphasise that no deception was intended by the plaintiffs. The plaintiffs thereby implied that acceptance of the bill in that form would be, or would be accepted by them as, a regular acceptance of the bill. Such an acceptance would not, of course, have involved Mr. Jackson in personal liability. In these circumstances it would be inequitable that the plaintiffs should be allowed E to enforce the statutory liability of Mr. Jackson without first giving him an opportunity of regularising the acceptance by inscribing the correct name of Jacksons on the bill and that it is now too late to do. Accordingly the plaintiffs are unable to enforce the statutory liability, although it continues to exist and would have been available to other holders, who were unaffected by the equitable defence.

I have been tempted to explore the possibility that the same result could be F reached without the intervention of equity by the application of the common law principle that when an act is done by one person at the request of another—a bill is accepted by Mr. Jackson in a special form at the request of the plaintiffs—and the act is not manifestly tortious to the knowledge of the person doing it and such an act turns out to be injurious, the person doing it is entitled to an indemnity from him who requested that it should be done (see *Sheffield Corpn. v. Barclay* (6), per THE EARL OF HALSBURY, L.C., and *Dawson Line, Ltd. v. Aktiengesellschaft Adler Für Chemische Industrie of Berlin* (7), per SCRUTTON, L.J.). The existence of such an implied indemnity would give rise to a defence of circuity of action. However, the point not having been argued, I must and do resist the temptation.

H For the reasons given, I consider that the plaintiffs' claim fails. Had it succeeded, I should have had to consider a claim by the plaintiffs for interest and should have awarded simple interest on the sum claimed from Dec. 20, 1967, until judgment at a rate of one per cent. in excess of the Bank of England official discount rate from time to time in force during this period.

[HIS LORDSHIP dismissed the action against Mr. Michael Jackson, and made no order in respect of the company, which was in compulsory liquidation, in I view of s. 231 of the Companies Act, 1948.]

Solicitors: *Parker, Thomas & Co.* (for the plaintiffs); *Nabarro, Nathanson & Co.*, agents for *Ralph Aubrey, Snowise, Tynas & Seddon*, Manchester (for the second defendant, Mr. Michael Jackson).

[Reported by MARY COLTON, Barrister-at-Law.]

(5) [1955] 2 All E.R. 657 at p. 660.

(6) [1904-07] All E.R. Rep. 747 at p. 750; [1905] A.C. 392 at p. 397.

(7) [1931] All E.R. Rep. 546 at p. 549; [1932] 1 K.B. 433 at p. 439.

**NOTE.****R. v. UXBRIDGE JUSTICES, *Ex parte* CLARK.**

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Waller and Fisher, JJ.), May 23, 1968.]

*Magistrates—Jurisdiction—Functus officio—Sentence passed—Invalid sentence—Whether magistrates had jurisdiction to substitute valid sentence—Sentence substituted by Divisional Court on application for certiorari—Administration of Justice Act, 1960 (8 & 9 Eliz. 2 c. 65), s. 16—Criminal Justice Act 1967 (c. 80), s. 39.*

[As to suspended sentences, see SUPPLEMENT TO 10 HALSBURY'S LAWS (3rd Edn.) para. 922A, 1.

For the Criminal Justice Act 1967, s. 39, see 47 HALSBURY'S STATUTES (2nd Edn.) 394.]

**Cases referred to:**

*R. v. Marsham, Ex p. Pethick Lawrence*, [1911-13] All E.R. Rep. 639; [1912] 2 K.B. 362; 81 L.J.K.B. 957; 107 L.T. 89; 76 J.P. 284; 14 Digest (Repl.) 392, 3817.

*R. v. Willesden Justices, Ex p. Utley*, [1947] 2 All E.R. 838; [1948] 1 K.B. 397; [1948] L.J.R. 394; 112 J.P. 97; 16 Digest (Repl.) 536, 3767.

**Application.**

The applicant, Kevan Hugh Clark, was sentenced by a district court-martial in Germany to 112 days' detention. On Mar. 28, 1968, the Uxbridge justices imposed on him a sentence of six months' imprisonment for an offence of obtaining £27 15s. by false pretences. Application was now made on behalf of the applicant by motion for certiorari to quash the sentence of six months' imprisonment on the ground that the justices had been bound to make an order suspending the sentence, and the question arose for determination whether the justices were functus officio or could substitute a suspended sentence.

*M. Hill* for the applicant.

The respondent was not represented.

**LORD PARKER, C.J.:** 'The justices announced their sentence of six months' imprisonment believing that they had power to do so. Having done that they were reminded that under the Criminal Justice Act 1967 (1), since the only detention had been pursuant to a district court-martial in Germany when he was ordered to serve 112 days' detention, the sentence of six months had to be suspended. There was then an argument whether the justices having realised they had given an illegal sentence were functus officio or could substitute a proper sentence. They were asked to adjourn so that an application could be made to this court, which has been done.

This court is quite satisfied that the justices were in fact functus officio and that the present case comes within the line of cases of which *R. v. Willesden Justices, Ex p. Utley* (2) is one, rather than the case to which the justices refer of *R. v. Marsham, Ex p. Pethick Lawrence* (3), the reason being that in the former case there had been a perfectly proper hearing, whereas in the latter case the hearing itself had been a nullity. As the result of s. 16 of the Administration of Justice Act, 1960, this court has now power to substitute a valid sentence rather than what

(1) See s. 39 of the Criminal Justice Act 1967.

(2) [1947] 2 All E.R. 838; [1948] 1 K.B. 397.

(3) [1911-13] All E.R. Rep. 639; [1912] 2 K.B. 362.



A theretofore had been necessary to quash the whole conviction. In all the circumstances this court will substitute a sentence of six months suspended for two years.

*Suspended sentence substituted.*

Solicitors: *A. H. Kurtz & Co.* (for the applicant).

B [Reported by N. CHINIVASAGAM, ESQ., *Barrister-at-Law.*]

## SCOTT v. BAKER.

C [QUEEN'S BENCH DIVISION (Lord Parker, C.J., Waller and Fisher, JJ.), May 14, 1968.]

*Road Traffic—Driving with blood-alcohol proportion above prescribed limit—Evidence—Provision of specimen—Breath test—Device by means of which test carried out to be approved by Secretary of State—Whether maxim omnia praesumuntur rite esse acta sufficient to establish prima facie case—Road Safety Act 1967 (c. 30) s. 1 (1), s. 2 (4), (7), s. 7 (1).*

D A police constable stopped a motor car driven by the respondent, having formed the opinion that it was exceeding the speed limit. The respondent's breath smelt of alcohol, so the constable asked him to submit to a breath test in accordance with s. 2 (1)\* of the Road Safety Act 1967. The respondent  
E consented to the test, which proved positive, whereupon the constable arrested him under s. 2 (4)\* of the Act of 1967. He was taken to a police station where, in accordance with s. 2 (7)\* of the Act of 1967, he was offered and consented to take a second breath test, which also proved positive. A blood specimen was thereupon taken in accordance with s. 3 (1)† of the Act of 1967, which on analysis, was shown to contain alcohol in excess of the  
F prescribed limit. On an information against the respondent that he drove a motor car having consumed alcohol in such a quantity that the proportion in his blood exceeded the prescribed limit, contrary to s. 1 (1)‡ of the Act of 1967, the justices upheld a submission on behalf of the respondent that there had been no proof by the prosecution that the device used by the  
G constable was of a type which had the approval§ of the Secretary of State which was required by s. 7 (1) of the Act of 1967|| and dismissed the information. On appeal by the prosecutor, it being conceded that Home Office circular 157/1967 on Part 1 of the Road Safety Act 1967 was not admissible as evidence of approval of the device used to test the respondent's breath,

**Held:** the information had been rightly dismissed for the following reasons—

H (i) where a person was charged with an offence against s. 1 of the Road Safety Act 1967 (of which he could be guilty only if the excessive alcohol proportion in his blood were ascertained from a specimen provided under s. 3) the offence was not established unless it was shown that the specimen had been provided in accordance with s. 3 (see p. 998, letter G, p. 1000, letter G, and p. 1001, letter G, post).

I (ii) in the circumstances of the present case a specimen was not provided in accordance with s. 3 unless the person had been arrested in accordance with s. 2 (4), viz., after a first breath test, and unless he had been given

\* Section 2, so far as material, is set out at p. 996, letters F to I, post.

† Section 3 (1), so far as material, is set out at p. 997, letter A, post.

‡ Section 1 (1), so far as material, is set out at p. 997, letter C, post.

§ See now the Breath Test Device (Approval) (No. 1) Order 1968 and the Breath Test Device (Approval) (No. 2) Order 1968.

|| Section 7 (1), so far as material, is set out at p. 997, letter D, post.

opportunity in accordance with s. 2 (7) to have a second breath test; for which purposes the breath test must have been carried out by means of a device of a type approved by the Secretary of State (see p. 998, letter E, p. 1000, letter G, and p. 1001, letter G, post), and

(iii) in the present case it was not established as a fact that the device was of an approved type (see p. 998, letter A, p. 1000, letter G, and p. 1001, letter G, post), and the presumption *omnia praesumuntur rite esse acta* did not so apply as to enable a *prima facie* case to be established in a criminal prosecution merely by showing that breath test devices had been issued to the police and that the device used in the present case was a device so issued, when the question of approval was raised in defence (see p. 999, letters D and F, p. 1000, letter F, and p. 1001, letters E and G, post).

*Boyd-Gibbins v. Skinner* ([1951] 1 All E.R. 1049) distinguished.  
Appeal dismissed.

[**Editorial Note.** Although the device is now approved by two short orders (The Breath Test Device (Approval) (No. 1) Order 1968, which approves the device known as the Alcotest supplied to police forces in England and Wales and the Breath Test Device (Approval) (No. 2) Order 1968, which approves the same device supplied to members of the provost staff (as defined in s. 6 (3) of the Road Safety Act 1967), which identify the device approved, the ratio decidendi in the present case on the effect of the requirement in s. 1 (1) of the Road Safety Act 1967 that the proportion of alcohol in the accused's blood be ascertained from a specimen provided under s. 3 remains generally applicable, with the consequence that, where s. 3 (1) applies, conditions for arrest under s. 2 must be shown to be satisfied before the offence is established. This reasoning, of course, is applicable to the particular offence created by s. 1 (1) of the Road Safety Act 1967; but it would not be applicable where the charge was laid under the previously existing statute law which created the offence of driving while unfit to drive through drink (Road Traffic Act, 1960, s. 6); see p. 998, letter F, post.

As to the offence of driving a motor vehicle with an undue proportion of alcohol in blood, see SUPPLEMENT to 33 HALSBURY'S LAWS (3rd Edn.), para. 1061A, 1.

For the Road Safety Act 1967, s. 1, s. 2, s. 3 (1), s. 7, see 47 HALSBURY'S STATUTES (2nd Edn.) 1554, 1556, 1558 and 1562.]

Cases referred to:

*Boyd-Gibbins v. Skinner*, [1951] 1 All E.R. 1049; 115 J.P. 360; sub nom.

*Gibbins v. Skinner*, [1951] 2 K.B. 379; 45 Digest (Repl.) 32, 106.

*Swift v. Barrett*, (1940), 163 L.T. 154; 104 J.P. 239; 45 Digest (Repl.) 35, 118.

### Case Stated.

This was a Case Stated by justices for the county of Leicester in respect of their adjudication as a magistrates' court sitting at Loughborough on Jan. 24, 1968. On Dec. 5, 1967, the respondent, Alan Victor Baker, was charged by the appellant, John Kevin Scott, a chief inspector of police, that, on Nov. 12, 1967, he drove a motor car on Leicester Road, Loughborough, in the county of Leicester, having consumed alcohol in such a quantity that the proportion in his blood exceeded the prescribed limit, contrary to s. 1 of the Road Safety Act 1967 (hereafter called "the Act"). Evidence was adduced on behalf of the appellant in support of the following facts. On Nov. 12, 1967, a constable on Leicester Road, Loughborough (which was a public highway situate in a built up area), stopped a car driven by the respondent, having formed the opinion that its speed exceeded thirty miles per hour. Since the respondent's breath smelt of alcohol, the constable asked him to submit to a breath test; he consented to the test which proved positive. The device used was deposited to have been an "Alcotest 80" as manufactured by Draeger Normalair, Ltd. The respondent was arrested under s. 2 of the Act and taken to Loughborough police station where he was offered, and consented to take, a second breath test on a device deposited to have been similarly

A named which also proved positive. In consequence, a blood specimen was duly taken from him by a doctor which, on analysis, was shown to contain alcohol in excess of the prescribed limit. Police Inspector George deposed that in the custody of the office of the chief constable of the Leicester and Rutland constabulary lay a circular letter purporting to have issued from the Home Office and to be addressed to chief constables which he produced from such custody.

B Paragraph 44 of the Schedule thereto stated that the "Alcotest" device had been approved by the Secretary of State, and para. 45 expressed the view that the notification to chief constables by circular of such approval should be sufficient evidence thereof.

After the appellant had closed his case, it was submitted to the justices on behalf of the respondent that the evidence so adduced was insufficient in law to support a conviction on the information in that: (i) a "breath test" was defined in s. 7 (1) of the Act of 1967 as a test "... by means of a device of a type approved for the purpose of such a test by the Secretary of State ...". The Act was a penal Act which involved the liberty of the subject and strict proof of approval (the onus whereof lay on the prosecution) was a pre-requisite of conviction. The circular to chief constables by itself had no evidential value; (ii) s. 1 of the Act created a criminal offence if the respondent had driven having in his blood a higher concentration of alcohol than the prescribed limit, such concentration having been ascertained by means of a laboratory test on a specimen provided under s. 3 of the Act. Such specimen of blood or urine might be required under s. 3 of the Act from him, if, having been arrested in conformity with s. 2 (1) (b) and (4) of the Act, he had previously been given an opportunity at the police station to provide a specimen of breath for a breath test under s. 2 (7) of the Act. It was clear that only if that procedure had been adopted might the specimen be required of him under s. 3 of the Act, and a specimen otherwise obtained was not "a specimen provided under s. 3 of the Act"; (iii) in default of proper proof that the devices used in the present case (and in particular that device used at the police station) were of an approved type, the justices were not entitled to convict on the bare ground that, in a blood specimen taken from the respondent, there was found to be an alcohol content in excess of the prescribed limit, for the specimen would not then be a specimen "provided under s. 3". It was submitted to the justices on behalf of the prosecutor that—(a) the blood specimen contained an excess of alcohol over the prescribed limit. It, therefore, mattered not whether the devices used for the breath tests were, or were not, of an approved type, because the very existence of such an excess made irrelevant any reference to the preliminaries which ought to have led to the taking of the sample. There were numerous precedents for the admission of evidence obtained where procedural pre-requisites were unproved or had been disregarded; (b) the justices should assume from the fact of its issue to and use by the police that the type of device had been in fact duly approved, and no supporting evidence of approval needed to be adduced at all. In the alternative sufficient publicity had been given to the device for them to take judicial notice of its approval; (c) if, per contra, any proof at all were required, it was sufficiently evidenced and was proved to the justices by the production of the circular letter from its proper custody; (d) the Act contained no guidance, and the Secretary of State was entitled to indicate his approval of a type of device in any way that he chose.

I

On the conclusion of the argument and before the justices adjudicated on the submission (being conscious of the serious inconveniences which would flow should it be well founded), they invited the prosecution to consider whether, in the light of the submission, an adjournment should be requested so as to enable any further or better evidence of approval of the type of device to be adduced; because the justices considered that, since the alleged want of proof touched only a formal matter, the prosecution would be entitled to an adjournment for that purpose, notwithstanding that they had closed their case. An adjournment was not requested,



but the prosecution asked the justices to adjudicate. The justices adjourned to consider their decision. On Jan. 31, 1968, no application was made to the justices by the appellant's solicitor to adduce any further evidence that the type of device had been approved before they had adjudicated. The justices informed the parties that it then appeared that, in the files of their court, had for some time lain another document purporting to be a circular letter, No. 157/1967, addressed to clerks of assize, clerks of the peace and to justices clerks from the Home Office, wherein para. 39 stated that the "Alcotest" device supplied by Draeger Normalair, Ltd. had been approved by the Secretary of State; and since the existence of this circular letter had not been within their knowledge or that of the parties at the former hearing, they invited the parties to argue whether or not they must, or should, or could then take cognisance of it, and what (if they did) was its probative value (if any). The prosecutor stood on his former reply. It was submitted for the respondent that if (which he contested) the justices were entitled to take cognisance of that circular letter at that stage of the proceedings or at all, its production fell as short as did that of the other circular letter (a first circular letter to, among others, clerks to justices) of constituting that proper evidence of approval which was an essential pre-requisite of conviction, and, that in fact the second circular letter in an evidential sense proved nothing\*.

The justices dismissed the information, and the appellant now appealed.

The authority, statutes and cases noted below† were cited during the argument in addition to the cases referred to in the judgments.

*A. W. M. Davies, Q.C.*, and *E. M. Ogden, Q.C.*, for the appellants.

*Geoffrey Howe, Q.C.*, and *F. B. Smedley* for the respondents.

**LORD PARKER, C.J.:** Before dealing with the facts of this case, it is, I think, convenient to look at the relevant provisions of the Road Safety Act 1967. I begin with s. 2, which, so far as material, provides:

"(1) A constable in uniform may require any person driving or attempting to drive a motor vehicle on a road or other public place to provide a specimen of breath for a breath test there or nearby, if the constable has reasonable cause . . . (b) to suspect him of having committed a traffic offence while the vehicle was in motion . . .

"(3) A person who, without reasonable excuse, fails to provide a specimen of breath for a breath test under either of the two foregoing subsections shall be liable on summary conviction to a fine not exceeding £50.

"(4) If it appears to a constable in consequence of a breath test carried out by him on any person under sub-s. (1) or (2) of this section that the device by means of which the test is carried out indicates that the proportion of alcohol in that person's blood exceeds the prescribed limit, the constable may arrest that person without warrant . . .

"(5) If a person required by a constable under sub-s. (1) or (2) of this section to provide a specimen of breath for a breath test fails to do so and the constable has reasonable cause to suspect him of having alcohol in his body, the constable may arrest him without warrant . . .

"(7) A person arrested under this section or under . . . s. 6 (4) [of the Road Traffic Act, 1960] shall, while at a police station, be given an opportunity to provide a specimen of breath for a breath test there . . ."

\* Reliance was placed on the dictum of LORD HEWART, C.J., in *Peagram v. Peagram* ([1926] 2 K.B. at p. 180).

† ARCHBOLD'S CRIMINAL PLEADING EVIDENCE AND PRACTICE (36th Edn.) para. 1156; Children and Young Persons Act, 1933, s. 79; Exchange Control Act, 1947, s. 37; *Jones v. Owen*, (1870), 34 J.P. 759; *Duffin v. Markham*, (1918), 82 J.P. 281; *Peagram v. Peagram*, [1926] All E.R. Rep. 261; [1926] 2 K.B. 165; *Kuruma Son of Kanari v. Reginam*, [1955] 1 All E.R. 236; [1955] A.C. 197; *R. v. Mitten*, [1965] 2 All E.R. 59; [1966] 1 Q.B. 10; *Royal v. Prescott-Clarke*, [1966] 2 All E.R. 366.

**A** Section 3 (1) of the Act of 1967 provides that:

" A person who has been arrested under the last foregoing section or s. 6 (4) of the [Road Traffic Act, 1960] may, while at a police station, be required by a constable to provide a specimen for a laboratory test (which may be a specimen of blood or of urine), if he has previously been given an opportunity to provide a specimen of breath for a breath test at that station under sub-s. (7) of the last foregoing section, and . . . (a) it appears to a constable in consequence of the breath test that the device by means of which the test is carried out indicates that the proportion of alcohol in his blood exceeds the prescribed limit . . . "

Finally, so far as Part I is concerned, s. 1 (1) provides that:

" If a person drives or attempts to drive a motor vehicle on a road or other public place, having consumed alcohol in such a quantity that the proportion thereof in his blood, as ascertained from a laboratory test for which he subsequently provides a specimen under s. 3 of this Act, exceeds the prescribed limit at the time he provides the specimen, he shall be liable . . . "

and so on. Section 7 (1) provides that:

" . . . ' the prescribed limit ' means 80 milligrammes of alcohol in 100 millilitres of blood or such other proportion as may be prescribed by regulations made by statutory instrument by the Minister ",

and " breath test " is defined in s. 7 (1) as

" a test for the purpose of obtaining an indication of the proportion of alcohol in a person's blood carried out, by means of a device of a type approved for the purpose of such a test by the Secretary of State, on a specimen of breath provided by that person."

What happened in the present case was that on Nov. 12, 1967, a constable in Loughborough stopped a motor car driven by the respondent, having formed the opinion that its speed exceeded thirty miles an hour. The respondent's breath smelt of alcohol, so the constable asked him to submit to a breath test; that he was entitled to do under s. 2 (1) which I have just read. He consented to the test, which proved positive. Thereupon, the constable, again as he was entitled to do under s. 2 (4), arrested the respondent; he was taken to a police station, and there he was offered and consented to take a second breath test, which also proved positive. Accordingly, s. 2 (7) was apparently complied with. Thereupon, a blood specimen was duly taken from the respondent by a doctor, which on analysis was shown to contain alcohol in excess of the prescribed limit. Those were the facts of this case, save that the constable deposed that the device used was known as an " Alcotest 80 " as manufactured by Draeger Normalair, Ltd. It was in those circumstances that, at the end of the prosecution case, the respondent's solicitor submitted to the justices that the evidence so adduced was insufficient to support a conviction, because, and this is the whole point, it was said that there had been no proof by the prosecution that the device in fact used by the constable was of a type which had been approved by the Secretary of State as provided in s. 7 (1). An adjournment was offered but refused by the prosecution.

That submission made on behalf of the respondent was challenged by the prosecution on three grounds: it was first of all said that there was proof of approval by the Secretary of State because a circular had been sent out from the Home Office purporting to have been made by the direction of the Secretary of State, which, in reference to s. 7, stated:

" One device has so far been approved by the Secretary of State, namely ' Alcotest ', supplied by Draeger Normalair, Ltd. of Blyth, Northumberland."

The circular then went on in circumstances which are somewhat naive to say:

"The notification to chief officers by circular that the Secretary of State has approved a particular device for the purpose of the Act should be sufficient evidence of the approval if this is required for court proceedings."

I say that that was a little naive because it is now conceded, and properly conceded, that this circular is not admissible at all as evidence of the approval, if any, by the Secretary of State. A similar circular in fact was sent to all courts of assize, quarter sessions and justices of the peace; but, equally, it is conceded that that is no evidence of the approval of the device used by the police officer.

The second point taken, though not in the order put forward, was really this, that the offence created by s. 1 was having in the blood a proportion of alcohol which exceeded the prescribed limit. Undoubtedly that was the case here; no challenge was made to the analysis, and the analysis clearly showed a proportion of alcohol in the blood which did exceed the prescribed limit. Accordingly, it was submitted to the justices and has been submitted to us here today that, that being the offence, it matters not if it be the fact that the preliminary tests, the breath tests, were not carried out lawfully in the sense that the device was not approved by the Secretary of State. Counsel for the appellant has referred us to cases which make it clear that evidence may be admissible notwithstanding that it has been obtained by improper means; but here it is not a question of admissibility but of construing s. 1, which itself creates the offence. That section provides that it shall only be an offence if the person drives a motor vehicle having consumed alcohol which is later shown to exceed the prescribed limit on the provision of a specimen under s. 3. If one goes to s. 3, it will be seen that there can, so far as the present case is concerned, be no provision of a specimen (1) under s. 3 unless the person has been arrested under s. 2 (4), which in turn can only be made after what I may call the first breath test; and, secondly, the specimen can only be provided if the person has been given an opportunity under s. 2 (7) to have a second breath test. It seems to me quite impossible to argue that a specimen was properly provided under s. 3, as it has to be before there is an offence, unless those matters have first been complied with. It may, of course, well be that, in the case of the principal Act, the Road Traffic Act, 1960, where a person has been charged, not of having a proportion of alcohol in his breath exceeding the prescribed limit but of driving when he is unfit to drive through alcohol, that the specimen provided then can be used, and properly used, to prove the offence, notwithstanding that there have been no breath tests prior thereto at all. But, so far as this offence is concerned, the offence created by s. 1 of the Act of 1967, I am quite clear that, before a person can be convicted, it must be shown that the specimen has been provided as laid down in s. 3.

The third point raised before the justices, and again taken before this court, was that, in fact, there was *prima facie* evidence at the end of the prosecution case that the device used by the constable in this case was a device of a type so approved. In order to substantiate that, that there was such *prima facie* evidence, counsel for the appellant has urged us to apply the well-known principle, and I need not deal with it in full, of *omnia praesumuntur rite esse acta*. He urges that here we have the Secretary of State, and nobody could suggest that he had not been validly appointed, a public officer charged with the power, and I would concede the duty, if the Act of 1967 is to be administered, of approving a device. Secondly, one finds officers of police throughout the country issued, and as the justices say this is notorious, with devices. Accordingly, it is said that, applying the presumption to which I have referred, the only proper inference is that

(1) On May 17, 1968, LORD PARKER, C.J., at the sitting of the court referred to this passage in his judgment in *Scott v. Baker* and stated that the reference to a specimen being only properly obtained under s. 3 of the Act of 1967 if the accused had been arrested under s. 2 (4) should not be read as an exclusive statement. It applied only to the particular facts in *Scott v. Baker*, and a specimen could properly be taken if the accused had been arrested under s. 2 (5) of the Act of 1967 or s. 6 (4) of the Road Traffic Act, 1960.



A prima facie the Secretary of State had approved this device. I think, for myself, that one ought to take very great care in a criminal case as to the length one goes in applying that presumption. It is important to see where one gets to. If I may for the moment go back to s. 2 (3), the subsection which makes it an offence without reasonable excuse to fail to provide a specimen of breath for a breath test on the spot, is it really to be said that without any proof it is to be presumed that the device which a constable has used has been approved by the Secretary of State? Counsel for the appellant has urged that different principles may apply in considering the offence under s. 2 (3) and that created by s. 1 (1). He would say in regard to the former that the approval by the Secretary of State was, as he puts it, central to the offence, whereas in dealing with s. 1 it is only in relation to a preliminary matter. In my judgment, that really brings one back to the argument to which I have previously referred, and if, as I think, it is fundamental to the offence created by s. 1 that there should have been valid breath tests, and a valid arrest, before a specimen of blood or urine is provided, then, as it seems to me, the approval of the Secretary of State is just as central to that offence as it is to the offence created by s. 1 (3).

When one analyses this question, one is faced with this: is it sufficient to raise a prima facie case of an offence under s. 1 (1) to point to s. 7 (1) of the Act of 1967, where a public officer is charged with a duty, and then to turn to the facts that breathalysers have been issued to the police, and that the constable on this occasion used a breathalyser so issued to him? In answering that question, I think that one should put out of one's mind, so far as it is possible, any repercussions which this decision might have in regard to those convicted of this offence in the early days. I say "in the early days" because steps have been taken, certainly on Feb. 9, 1968, and later, whereby the Secretary of State has sought to provide machinery whereby his approval can be adduced in evidence (2). I am not for my part making any ruling as to those who have been convicted prior to Feb. 9, 1968; it may well be that if, as is likely in most cases the point has never been taken at all, that will amount to an admission by the defence that the Secretary of State has approved the device in issue. Indeed, I think that that would be the natural inference if no point is taken. If, however, in any of those cases, as here, the point was taken, in other words, that there is an issue raised whether the device in question had been approved, then, as it seems to me and despite counsel for the appellants' argument, something more remains to be done, and that is to prove other than by way of a rebuttable presumption, because the presumption has been challenged, that approval was given to the type of device used.

There is not very much authority on this point, but the court has looked with some care at a decision of the Divisional Court, *Boyd-Gibbins v. Skinner* (3), a case which raised much the same sort of point as here. In that case, the defendant was convicted on an information preferred under s. 10 of the Road Traffic Act, 1930, which charged him with driving a motor car on a road in a built up area at a speed exceeding thirty miles an hour. Under the Road Traffic Act, 1934, s. 1 (1), it was provided that a length of road shall be deemed to be a road in a built up area:

"(a) If a system of street lighting furnished by means of lamps placed not more than two hundred yards apart is provided thereon, . . . or (b) if a direction that it shall be deemed to be a road in a built up area is in force under this section; and not otherwise."

In fact, there was on the street in question no system of street lighting. Therefore, it was only a built up road, and an offence could only be committed if in fact a direction was in force that it should be deemed to be a road in a built up area.

(2) See the Breath Test Device (Approval) (No. 1) Order 1968, made on Feb. 9, 1968, and the Breath Test Device (Approval) (No. 2) Order 1968, made on Mar. 13, 1968.

(3) [1951] 1 All E.R. 1049; [1951] 2 K.B. 379.

On appeal to quarter sessions, quarter sessions allowed the appeal on the basis that it had not been proved that there was such a direction in force. On appeal by way of Case Stated to this court, the court allowed the appeal and remitted the Case to the justices, holding that there was in all the circumstances *prima facie* evidence that such a direction was in force. What had happened in that case was that, on this section of road, traffic signs had been put up; they were traffic signs of a type authorised by the Minister, and, further, by s. 1 (7) of the Act of 1934, it was the duty of the local authority to erect and maintain proper traffic signs in such positions as might be requisite in order to give effect to general or other directions given by the Minister for the purpose of securing that adequate guidance was given to drivers of motor vehicles, and so on. What this court held in that case was that the fact that there had been erected on this part of the road authorised traffic signs, the erection having taken place in fulfilment of the local authority's duty, raised *prima facie* evidence that this was a built up area. **SELLERS, J.**, added this in a short judgment (4):

"Therefore, there are two authorities who are responsible [referring there to the Minister and the local authority] for putting up these necessary signs giving guidance to drivers. In those circumstances, . . . the signs in themselves provide sufficient *prima facie* evidence of the road being deemed to be in a built up area."

In my judgment, if one acceded to counsel for the appellant's argument in the present case, it would mean going further than this court went in *Boyd-Gibbins v. Skinner* (5). The facts, as it appears to me, of *Boyd-Gibbins v. Skinner* (5) are clearly different from the facts of this case in that there was a statutory duty on the local authority to erect signs, and signs were erected in pursuance of that statutory duty. In my judgment, it would be going a very long way in the present case to say that, because the police as public officers should act properly in the administration of the Act of 1967, therefore one can eliminate any question of mistake and assume that they are using a device which has properly been approved by the Secretary of State. After all, until the order of Feb. 9, 1968, nobody knew what, if any, device the Secretary of State had in fact approved. Bearing in mind that this is a criminal case, it seems to me that it would be going much too far to press the presumption of *omnia praesumuntur* to the length of saying that there was a *prima facie* case here that the device used was of a type approved by the Secretary of State. I think that the justices, in their very careful judgment and reasoning, came to a correct conclusion and I would dismiss this appeal.

**WALLER, J.:** I agree. I would only add this because at one time I did feel misgivings about the effect of *Boyd-Gibbins v. Skinner* (5) that the line to be drawn seems to me to be a fine one. In *Boyd-Gibbins v. Skinner* (5), there was cited in favour of the argument for the appellant *Swift v. Barrett* (6). That was a case where a driver was charged with contravening s. 49 of the Road Traffic Act, 1930, by failing to conform to the direction given by a traffic sign, and where the prosecution had not proved that the sign was of the prescribed size, colour and type. The motor driver had been convicted and on appeal to this court the appeal was allowed. **HILBERY, J.**, one of the members of the court saying (7):

"According to the Case Stated, all that was proved by the prosecution was that there was placed on or near the road in question a sign for regulating the movement of traffic, namely a 'Halt at major road ahead' sign . . . The offence which they were charging was not merely that the appellant had disregarded a 'Halt at major road ahead' sign, which does not of itself

(4) [1951] 1 All E.R. at p. 1052; [1951] 2 K.B. at p. 387.

(5) [1951] 1 All E.R. 1049; [1951] 2 K.B. 379.

(6) (1940), 163 L.T. 154.

(7) (1940), 163 L.T. at p. 154.

A constitute an offence. The appellant was charged with having disregarded such a sign which had been lawfully placed on or near the road. There was a breakdown in the chain of evidence, which could easily have been repaired by the production of the regulation under which the sign was placed on or near the road, and the testimony of a constable that the sign had been placed at the particular spot was in accordance with the regulation. There was no  
B practical difficulty in supplying the link in the chain, but, having omitted to supply it, the prosecution should have failed."

In *Boyd-Gibbins v. Skinner* (8), which was decided in the opposite way, namely, that there was a presumption, it seems to me that there were three differences, firstly, as LORD PARKER, C.J., has already pointed out, the duty was cast both on the local authority and on the Minister in that case; secondly, it was a case  
C where it was obvious to the public passing by that there were the two signs indicating that there was a speed limit; and, thirdly, and this clearly was a matter which influenced LORD GODDARD, C.J., it would have been a very grave inconvenience to everybody who was ever prosecuted under that regulation if evidence had to be called for local authorities to prove the precise position of a particular piece of road. The inconvenience to other defendants would have been great, and those  
D matters appear to have influenced the court in coming to the conclusion which they did. In this case there was no duty; in this case, if one asks oneself at the end of the prosecution case whether there is a *prima facie* case that a device of the type approved for the purpose of such test by the Secretary of State was used, one is left in a state of complete doubt, one's mind not moving one side or the other of doubt, there being no *prima facie* case one way or the other. In my  
E view, therefore, for that reason I agree with what LORD PARKER, C.J., has already said.

I would only add this on the question of the repercussions of this case. It does seem to me that this question only arises where it has been clearly raised before the justices. In this case, a great point was made before the justices that this particular question had not been proved, and it does appear to me that there will  
F not be much comfort to be derived from this case to those who have already been convicted of this offence under the law as it was up to Feb. 7, 1968, unless this specific issue was raised.

FISHER, J.: I agree with the judgment delivered by LORD PARKER, C.J., and there is nothing which I can usefully add.

G *Appeal dismissed.*

Solicitors: *Field, Roscoe & Co.*, agents for *Freer, Bouskell & Co.*, Leicester (for the appellant); *Amery-Parkes & Co.*, agents for *Hanley & Rogers*, Leicester (for the respondent).

[Reported by N. P. METCALFE, ESQ., Barrister-at-Law.]

H

I



# CARL-ZEISS-STIFTUNG v. HERBERT SMITH & CO. (a firm) AND ANOTHER.

[COURT OF APPEAL, CIVIL DIVISION (Lord Denning, M.R., Diplock and Sachs, L.J.J.), May 22, 23, 1968.]

*Practice—Preliminary point of law—Test whether preliminary issue should be ordered—Decisive of litigation if point of law decided one way—Action by East German company against West German company—Claim by East German company against solicitors acting for West German company in respect of money for fees and disbursements received by solicitors in good faith from West German company—Preliminary issue ordered.*

The plaintiff, a corporate entity carrying on business in East Germany, brought an action in England against another organisation of the same name carrying on business in West Germany, claiming that the West German company had been guilty of passing off and infringing trade marks and, in addition, that all the property and assets of the West German company belonged to the plaintiff. The plaintiff brought a separate action against the defendants, two firms of solicitors acting for the West German company in the main action, claiming that the defendants were liable to pay over all the moneys that they had received from the West German company for fees, costs and disbursements. On appeal from a refusal to order trial of a preliminary issue on a point of law in the action against the solicitors,

**Held:** the test whether the trial of a preliminary issue on a point of law should be directed was whether the point of law, if decided in one way, would be decisive of the litigation, and the point of law in the present case would dispose of the claim against the solicitors irrespective of the decision in the main action; accordingly the question of law whether the defendant solicitors would be accountable to the plaintiff in respect of fees, costs or disbursements received by them in good faith in their capacity as solicitors for the defendants in the main action should be tried as a preliminary issue (see p. 1004, letters D, E and I, post).

Dictum of ROMER, L.J., in *Everett v. Ribbands* ([1952] 1 All E.R. at p. 827) applied.

Dicta of LORD EVERSHED, M.R., in *Windsor Refrigerator Co., Ltd. v. Branch Nominees, Ltd.* ([1961] Ch. at p. 382) and of HARMAN, L.J., in *Yeoman Credit, Ltd. v. Latter* ([1961] 2 All E.R. at p. 299) not followed.

Appeal allowed.

[As to preliminary points of law, see 30 HALSBURY'S LAWS (3rd Edn.) 392, paras. 730, 731.]

Cases referred to:

*Everett v. Ribbands*, [1952] 1 All E.R. 823; [1952] 2 Q.B. 198; 116 J.P. 221; 33 Digest (Repl.) 400, 135.

*Windsor Refrigerator Co., Ltd. v. Branch Nominees, Ltd.*, [1961] 1 All E.R. 277; [1961] Ch. 375; [1961] 2 W.L.R. 196; Digest (Cont. Vol. A) 182, 5325a.

*Yeoman Credit, Ltd. v. Latter*, [1961] 2 All E.R. 294; [1961] 1 W.L.R. 828; Digest (Cont. Vol. A) 628, 13a.

## Interlocutory Appeal.

This was an appeal by the defendants, Herbert Smith & Co. and Dehn & Lauderdale, two firms of solicitors, from a judgment of PENNYCUICK, J., dated May 8, 1968, whereby he made no order on motion by the defendants under R.S.C., Ord. 33, r. 3, that a point of law, whether the defendants and each of them would be accountable to the plaintiff, Carl-Zeiss-Stiftung, a corporate entity carrying on business in East Germany, in respect of fees, costs and disbursements received by them, and each of them, from Carl-Zeiss-Stiftung of West Germany,

**A** should be tried as a preliminary issue, in the present action by the plaintiff against the defendants. The main action, which was brought by the East German company against the West German company and two English companies, was begun by writ issued on Oct. 20, 1955 (cf., *Carl-Zeiss-Stiftung v. Rayner and Keeler, Ltd.* (No 2), [1966] 2 All E.R. at p. 541, letter E). Trial of it was expected to take place in the autumn of 1969. The present action was begun by writ issued on Mar. 18, 1968. In the present action the East German company claimed that the defendants were liable to account to the East German company for moneys received from the West German company, on the ground that, as the East German company alleged, all assets and moneys arising from the trade or business conducted by the West German company or persons purporting to instruct the defendant solicitors on behalf of Carl-Zeiss-Stiftung were the property of the East German company, the trade or business having been (so it was alleged) obtained without consideration and the persons managing it in West Germany acting (so it was alleged) in breach of fiduciary obligation to the East German company.

The authority and cases noted below\* were cited during the argument in addition to the cases referred to in the judgment of LORD DENNING, M.R.

**D** *Michael Kerr, Q.C., C. J. Slade, Q.C., and G. Slynne* for the defendants.  
*D. W. Falconer, Q.C., and Jeremiah Harman, Q.C.,* for the plaintiff.

**LORD DENNING, M.R.:** This is a claim by the plaintiff, a company which is called Carl-Zeiss-Stiftung. It is a corporate entity, but that is all that is admitted about it. It carries on business in East Germany. It brings this action against the defendants, two firms of solicitors, Herbert Smith & Co., and Dehn & Lauderdale. The claim arises in this way. There is another organisation which is also called Carl-Zeiss-Stiftung. It carries on business in West Germany. The plaintiff, the Carl-Zeiss-Stiftung of East Germany, has brought an action against the Carl-Zeiss-Stiftung of West Germany. The plaintiff claims that the West German company has been guilty of passing off, infringing trade marks, and so forth. In addition, by an amendment, the plaintiff claims that all the property and assets of the West German company belong to the plaintiff. That is the main action. It is an action on a colossal scale. It has been going on for years. It will not come on for trial in the most optimistic circumstances until some time in 1969.

In this present action, the plaintiff makes a claim against the defendants, the solicitors who have acted for the West German company. The plaintiff says that the defendants must pay over to the plaintiff all the moneys which they have received from their clients, the West German company, for fees and disbursements. The plaintiff says that all these moneys belonged to it and that the defendants are accountable as constructive trustees, or something of the kind. The plaintiff first put forward its claim in a letter of Jan. 10, 1968. It made the first defendants very anxious. They had already received large sums for costs; and there were very large sums which were going to be incurred in carrying on this action. It was a great risk for them to go on with this claim hanging over them. They wrote back on Mar. 8, 1968:

“... the fact that this claim has been made and is being maintained renders our clients' position in this litigation extremely difficult, if not impossible.”

**I** They said that they would have to apply to the court; but, before the first defendants applied to the court, the plaintiff brought this action against them.

The defendants now ask that a preliminary issue be tried so as to decide whether they are liable for moneys which they received from their clients honestly on

\* 38 HALSBURY'S LAWS OF ENGLAND (3rd Edn.) 860, para. 1449; *Barnes v. Addy*, (1874), 9 Ch. App. 244; *Williams-Ashman v. Price & Williams*, [1942] 1 All E.R. 310; [1942] Ch. 219; *Radstock Co-operative & Industrial Society, Ltd. v. Norton-Radstock Urban District Council*, [1968] 2 All E.R. 59.

account of their fees and disbursements. They point out that they cannot safely conduct the litigation for the West Germany company with this risk, and, I might almost say, this threat, hanging over their heads. The judge refused to order a preliminary issue. He said that the main action should be fought out to its conclusion before the trial judge; and that then this second action against the defendants should be tried before the same judge. I am afraid that I cannot agree with the judge's decision. The defendants ought to know where they stand. They should be able to conduct the litigation without having a sword suspended over their heads. It is not a hypothetical issue. It is a practical issue of urgency. It is very desirable that it should be decided as soon as possible before many further costs are incurred. I know that it has been said on one or two occasions that a preliminary issue should be ordered only when, *whichever way it is decided*, it is conclusive of the whole matter. That was said by LORD EVERSHED, M.R., in *Windsor Refrigerator Co., Ltd. v. Branch Nominees, Ltd.* (1); and by HARMAN, L.J., in *Yeoman Credit, Ltd. v. Latter* (2). I do not think that that is correct. The true rule was stated by ROMER, L.J., in *Everett v. Ribbands* (3):

"Where there is a point of law which, *if decided in one way*, is going to be decisive of the litigation, advantage ought to be taken of the facilities afforded by the rules of court to have it disposed of at the close of pleadings or very shortly afterwards."

I have always understood such to be the practice. I quite agree that, in many cases, the facts and law are so mixed up that it is very undesirable to have a preliminary issue. I always like to know the facts before deciding the law; but this is an exceptional case. The defendants have received in good faith moneys for the defence of this action. They ought to know at once whether they can safely go on receiving them. If the issue of law is decided in their favour, it will dispose of the claim against them, irrespective of the main action. I would order a preliminary issue to be tried. It is stated in a letter of May 17, 1968, with complete accuracy:

"That irrespective of the decision upon any issue in the action 1955 C. No. 4445 [the main action] referred to in the pleadings herein, neither of the defendants herein would be accountable to the plaintiff in respect of any fees, costs or disbursements received by them from or on behalf of the defendants in that action so long as the defendants herein act honestly as solicitors on behalf of the said defendants, and receive such fees, costs and disbursements in their said capacity of solicitors."

It was said that this issue is a serious issue which may go to the Court of Appeal and the House of Lords, and not be disposed of for a long time. That does not trouble me. It can, and should, be decided with expedition in every court. It can and should, be decided on the first day of next term in the Chancery Division; and, being an interlocutory matter, it can be brought on here within another week. It can be decided by next month.

I would allow this appeal and order the preliminary point in the terms set out in that letter.

DIPLOCK, L.J.: I agree.

SACHS, L.J.: I entirely agree.

*Appeal allowed.*

Solicitors: *Herbert Smith & Co.* (for the defendants); *Courts & Co.* (for the plaintiff).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

(1) [1961] Ch. 375 at p. 382.

(2) [1961] 2 All E.R. 294 at p. 299;

(3) [1952] 1 All E.R. 823 at p. 827; [1952] 2 Q.B. 198 at p. 206.



A

# WEST PENWITH RURAL DISTRICT COUNCIL v. GUNNELL AND ANOTHER.

[COURT OF APPEAL, CIVIL DIVISION (Willmer, Davies and Edmund Davies, L.JJ.), April 25, 1968.]

B *County Court—Jurisdiction—Mortgage—Possession—Whether jurisdiction over an action for possession is that applicable to an action for recovery of land or for enforcement of the mortgage—County Courts Act, 1959 (7 & 8 Eliz. 2 c. 22), s. 48 (1), s. 52 (1) (c).*

Mortgagees by demise of premises, whose annual value for rating was below £400, brought an action for possession in the county court based on the mortgagors' default in payments under the mortgage. The amount due on the mortgage exceeded £500.

C

**Held:** the action lay under s. 48 (1)\* of the County Courts Act, 1959, viz., under the jurisdiction in actions for recovery of land, notwithstanding that the jurisdiction in equity under s. 52 (1) (c)† for enforcing any charge was limited to cases where the amount owing in respect of the charge did not exceed £500 (see p. 1007, letter B, and p. 1008, letters C and F, post).

D

*R. v. Judge Dutton Briant* ([1957] 2 All E.R. 625) approved.

Appeal dismissed.

[As to the jurisdiction of a county court in regard to enforcing mortgages, see 9 HALSBURY'S LAWS (3rd Edn.) 156, 157, para. 306 and as to the court's jurisdiction in actions for recovery of land, see *ibid.*, 153, para. 300 and pp. 148, 149, para. 292; and for cases on these subjects, see 13 DIGEST (Repl.) 395, 396, 234-243, pp. 388-390, 166-181.]

E

As to jurisdiction of the courts in actions for the recovery of possession by mortgagees, see 27 HALSBURY'S LAWS (3rd Edn.) 351, 352, paras. 658, 659.

For the County Courts Act, 1959, s. 48 and s. 52, see 39 HALSBURY'S STATUTES (2nd Edn.) 137, 141.]

F

Cases referred to:

*Alliance Perpetual Building Society v. Belrum Investments, Ltd.*, [1957] 1 All E.R. 635; [1957] 1 W.L.R. 720; 16 Digest (Repl.) 41, 342.

*Birmingham Citizens Permanent Building Society v. Caunt*, [1962] 1 All E.R. 163; [1962] Ch. 883; [1962] 2 W.L.R. 323; Digest (Cont. Vol. A) 77, 187a.

G

*R. v. Judge Dutton Briant, Ex p. Abbey National Building Society*, [1957] 2 All E.R. 625; [1957] 2 Q.B. 497; [1957] 3 W.L.R. 249; Digest (Cont. Vol. A) 318, 165a.

**Appeal.**

H

By a mortgage dated June 4, 1965, between the defendants, Kenneth George Percy Gunnell and Jean Marjory Gunnell, his wife, of the one part and the plaintiffs, the Rural District Council of West Penwith, the defendants demised to the council the freehold dwelling house and premises known as "Trenoweth", Reawla Lane, in the parish of Gwinear-Gwithian in the county of Cornwall for a term of three thousand years by way of mortgage, subject to a proviso for cesser contained in the mortgage, in consideration of the sum of £2,660 then advanced by the council to the defendants. The principal sum and interest were repayable by quarterly instalments. The defendants made default in payment of instalments. On May 31, 1967, so the council alleged, the interest and instalments under the mortgage were in arrear to the extent of £2,742 18s. 11d. That sum was then due and unpaid, the council having by prior notice in writing, dated Apr. 13, 1967, required payment of principal and interest due under the mortgage. The council accordingly claimed possession of the property mortgaged. The net

I

\* For the text of s. 48 (1), as amended, so far as material, see p. 1006, letter G, post.

† For the text of s. 52 (1), so far as material, see p. 1006, letter F, post.

rateable value of "Tronoweth" was alleged by the council to be £61. By order of His Honour JUDGE CHOPE made in Redruth county court on Oct. 26, 1967, it was adjudged that the council should recover from the defendants possession of the mortgaged property and that the defendants should give possession of it on Nov. 23, 1967. By notice dated Oct. 27, 1967, the defendants gave notice of appeal. The principal ground of appeal was that the council's claim was for possession of a freehold valued at more than £3,000, and was accordingly a claim that it was beyond the jurisdiction of the county court to hear and determine.

*H. G. Bennett* for the defendants.

*Gavin Lightman* for the plaintiff council.

**WILLMER, L.J.**, stated the nature of the appeal and continued: So far as I have been able to ascertain, there is not, and never has been, any defence on the merits. The point sought to be argued on this appeal is that the judge, in making his order, exceeded the jurisdiction which he had under the County Courts Act, 1959. Two comments may be said to arise on that. One is that the only effect of the defendants succeeding on the appeal would be that a new action would have to be started straight away in the High Court with the resultant expenditure of further costs. The only advantage that the defendants would obtain would be some extension of time. The other comment is this. In the court below the defendants appeared in person, but in this court they have had the advantage of being represented by counsel. From what we are told, it is clear that the point now sought to be argued on the appeal was not taken in argument in the court below, although it is no doubt adumbrated in the defence filed on behalf of the defendants. If that be right, it would follow that strictly speaking that we in this court never had any jurisdiction to entertain the appeal at all. In all the circumstances of the case, however, we have thought it right to entertain the appeal, and we have heard argument on it from both sides. The point is an extremely short one, and it is one that is already covered by authority in a case in the Queen's Bench Divisional Court; and I think that the appeal is avowedly brought for the purpose of testing the correctness or otherwise of that decision of the Divisional Court.

The defendants say that this action is within the words "proceedings for foreclosure or redemption of any mortgage or for enforcing any charge or lien" in s. 52 (1) (c) of the County Courts Act, 1959. That provides that county court jurisdiction in such a case shall be available only where the charge or lien does not exceed £500. Here, without going into precise figures, it is sufficient to say that the amount due on the mortgage is very considerably in excess of £500.

The plaintiff council, on the other hand, say that the action falls within s. 48 (1) of the Act (1), as being an action "for the recovery of land where the net annual value for rating of the land in question does not exceed £400". Here the net annual value for rating purposes does not exceed £400, and therefore, if s. 48 (1) applies, there was jurisdiction. If, on the other hand, jurisdiction is limited to that provided by s. 52 (1) (c) then this action does not fall within the jurisdiction.

The case to which I have referred is that of *R. v. Judge Dutton Briant, Ex p. Abbey National Building Society* (2). That was a case in which this precise question arose for decision before the Queen's Bench Divisional Court consisting of LORD GODDARD, C.J., BYRNE and DEVLIN, JJ. The Divisional Court went thoroughly into the matter, and a detailed judgment was delivered by LORD GODDARD, C.J., with which the other two members of the court agreed. The effect of the decision was to establish that an action such as this is an action for the recovery of land, and therefore comes within s. 48 (1), so that the limit imposed by s. 52 (1) (c) does not apply. That decision has stood, as was pointed out during the argument, for some ten years. Moreover, it is not unimportant to observe (as was pointed

(1) I.e., County Courts Act, 1959, s. 48 (1) as amended by the County Courts (Jurisdiction) Act 1963 (c. 5) s. 1 (1).

(2) [1957] 2 All E.R. 625; [1957] 2 Q.B. 497.

A out by counsel for the council) that since the date of that decision the new County Courts Act, 1959, has been passed, re-enacting the relevant provisions of the previous Act. Accordingly, in accordance with the usual rule, it must be assumed that Parliament, when it re-enacted these provisions, had the decision in the case of *R. v. Judge Dutton Briant* (3) in mind.

B We are now invited to say that the Divisional Court in that case came to a wrong decision. For my part I feel wholly unable to take that course. We have had the judgment in that case read to us more or less in full, and I find myself in agreement with it. It seems to me that, whatever may have been the motive for bringing these proceedings, they were in essence proceedings for the recovery of land, and therefore covered by s. 48 (1). I can see no reason why in 1968 we should say that the Divisional Court in that case was wrong. For my part, I  
C would follow the decision in that case, and it necessarily follows from that that this appeal must be dismissed.

DAVIES, L.J.: I agree. As my lord has said, this appeal is totally without merits, and for myself I doubt whether this particular point was pleaded in para. 4 of the defence delivered in person by the defendants. Since the point goes to the  
D jurisdiction of the court, however, it may not matter perhaps whether it was pleaded or not. It is to be observed that this mortgage was a legal mortgage by demise for a term of three thousand years. Thus in a sense the plaintiffs, the rural district council, were lessees of the defendants, and the action for possession was in a sense an action by a lessee who was entitled to the legal estate for the ejection of a trespassing lessor. One is, of course, attracted by the argument of counsel  
E for the defendants that, although on its face this is a claim for possession of land, it is in a sense a preliminary step to the enforcement by some means or another of the charge that the council had over this property. But in that connexion I think that it is to be noted that in C.C.R., Ord. 24, r. 4 (2), which refers to the form in which the judgment in this case was framed, one finds these words:

F "In an action (other than a foreclosure action) in which there is a claim for possession of any property forming a security for payment to the plaintiff of any principal money or interest, with or without a claim for the whole or part of such money or interest, a judgment for the plaintiff shall include an order to the plaintiff as set out in form 385 . . ."

G that is the formal document here giving the defendants the right to pay the money and so on. It would appear that that rule, dealing with this sort of proceedings, draws a distinction between a foreclosure action and a claim for possession of property forming the security for the payment to the mortgagee. It may be that there is not a great deal in that, but it does indicate, I think, that a distinction is drawn, and that a claim for possession is a claim for possession, whatever its ultimate object.

H We were referred in the course of the argument to a passage in MEGARRY AND WADE ON THE LAW OF REAL PROPERTY (2nd Edn.) at p. 868, where this is stated:

I "Since a legal mortgage gives the mortgagee a legal estate in possession, he is entitled to take possession of the mortgaged property as soon as the mortgage is made, even if the mortgagor is guilty of no default; a legal chargee has a corresponding statutory right."

Of course, the learned authors of that work were not thinking of this particular point at the time, and neither, it is to be supposed, was RUSSELL, J., in giving judgment in the case of *Birmingham Citizens Permanent Building Society v. Caunt* (4). There RUSSELL, J., cited with approval passages from COOTE ON MORTGAGES (5)

(3) [1957] 2 All E.R. 625; [1957] 2 Q.B. 497.

(4) [1962] 1 All E.R. 163; [1962] Ch. 883.

(5) I.e., COOTE ON MORTGAGES (9th Edn.), Vol. 2, at pp. 821, 822.



and MAITLAND'S LECTURES ON EQUITY (6) which make it plain that the legal mortgagee is entitled to possession of the property; and RUSSELL, J., cited (7) a judgment of HARMAN, J. (8) in which the latter judge said, dealing with the procedure which is used in the Chancery Division by originating summons:

"This is a form of procedure now much in vogue when there are persons other than the mortgagor in occupation. It is usually designed to enable the mortgagees to exercise their power of sale, which can only be done with advantage if vacant possession can be offered. It has nothing to do with the enforcement of the mortgage debt, nor with foreclosure. Possession is a remedy to which a mortgagee is entitled as of right against the mortgagor, whether the principal or interest be due or not, unless there is some special clause in the mortgage excluding it."

It seems to me clear from those passages that a distinct line must be drawn between an action for possession of the mortgaged property and the other remedies, foreclosure and so on, which are open to the mortgagee, and would plainly fall under the provisions of s. 52 (1) (c) of the County Courts Act, 1959, as opposed to this case, which in my judgment is clearly within s. 48.

I agree, therefore, that the appeal fails.

EDMUND DAVIES, L.J.: Were the point raised in this appeal *res integra*, I think that it is a matter of conjecture how it would be determined. Speaking entirely for myself, I do not, with respect, find guidance to its proper determination in the passage quoted already by my lord from p. 868 of MEGARRY AND WADE ON THE LAW OF REAL PROPERTY (2nd Edn.). But the combined weight of the Divisional Court judgment in *R. v. Judge Dutton Briant* (9), the observations of HARMAN, J., in *Alliance Perpetual Building Society v. Belrum Investments, Ltd.* (10), cited with approval by RUSSELL, J., in *Caunt's case* (11), and the clear view expressed by my brethren in this court serve to persuade me that such doubts as I confess remain in my mind regarding the proper interpretation of s. 52 (1) (c) of the County Courts Act, 1959, are probably ill-founded.

In these circumstances I do not dissent from the view of my brethren that this appeal should be dismissed.

*Appeal dismissed. Order made for possession within twenty-eight days.*

Solicitors: Robbins, Olivey & Lake, agents for Stewart & Trott, Camborne (for the defendants); Burton, Yeates & Hart (for the plaintiff council).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

(6) I.e., MAITLAND ON EQUITY (2nd Edn.), Lecture 13, at p. 186.

(7) [1962] 1 All E.R. at p. 167; [1962] Ch. at p. 889.

(8) In *Alliance Perpetual Building Society v. Belrum Investments, Ltd.*, [1957] 1 All E.R. 635, at p. 636.

(9) [1957] 2 All E.R. 625; [1967] 2 Q.B. 497.

(10) [1957] 1 All E.R. at p. 636.

(11) [1962] 1 All E.R. at pp. 167, 168; [1962] Ch. at p. 889.

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## R. v. HALL.

[COURT OF APPEAL, CRIMINAL DIVISION (Lord Parker, C.J., Winn, L.J., and Ashworth, J.), April 8, 9, 10, 1968.]

*Criminal Law—Indictment—Amendment—Amendment before arraignment—Amendment of one count substituting receiving eight pictures for three pictures—Plea of guilty by accused to amended count—No injustice caused to accused—Whether amendment valid—Indictments Act, 1915 (5 & 6 Geo. 5 c. 90), s. 5 (1).*

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An indictment was preferred against the appellant containing eleven counts, of which one charged breaking and entering and stealing eight paintings and another charged receiving three of the eight paintings. He pleaded guilty to the count of receiving, it being amended so as to allege receiving all the eight pictures. There was, so the Court of Appeal found, evidence on the depositions to support a charge of receiving the eight pictures. The appellant appealed against conviction. On a preliminary question whether there had been power to make the amendment,

**Held:** (i) the amendment of the count of receiving so as to include the charge of receiving eight pictures, was validly made under s. 5 (1)\* of the Indictments Act, 1915, since an indictment was defective for the purposes of s. 5 (1) if it did not charge an offence which was disclosed by the depositions, just as it was defective if it charged an offence not so disclosed (see p. 1010, letter I, post).

Dictum of LORD PARKER, C.J., in *R. v. Martin* ([1961] 2 All E.R. at p. 749) considered.

(ii) if the count, as altered to charge receiving the eight pictures, were a new count, the indictment could have been validly amended under s. 5 (1) before arraignment so as to include the new count, there being no injustice to the appellant by so doing (see p. 1011, letter C, post).

Dictum of LORD PARKER, C.J., in *R. v. Martin* ([1961] 2 All E.R. at pp. 750, 751) applied.

Appeal dismissed.

[As to the amendment of indictments, see 10 HALSBURY'S LAWS (3rd Edn.) 393, para. 712; and for cases on the subject, see 14 DIGEST (Repl.) 265-268, 2332-2362.]

For the Indictments Act, 1915, s. 5, see 5 HALSBURY'S STATUTES (2nd Edn.) 995.]

Case referred to:

*R. v. Martin*, [1961] 2 All E.R. 747; [1962] 1 Q.B. 221; [1961] 3 W.L.R. 17; 45 Cr. App. Rep. 199; Digest (Cont. Vol. A) 353, 2342a.

### Appeal.

On May 26, 1967, at the Central Criminal Court, the appellant, Michael Hall, pleaded guilty to one count (No. 10) of receiving eight paintings knowing them to have been stolen. He was sentenced by the recorder (SIR CARL AARVOLD) to five years' imprisonment. He now appealed against conviction, despite his plea of guilty, and also against sentence.

The facts of the case are set out in the judgment.

The cases noted below† were cited during the argument in addition to those referred to in the judgment of the court.

\* Section 5 (1) is set out at p. 1010, letter G, post.

† *R. v. Alexander*, (1912), 7 Cr. App. Rep. 110; *R. v. Golatham*, (1915), 11 Cr. App. Rep. 79; *R. v. Errington*, (1922), 16 Cr. App. Rep. 148; *R. v. Hughes*, (1927), 136 L.T. 671; 20 Cr. App. Rep. 4; *R. v. Tuttle*, [1929] All E.R. Rep. 107; 21 Cr. App. Rep. 85; *R. v. Field*, (1943), 29 Cr. App. Rep. 151; *R. v. Jennings*, (1949), 33 Cr. App. Rep. 143; *R. v. Smith*, *R. v. Pople*, *R. v. Dallimore*, *R. v. Lord*, *R. v. Mallon*, [1950] 2 All E.R. 679; [1951] 1 K.B. 53.

*Paul Wrightson, Q.C., and J. B. R. Hazan for the appellant.*  
*J. C. Matthew for the Crown.*

LORD PARKER, C.J., delivered the following judgment of the court, in which, after stating the circumstances and the reason for hearing the appeal in open court he continued:] This case is commonly called the Dulwich Art Gallery case; as is well known, on Dec. 30/31, 1966, the gallery was broken into and paintings said to be worth £1½ million were stolen. In the result, this appellant was indicted on some eleven counts. Eight of them had nothing to do with the Dulwich Art Gallery robbery and it is quite clear, and indeed is accepted by every one, that if the case had gone to trial on pleas of not guilty counts 1 to 8 would have been severed, and only counts 9, 10 and 11, which dealt with the art gallery case, would have been tried at the same time. The first of those counts alleged that the appellant broke and entered Dulwich Art Gallery and stole these eight paintings; count 10 in the alternative charged that he had received three of them, and count 11 was a count of misprision of felony. In the result he pleaded guilty to count 10 as amended to allege a receiving of all the eight pictures. His case is that he was intimidated in some way to pleading guilty, and I will come back to that in a moment.

In this appeal, counsel for the appellant has taken two preliminary points, the success of either of which he says would at any rate entail a venire de novo. The first point is that there was no power in the court to amend count 10 in the way that I have said. As the court understands his argument, it is that the only power to amend is a power to amend a defective indictment, and that there was nothing defective in count 10 as it originally was, charging a receiving of three pictures; it was not defective in the way of misdescription as to subject matter or date, or the like, and it was, as counsel would readily agree, supported by the evidence at the committal proceedings. He goes on to say that not only was it not defective, but the amendment really amounted to a new count altogether, and that was not permissible even before arraignment. In the course of his argument, the court has been referred to a great number of authorities to which it is unnecessary to refer (1). The argument on the first point, that the count was not defective, is based on the Indictments Act, 1915, s. 5 (1), which provides that:

"Where, before trial, or at any stage of a trial, it appears to the court that the indictment is defective, the court shall make such order for the amendment of the indictment as the court thinks necessary to meet the circumstances of the case, unless, having regard to the merits of the case, the required amendments cannot be made without injustice, and may make such order as to the payment of any costs incurred owing to the necessity for amendment as the court thinks fit."

The latest authority on this matter is *R. v. Martin* (2). In that case, the circumstances in which a count could be said to be defective were considered, and in giving the judgment of the court, I said this (3):

"An indictment which charges offences which are not disclosed in the depositions and fails to charge an offence which is, lacks the most essential quality of an indictment."

It may well be said that on the facts of that case those remarks were obiter, but this court, faced with deciding the question, has no hesitation in saying that an indictment lacks the most essential quality, in other words is defective, not only if it charges offences which are not disclosed in the depositions, but equally if it fails to charge an offence which is disclosed by the depositions.

In so far as the matter is put by counsel for the appellant on the basis that it is

(1) See footnote †, p. 1009, ante.

(2) [1961] 2 All E.R. 747; [1962] 1 Q.B. 221.

(3) [1961] 2 All E.R. at p. 749; [1962] 1 Q.B. at p. 227.



A a new count, it so happens that that also was dealt with in *R. v. Martin* (4) where I said:

“We appreciate that no new case has been reported which approves the adding of a new count before arraignment and by way of an amendment, but nevertheless we consider that there is no objection in principle to this being done provided it can be done without injustice.”

B The court then went on to express the hope that the occasions for that would be rare, in that indictments should be carefully drafted. Finally the judgment ended (5):

C “When, however, the court which is asked before arraignment to allow the addition of a new count is satisfied that no injustice will be caused to the defendant, we can see no reason why such an amendment of the indictment should not be made.”

I should add that counsel for the appellant quite rightly, on the facts of this case, cannot suggest that the amendment, or the addition of a new count by way of amendment before arraignment, in the present case caused any injustice whatsoever.

D The second point, as the court understands it, is that looking at the evidence at the end of the day, it is not possible to say that the appellant could have been convicted on the amended count. It may be only a matter of words, but this court is quite satisfied that, granted that there is power to amend, the second question is really whether the amendment asked for and granted was supported by evidence given at the committal proceedings. In the opinion of this court, E there was evidence to support the amendment. It is perfectly true that counsel of some experience who drafted the indictment, limited the count to three pictures, and he clearly did that because he was not so happy about the evidence in regard to the other five. Be that as it may, however, counsel who later led him felt there was such evidence, and this court has no doubt about it at all. F It is unnecessary to go through the details here, but there was evidence on the depositions that the three pictures which formed the subject of the original count had been in the appellant's physical possession. As regards the other five, there was evidence that he knew about them, that he had been negotiating concerning them, and particularly that there was, on the wrappings of the five pictures when they were eventually recovered, newspaper on one sheet of which G was a fingerprint of the appellant. I may say that throughout this appeal, and indeed in his very grounds of appeal, he has admitted guilty knowledge in the sense that he knew that all the eight had been stolen. Those are the two preliminary points taken by counsel for the appellant.

The main point, which resulted in leave to appeal being given, was the suggestion that the appellant's mind did not go with his plea, a plea apparently unequivocal, that he was guilty of receiving the eight pictures. His case, and that H raised by those who have taken cudgels up on his behalf, has really been based on the fact that he was intimidated or threatened into pleading guilty to something of which he was completely innocent. The court allowed the appellant himself to be called to give evidence of this matter, and the court thought it right, bearing in mind the allegations that had been made, to call as witnesses Mr. Robin Simpson, who defended the appellant, Mr. Buzzard, who was prosecuting counsel, Mr. Leonard his junior, and Mr. Pearce Butler, who was the I solicitor's managing clerk at the time. [His LORDSHIP reviewed the evidence and continued:] I am sure that anybody who has heard the evidence in this case, and had understood the workings of the law and our procedure, could not fail to realise that the appellant has no grievance at all, except perhaps that he was the only man caught, and that his counsel performed his duty to the best

(4) [1961] 2 All E.R. at p. 750; [1962] 1 Q.B. at p. 228.

(5) [1961] 2 All E.R. at pp. 750, 751; [1962] 1 Q.B. at pp. 228, 229.

of his ability. This court has no hesitation in dismissing the appeal against conviction. [Turning to the appellant's appeal against sentence His LORDSHIP said that the appellant was a man of bad character with a string of convictions and that the court was quite satisfied that there was no reason to interfere with the sentence, and, accordingly, that the appeal against sentence would be dismissed.]

*Appeal dismissed.* B

Solicitors: *Victor J. Lissack* (for the appellant); *Director of Public Prosecutions* (for the Crown).

[*Reported by N. P. METCALFE, Esq., Barrister-at-Law.*]

## Re HARVEST LANE MOTOR BODIES, LTD.

[CHANCERY DIVISION (Megarry, J.), May 20, 1968.]

*Company—Registration—Restoration to register—Applicant a plaintiff in an action for damages against company—Petitioner's husband died as result of traffic accident—Whether plaintiff was a "creditor" of the company, for the purpose of maintaining her petition—Companies Act, 1948 (11 & 12 Geo. 6 c. 38), s. 353 (6).* D

The word "creditor" in s. 353 (6) of the Companies Act, 1948, extends to a plaintiff claiming damages under the Fatal Accidents Acts, 1846-1959, and having, therefore, an unquantified claim against the company, as distinct from being entitled to a debt of fixed amount; accordingly such a plaintiff can maintain an application that the name of the company, if it has been struck off the register, be restored to the register (see p. 1015, letter G, post). E

Dictum of SIR WILLIAM JAMES, V.-C., in *Re Telegraph Construction Co.* ((1870), L.R. 10 Eq. 384) applied.

[As to restoring the names of defunct companies to the register, see 6 HALSBURY'S LAWS (3rd Edn.) 788-789, paras. 1590, 1591; and for cases on the subject, see 10 DIGEST (Repl.) 1140-1142, 7938-7957. F

For the Companies Act, 1948, s. 353 (6), see 3 HALSBURY'S STATUTES (2nd Edn.) 727.]

Cases referred to:

*Avondale Hotel Southport, Ltd., Re*, (1951), unreported. See BUCKLEY ON THE COMPANIES ACTS (13th Edn.) 701, footnote (f). G

*Midland Coal, Coke and Iron Co., Re, Craig's Claim*, [1895] 1 Ch. 267; 64 L.J.Ch. 279; 71 L.T. 705; 10 Digest (Repl.) 1131, 7874.

*Telegraph Construction Co., Re*, (1870), L.R. 10 Eq. 384; 22 L.T. 649; sub nom. *Telegraph Construction & Maintenance Co., Ltd. & Reduced, Ex p. Enderby's Trustees*, 39 L.J.Ch. 723; 9 Digest (Repl.) 168, 1015. H

### Petition.

This was an application by the widow of a man who had died in a road accident to have the name of a company, Harvest Lane Motor Bodies, Ltd., which had been struck off the register of companies, restored to the register under s. 353 (6) of the Companies Act, 1948. The petitioner had issued a writ dated Apr. 26, 1963, claiming damages against the company under the Fatal Accidents Acts, 1846 to 1959, and the Law Reform (Miscellaneous Provisions) Act, 1934. The company's name had been struck off the register in June, 1965. I

*D. A. Thomas* for the petitioner.

The company did not appear and was not represented.

MEGARRY, J.: This is a petition under the Companies Act, 1948, s. 353 (6). The petitioner, who was represented by counsel, is the only person who appeared before me; but although counsel was instructed on behalf of one party only he

A has very fairly put forward the relevant considerations in the case, together with the authorities.

The matter arises in this way. On July 16, 1961, the husband of the petitioner died as the result of a traffic accident. On Apr. 26, 1963, the petitioner issued a writ against the company claiming damages under the Fatal Accidents Acts and under the Law Reform (Miscellaneous Provisions) Act, 1934. In June, 1965, the company's name was struck off the register under the Companies Act, 1948, s. 353 as being, if I may put it briefly, a defunct company. Notwithstanding this event, which was duly advertised in the London Gazette on July 2, 1965, the proceedings against the company have continued; and various interlocutory orders have, I am told, been made since that date, in some cases, at least, reciting the appearance of counsel for the company. The plight of the company has now come to the notice of those engaged in the action, and in these circumstances the petitioner seeks the restoration of the name of the company to the register under the jurisdiction conferred by s. 353. It is a case in which the Treasury Solicitor has no objection to the application and is not represented, and the Solicitor for the Board of Trade has stated that the Registrar of Companies has no objection.

D The problem is this. Under s. 353 (6) the application may be made if the company "or any member or creditor thereof feels aggrieved" by the company having been struck off. The petitioner here is neither the company nor a member of it, and so she must bring herself within the word "creditor". Can the plaintiff in an action against the company for damages arising out of the death fairly be described as a "creditor" of the company?

E Before attempting to answer this question, I must deal with the possible alternative routes of escape for the petitioner. First, the Third Parties (Rights Against Insurers) Act, 1930, s. 1 (1), contains provisions whereby in an action relating to a road accident proceedings may be brought directly by the plaintiff against the insurers; but under s. 1 (1) (b) these provisions are confined to cases where a winding-up order has been made or there has been a resolution for voluntary winding-up. The dissolution of a company resulting from it being struck off the register under s. 353 is plainly not one of these cases. The second possible alternative route of escape is also not available, namely, under the Companies Act, 1948, s. 352. Under sub-s. (1) of that section, where a company has been "dissolved" (a word plainly applicable to the present case), on application being made for the purpose by the liquidator of the company or by "any other person who appears to the court to be interested", the court may make an order declaring the dissolution to be void. The petitioner is clearly a person who "appears to the court to be interested", but the right to apply under the section is subject to a time limit, namely, "any time within two years of the date of the dissolution". Here more than two years has passed since the date of the dissolution of the company. Accordingly, it appears that if the petitioner is to have redress that redress must be sought under s. 353. I am thus brought back to the meaning of the one word "creditor" as it appears in sub-s. (6) of that section.

I Looking at the Act of 1948 as a whole, I must refer to s. 224 (1), to which counsel has very properly drawn my attention. This defines the persons who may make an application to a court for the winding-up of a company. The subsection provides that the application may be made "either by the company or by any creditor or creditors (including any contingent or prospective creditor or creditors)"; and it then continues with certain other words. It is thus possible to point to a marked contrast between the wide-ranging words of s. 224 (1) on the one hand and the naked word "creditor" in s. 353 (6) on the other hand: ergo, *expressum facit cessare tacitum*.

As a matter of the language of the statute, there is of course force in this argument. On the other hand, there are certain authorities which have some bearing on the matter, and I must refer to these. First, there is the unreported



decision of WYNN-PARRY, J., in *Re Avondale Hotel Southport, Ltd.* (1). This is cited as authority for the proposition that an order under s. 353 has been made on the petition "of a contingent creditor". Taken literally, this summary statement appears to carry counsel for the petitioner a long way to success, if not the whole way. However, through the diligence of counsel and the assistance of the registrar, I have seen the papers in that case. The petition discloses that it was presented by the Commissioners of Inland Revenue in respect of certain assessments to income tax amounting in all to a little under £6,000. The debt was thus in respect of fixed and quantified sums assessed on the company, although they were then contingent to the extent of being the subject of an appeal. Here I have before me a wholly unquantified claim for damages arising out of an accident. Accordingly, when the facts in *Re Avondale Hotel Southport, Ltd.*, (1) are examined they do not by themselves necessarily establish the proposition for which counsel contends. A  
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Counsel also referred me to *Re Telegraph Construction Co.* (2). That case related to the Companies Act, 1867, s. 13, which gave a right to object to a reduction of capital to "every creditor of the company" who was entitled to any debt or claim which would have been admissible against the company if the winding-up had then commenced. SIR WILLIAM JAMES, V.-C., held that these words included a claim by lessors of the company's premises to future rent under a long lease, despite a power by the company to determine the lease every ten years. In a somewhat striking statement he said (3): D

"I think we must give a liberal construction to the statute, such as is consistent with common justice and common sense; and it appears to me it would not be consistent with common justice or common sense that a person who has entered into a contingent obligation, by which he has bound himself, should be permitted to say that, because the contingency has not yet happened, although it may still happen, he is not bound to give any security in respect of it." E

He added (4):

"These lessors have a contingent claim, they may become creditors; and I think that shareholders (I am not speaking of ordinary creditors) are not entitled to have assets distributed among themselves so as to prejudice the claims of contingent creditors. If a creditor has a claim which is admissible as a contingent claim, that ought to be admitted to the catalogue of claims admissible to proof in the winding-up. Such a proof is not a proof for anything payable in praesenti, but it is admissible as a proof for something which may ripen into a right to present payment. These lessors have a claim which is admissible to proof for a sum which may become payable at some future day, and they are entitled to ask the court to stop a distribution of the assets amongst shareholders until their claim is secured." F  
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I was also referred to the decision of WRIGHT, J., and the Court of Appeal in *Re Midland Coal, Coke and Iron Co., Craig's Claim* (5). Here again the statutory provisions were quite different; they related to the approval of creditors to schemes of arrangement. WRIGHT, J., referring to the Joint Stock Companies Arrangement Act, 1870, said (6): H

". . . I may take it that s. 2 is intended to apply to everybody who can be treated as a creditor of any sort, whether actual or contingent." I

Speaking for the Court of Appeal, LINDLEY, L.J., said (7):

(1) (1951), unreported. See BUCKLEY ON THE COMPANIES ACTS (13th Edn.), p. 701, footnote (f).

(2) (1870), L.R. 10 Eq. 384.

(3) (1870), L.R. 10 Eq. at pp. 387, 388.

(4) (1870), L.R. 10 Eq. at pp. 388, 389.

(6) [1895] 1 Ch. at p. 271.

(5) [1895] 1 Ch. 267.

(7) [1895] 1 Ch. at p. 277.

A "... we agree with WRIGHT, J., in thinking that the word 'creditor' is used in the Act of 1870 in the widest sense, and that it includes all persons having any pecuniary claims against the company."

B The words used in s. 2 were simply "creditors" and "any class of such creditors", without any exegetical words. The section is effect provided an extension to the Companies Act, 1862, s. 159, where the word "creditors" was used with a variety of other words increasing its ambit, including the words

"persons having or alleging themselves to have any claim, present or future, certain or contingent, ascertained or sounding only in damages against the company, or whereby the company may be rendered liable."

C I may add, too, that s. 224 (1) of the Companies Act, 1948, which I have already mentioned in relation to its contrasting language, may be prayed in aid in the opposite sense: for it demonstrates that the legislature regarded it as not inapposite for the word "creditor" to be made to include merely contingent or prospective creditors.

D Accordingly, I find myself in the position that, although the authorities show something of a tendency to construe the word "creditor" widely, there is no authority squarely in point on the issue that I have to decide here. It therefore seems to me that I must go back to the wording of s. 353 (6) to see if I can detect in it any tendency to require the somewhat protean word "creditor" to be construed widely or narrowly. In my judgment the section contains a sufficient indication that "creditor" ought to be construed widely. It begins with the

E words: "If a company or any member or creditor thereof feels aggrieved by the company having been struck off the register . . ." The subsection is thus concerned with a grievance on the part of some person, whether a company or a member or a creditor. Here we have the case of a petitioner who at the time when the company was struck off had an action in being against the company which was rendered ineffective by the disappearance of the company from the register. Where one is concerned with those who might feel a legitimate grievance

F because a company has been struck off, it seems to me that one should look somewhat generously at the word "creditor" which precedes the phrase "feels aggrieved". Put another way, I doubt very much whether in using the word "creditor" simpliciter the legislature can have been intending thereby to differentiate between those creditors whose debts are fixed and ascertained and

G those whose debts are contingent or prospective, providing redress for the grievances of the former but ignoring the grievances of the latter. In short, I think it would be wrong to construe the word "creditor" narrowly; and in refusing to do so I feel comforted by the approach indicated by so great a master of equity as SIR WILLIAM JAMES, V.-C., in *Re Telegraph Construction Co.* (8). Accordingly, in my judgment the word "creditor" is wide enough to embrace the petitioner in this case, and as it is plainly just to restore the company's

H name to the register the petition therefore succeeds.

*Order accordingly.*

Solicitors: *Barlow, Lyde & Gilbert*, agents for *Keeble Hanson, Steele Carr & Co.*, Sheffield (for the petitioner).

I [Reported by R. W. FARRIN, ESQ., Barrister-at-Law.]

## COVELL v. SWEETLAND.

[QUEEN'S BENCH DIVISION (Hinchcliffe, J.), April 3, 4, 1968.]

*Husband and Wife—Maintenance agreement—Duration—No express provision for duration or termination—Subsistence of marriage contemplated at time when agreement entered into—Decree absolute of divorce nearly four years later—Re-marriage of wife about four months after that—Thereafter husband paid towards arrears computed to date of wife's re-marriage—No claim to maintenance under agreement for period after re-marriage until more than four years after re-marriage, arrears claimed in respect of period since decree absolute—Whether agreement for maintenance ceased to have effect after decree absolute—Whether wife estopped from asserting claim.*

The plaintiff and defendant were married in 1947. In September, 1956, the marriage having finally broken down, the defendant husband left the wife. At that time it was contemplated, as correspondence showed, that the marriage would continue, the husband refusing to admit that he was in desertion. In November, 1956, the parties entered into a maintenance agreement, which was not under seal. They were therein referred to as "the husband" and "the wife". The agreement contained no words limiting its duration or providing for its termination. It provided that "the husband shall pay to the wife" £3 weekly, and that "the wife" should keep "the husband" indemnified in respect of any liability incurred by her. In January, 1960, the plaintiff wife filed a petition for divorce, and the defendant entered appearance asking to be heard on the questions of costs and maintenance. In May, 1960, a decree nisi was made on the grounds of desertion by the defendant. Before the decree was made absolute the plaintiff's solicitors suggested that the maintenance agreement would become void when the decree nisi was made absolute and asked that a new maintenance order should be agreed. No maintenance order was agreed or made, and the decree was made absolute in August, 1960. The defendant then ceased to make payments to the plaintiff for her own maintenance. In December, 1960, the plaintiff re-married. As a result of correspondence in May and June, 1961, the defendant undertook to pay £49 10s. arrears of maintenance to the plaintiff (computed up to the date of her re-marriage) by weekly payments of 5s. These payments were continued for some time. Letters passed in 1962 and 1963 between solicitors acting for the parties on the subject of maintenance, but it was not suggested that maintenance for the plaintiff should be paid in respect of any period after her re-marriage. In March, 1965, the plaintiff issued a writ claiming, under the agreement of 1956, £699 arrears of maintenance from September, 1960, to the date of the issue of the writ.

**Held:** the obligation of the defendant husband under the maintenance agreement to pay maintenance to the plaintiff wife ceased to have effect, on the true construction of the agreement (which did not provide expressly for its duration) in August, 1960, when the decree absolute was made; accordingly the plaintiff's claim failed (see p. 1020, letter D, post).

*Charlesworth v. Holt* ([1861-73] All E.R. Rep. 266) and *May v. May* ([1929] All E.R. Rep. 484) distinguished.

Per CURLIAM: having regard to the correspondence, from which it appeared that the plaintiff allowed the defendant to believe for a number of years that maintenance was not due to her for periods after her re-marriage, the plaintiff would be estopped from maintaining her claim to maintenance for any period after her re-marriage, if the agreement had not ceased by then to have effect (see p. 1020, letters G and H, post).

[As to the effect of decree of divorce on a separation deed, see 19 HALSBURY'S LAWS (3rd Edn.) 887, para. 1467, and for cases on the subject, see 27 DIGEST (Repl.) 229, 1836-1839.



A As to estoppel by representation of mixed fact and law, see 15 HALSBURY'S LAWS (3rd Edn.) 225, para. 425, and for a case on the subject, see 21 DIGEST (Repl.) 376, 1134.]

Cases referred to:

*Charlesworth v. Holt*, [1861-73] All E.R. Rep. 266; (1873), L.R. 9 Exch. 38; 43 L.J.Ex. 25; 29 L.T. 647; 27 Digest (Repl.) 229, 1837.

B *Clifford v. Clifford*, (1884), 9 P.D. 76; 53 L.J.P. 68; 50 L.T. 650; 27 Digest (Repl.) 246, 1983.

*May v. May*, [1929] All E.R. Rep. 484; [1929] 2 K.B. 386; 98 L.J.K.B. 770; 141 L.T. 629; 27 Digest (Repl.) 229, 1838.

*P. v. P.*, [1957] N.Z.L.R. 854.

C **Action.**

The plaintiff wife and the defendant husband married on Feb. 21, 1947; they had two sons, who were born in 1945 and 1950. The marriage finally broke up in September, 1956, when the husband left the wife. By letter of his solicitors dated Sept. 12, 1956, the husband's willingness to enter into a maintenance agreement for the support of the wife and their two children was communicated to the wife's solicitors, the amount of maintenance offered being £5 weekly. By an agreement under hand made on Nov. 6, 1956, between the husband and the wife it was provided that:

"1. The husband shall pay to the wife the sum of three pounds per week for her own maintenance together with one pound ten shillings in respect of the maintenance of each of their children Adrian Edward and Eric Thomas Hunter the said amount to be paid on Saturday in each week.

"2. The payments in respect of the children shall be made until such time as they attain the age of sixteen years or cease full-time education whichever shall be the later event respectively.

"3. The wife shall have the legal custody of the said children reasonable access to them being given to the husband.

"4. For the consideration aforesaid the wife shall keep the husband indemnified and free in respect of any liability incurred by her."

The wife filed a petition for dissolution of marriage on Jan. 26, 1960, alleging desertion, praying for a decree nisi, custody of the children and maintenance for herself and the children. The husband entered an appearance asking to be heard on the question of costs and maintenance for the children and the wife. A decree nisi was granted on May 19, 1960, with costs and custody of the children. On July 8 the wife's solicitors suggested in correspondence with the husband's solicitors that the maintenance agreement would become void as at the date of the decree absolute, and that a new maintenance order should be agreed or that one should be got ready for the continuance of maintenance. The wife's solicitors wrote again on Aug. 12:

"We shall be glad to learn whether a maintenance order can be agreed otherwise we see no alternative but to ask for an affidavit by your client together with the usual exhibits:"

The decree was made absolute on Aug. 22, 1960. On Oct. 12, 1960, the plaintiff's (the former wife's) solicitors wrote to the husband's solicitors to draw attention to the wife's financial difficulties caused by his non-payment. In this letter her solicitor explained that on the day of the decree absolute the defendant (the former husband) ceased all money payments to the plaintiff. On Dec. 2, 1960, the plaintiff married a Mr. Covell, and on Apr. 27, 1961, she made application to vary the order for custody. In an affidavit in support, she stated that payment was being made voluntarily for each child at the rate of £1 10s. per week. The order for custody was varied. The plaintiff was given custody of the younger child. The older child was then in the R.A.F. In May, 1961, the plaintiff's solicitors wrote to ask for the maintenance for the one child to be increased to £2 10s.

per week and also enquired about maintenance for the plaintiff from the decree absolute to the date of re-marriage. The defendant's solicitors replied setting out calculations of the arrears owing in respect of the children and £49 10s. due to the wife up to the date of her re-marriage. The defendant offered to pay off this latter amount at the rate of 5s. per week; this was paid and accepted by the plaintiff for a very considerable time. Although the plaintiff's solicitors disputed the calculation no agreement was reached and the defendant continued to pay £1 10s. in respect of one child. A  
B

New solicitors for the plaintiff wrote to the defendant's solicitors in October, 1962, asking for a copy of the agreement of 1956. In reply they were told that the question of arrears had been dealt with in June, 1961, the defendant had agreed to pay off the arrears at the rate of 5s. per week, and had maintained the payments regularly and would continue to do so in addition to maintaining weekly payments in respect of the one child. In this letter the defendant's solicitors wrote: C

"We could understand the position if, in fact, further arrears had accrued, but this is not the position."

On Nov. 30, 1962, the plaintiff's solicitors wrote that she would take proceedings unless the arrears were paid. The defendant's solicitors replied to the effect that the defendant's total assets were £18 and that he was unable to increase the payments of arrears from 5s. per week and that this amount had been agreed with the plaintiff's previous solicitors. In 1963 a letter written on behalf of the defendant stated that he refused to maintain the plaintiff any longer; and the plaintiff threatened to take out a summons for maintenance. In August, 1963, the defendant re-married. In September he sent the wife 5s. off the arrears of maintenance but withheld any payment in respect of the younger son since access to him had been refused and his whereabouts was not being disclosed. D  
E

On Mar. 22, 1965, the wife issued a writ claiming £699 arrears of maintenance from September, 1960, to the date of the writ. F

*D. Latham* for the plaintiff.

*M. H. Jackson-Lipkin* for the defendant.

**HINCHCLIFFE, J.**, summarised the history of the matter and reviewed the correspondence to which his attention had been drawn and continued:] It is submitted by counsel for the plaintiff that the agreement of 1956 is an agreement for life, and that neither the decree absolute nor the plaintiff's re-marriage can alter the position having regard to the terms of that agreement. It is contended that the agreement is one for life since no words are used to indicate the contrary, and that if it was not intended to be an agreement for life there would have been some such words as "until re-marriage", or words to this effect. It is further pointed out by counsel for the plaintiff that if the terms of an agreement of this sort need to be varied, an application could and should be made to the courts to vary it. G  
H

In support of his argument, counsel for the plaintiff referred the court to *Charlesworth v. Holt* (1). The headnote of that case reads as follows:

"By a separation deed reciting that differences existed between the defendant and his wife, and that they had agreed to separate, the defendant covenanted with trustees to pay them an annuity for his wife's support 'during their joint lives and so long as they should live separate and apart'. The deed contained clauses which indicated that the parties to the deed contemplated that the marriage relation would continue to exist between the defendant and his wife. In an action by the trustees for arrears of the annuity: Held, that a plea setting forth the deed and alleging the wife's subsequent adultery, and the dissolution of the marriage in consequence, I

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(1) (1873), L.R. 9 Exch. 38; [1861-73] All E.R. Rep. 266.

A was bad, there being no express words limiting the defendant's obligation to the period during which the marriage tie subsisted."

At first sight it would seem as though this case supported the submission of counsel for the plaintiff that this should be regarded as an agreement for life, but of course it is to be observed that the document in *Charlesworth v. Holt* (2) was a deed and not a maintenance agreement and—I take the view that this is  
B very important—there was a covenant to pay the annuity during their joint lives and so long as they should live separate and apart. There is no such clause in the agreement which the court is considering.

*Clifford v. Clifford* (3) is also referred to by counsel for the plaintiff. I do not find that that case gives the court much assistance because nowhere in the report is the document set out, and it seems to me that it is an impossible task  
C to attempt to construe a document without knowing its precise wording. The other case on this particular subject referred to by counsel for the plaintiff was *May v. May* (4). I take the view that this case can be distinguished from the present one in that in *May v. May* (4) there were clear and unequivocal words relating to "the life of the wife".

It is further submitted on behalf of the plaintiff that, although there is no  
D legal authority on the point, the plaintiff's re-marriage does not affect the agreement to pay maintenance; the re-marriage, it is said, might perhaps be a ground for the court to vary the maintenance, but there is no automatic discharge of that agreement on re-marriage. Counsel for the plaintiff finally submitted that the question of estoppel which is pleaded in the amended defence does not arise since there was no representation of fact; such representation that may have  
E been made related to law which does not create an estoppel.

Counsel for the defendant submits that the agreement in question did not subsist after the decree absolute or re-marriage; and he says that if he is wrong and it did, then it is submitted that the plaintiff is estopped from relying on her strict legal rights under the agreement, having regard to the correspondence and to the circumstances of the case. It is submitted that when the agreement  
F is looked at it is plain that it was not one which subsisted after re-marriage, and that when the surrounding circumstances are taken into account it becomes even clearer that the agreement was valid only for so long as the marriage subsisted.

I was invited by counsel for the defendant carefully to consider the terms of that agreement, and it was submitted that when one looks at the preamble of the agreement, it will be seen that the defendant, Eric Edward Sweetland, is referred to as "the husband" and the plaintiff, Ellen Elizabeth Sweetland, is referred to as "the wife". It is submitted that this clearly indicates that the parties or their respective solicitors were at pains to describe the parties of this action throughout as husband and wife. It is said that if this had been an agreement to subsist during their joint lives, they would have been referred to as Mr. Sweetland  
H and Mrs. Sweetland.

The next point that I am asked to take into consideration arises on the words "The husband shall pay to the wife". It is submitted that on those words it is as plain as a pikestaff that the agreement is one which remains in force so long as Ellen Elizabeth Sweetland remains the wife of the defendant. I was then asked to have regard to cl. 4 of the agreement, which is to the effect that the wife  
I shall keep the husband indemnified and free in respect of any liability incurred by her, and it is submitted that that would be powerless if the marriage were to be dissolved because it could have no application. Finally, it is submitted that on this agreement it is plain that the parties to it contemplated that the marriage would continue, and it was only an agreement to support the wife so long as she remained a wife. Those are the points that I take into consideration when I consider the agreement on its face value.

(2) [1861-73] All E.R. Rep. 266; (1873), L.R. 9 Exch. 38.

(3) (1884), 9 P.D. 76.

(4) [1929] All E.R. Rep. 484; [1929] 2 K.B. 386.



Counsel asks the court to consider the surrounding circumstances which he says are to be found in the correspondence. He draws attention to the letter of Sept. 12, 1956, which intimates that the defendant is prepared to enter into a maintenance agreement. There was no ground apparently for ending the marriage at that time. It is said that the defendant obviously contemplated that the marriage would continue and only qua the married life was he prepared to enter into the maintenance agreement. The letter of Sept. 25, 1956, reasserts that the wife had no ground for dissolving the marriage and again it is submitted that looking at that letter it is plain that the way in which the defendant was approaching his position was that so long as the marriage continued he would look after the wife and the children. The letter of Oct. 4, 1956, is the letter in which it is made plain that the defendant was prepared to enter into a maintenance agreement with his wife. On Oct. 22, 1956, the defendant, in a letter, refused to admit that he was in desertion; and so it is submitted that having regard to the terms of the agreement and to the surrounding circumstances it is quite plain that this agreement was only to be regarded as in force so long as the plaintiff remained the defendant's wife.

In my judgment, everything seems to me to point to the agreement being one to provide for the plaintiff as a wife so long as the marriage lasted; the words of the agreement and the surrounding circumstances make this abundantly clear. This marriage ended by the decree being made absolute on Aug. 22, 1960, and that is when the agreement in question ceased to have any effect. In these circumstances, it follows that this claim cannot succeed and the question of estoppel does not arise. Out of respect for the careful arguments addressed to the court by both learned counsel I would say this, that all the cases which have been cited, including the New Zealand one of *P. v. P.* (5), which seems to me to have been rightly decided, show that a representation can constitute an estoppel, but it must be one of fact—in this case, I think, the representation was of mixed law and fact—it must have been made with the intention that it would be acted on and it must have been acted on to the detriment of the person to whom it was made. Certainly in this case the defendant has been prejudiced in that he took no steps to vary the agreement—no steps to protect himself—and he failed to put any money aside to pay the maintenance. Therefore, it seems to me that if the plaintiff by her solicitors' letters allowed the defendant to believe for a number of years that the true position as to maintenance was as represented, and the defendant did so believe and acted to his detriment, then the plaintiff is estopped from denying that the facts were as represented.

In my judgment the plaintiff is estopped, having regard to all the circumstances of the case; that is to say that the agreement was intended to be for the duration of the marriage, and it only came to an end by the decree absolute. The plaintiff in the letters written on her behalf never suggested that the maintenance should be paid after she re-married and the first suggestion of this was Mar. 22, 1965, when this writ was issued. I have no doubt at all that it would be grossly unfair to the defendant if he should be ordered to satisfy the plaintiff's claim after so many years of delay during which he was lulled into a sense of false security into believing that the maintenance for the plaintiff certainly ended after she had re-married on Dec. 21, 1960 and no claim for continuing the maintenance was ever made until the issue of the writ. Therefore, in my judgment, the plaintiff is estopped from asserting that the defendant is indebted to her in the agreement in respect of maintenance. There will be judgment for the defendant.

*Judgment for the defendant.*

Solicitors: *Warren & Warren*, agents for *Chancellor & Ridley*, Dartford (for the plaintiff); *Denis Hayes*, agent for *Hewitt & Co.*, Dartford (for the defendant).

[Reported by MARY COLTON, Barrister-at-Law.]

A

## R. v. LYCETT.

[COURT OF APPEAL, CRIMINAL DIVISION (Lord Parker, C.J., Fenton Atkinson, L.J., and Bridge, J.), June 11, 1968.]

B

*Criminal Law—Sentence—Appropriate sentence for existing offences to be imposed—Concurrent instead of consecutive terms of imprisonment imposed with a view to qualifying offender for an extended term under Criminal Justice Act 1967 (c. 80) s. 37, if offence committed in future—Wrong in principle.*

C

When sentencing a prisoner for offences on which the court is adjudicating, the court should not reach its decision with a view to enabling another court at a later date to impose, for some future offence not yet committed, an extended term of imprisonment under the power conferred by s. 37 (2)\* of the Criminal Justice Act 1967; but the sentence passed should be determined by what is appropriate to the offences before the court at the time of sentencing. Thus it is wrong to impose for, e.g., three offences for which the appropriate sentences would each be one years' imprisonment consecutive, three concurrent terms of imprisonment each of three years, merely because the consequence of imposing an aggregate term of imprisonment of three years in the latter form would be to qualify the prisoner for an extended sentence under s. 37 (2), if he should be convicted in future of an offence not yet committed; though, if a sentence of three years is proper for each of the three existing offences, the Court of Appeal will not interfere with concurrent terms of three years so imposed (see p. 1022, letters F and G, post).

E

[As to previous convictions and sentences, see 10 HALSBURY'S LAWS (3rd Edn.) 511, para. 928; and for cases on the subject, see 14 DIGEST (Repl.) 554, 555, 5407-5425; as to extended terms of imprisonment, see SUPPLEMENT to 10 HALSBURY'S LAWS (3rd Edn.) para. 932A.

F

For the Criminal Justice Act 1967 s. 37, see 47 HALSBURY'S STATUTES (2nd Edn.) 391.]

### Appeal.

This was an appeal by Geoffrey Malcolm Lycett against concurrent sentences of three years' imprisonment imposed on him by the recorder (C. J. A. DOUGHTY, Q.C.) of Brighton Quarter Sessions on Feb. 13, 1968, after he had pleaded guilty to two counts of housebreaking and larceny and one count of false pretences, fourteen other cases being taken into consideration. The facts are set out in the judgment of the court.

G

*D. E. Peck* for the appellant.

The Crown was not represented.

H

LORD PARKER, C.J., delivered the following judgment of the court: The offences here consisted, in the first place, of breaking into a flat on Dec. 20, 1967, in Brighton and stealing articles including a cheque book, and then the next day using a cheque from that cheque book, obtaining goods by a dud cheque; and, in the second place, of breaking into another flat on Jan. 3, 1968, in Brighton

I

\* Section 37, so far as material, provides: "(2) Where an offender is convicted on indictment of an offence punishable with imprisonment for a term of two years or more and the conditions specified in sub-s. (4) of this section are satisfied . . . the court may impose an extended term of imprisonment under this section. (4) The conditions referred to in sub-s. (2) of this section are: (a) the offence was committed before the expiration of three years from a previous conviction of an offence punishable on indictment with imprisonment for a term of two years or more . . . and (b) the offender has been convicted on indictment on at least three previous occasions since he attained the age of twenty-one of offences punishable on indictment with imprisonment for a term of two years or more; and (c) the total length of sentences of imprisonment . . . to which he was sentenced on those occasions was not less than five years . . ."

and stealing other articles. The fourteen other offences taken into consideration consisted again of the same pattern; four of them were housebreakings and larcenies, seven were obtaining goods by fraudulent use of cheques from a cheque book that he had stolen, two were for fraudulently selling stolen goods which he had said were his to sell, and there was one offence of larceny. A

The truth of the matter is that the appellant was becoming a confounded nuisance in Brighton. These offences, committed within a week of his being released from prison on the last occasion, followed a history of ten previous convictions starting when he was sixteen involving larcenies, housebreakings and larcenies and false pretences, in the course of which probation has been tried three times, he has been sent to borstal, he has been returned to borstal, and he has had up to eighteen months' imprisonment. In those circumstances a comparatively heavy sentence was called for. B

Counsel for the appellant has quite properly drawn attention to the fact that the recent bout of offences may be due to the breakdown of the appellant's marriage, and says that he has now found a young girl who he wishes to marry when he can, though that will not be for some considerable time because divorce proceedings have not been commenced, and accordingly he asks in those circumstances for a reduction in the sentence. This court can see no ground whatever for reducing the sentence in this case; it seems to them that a total of three years was a perfectly proper sentence. C

Having said that, the court would like to draw attention to what the recorder said when he sentenced the appellant, for this was the ground which actuated the single judge in granting leave. The recorder said D

"If you had qualified I would have to consider giving you an extended term of imprisonment to protect the public (1), and I will tell you exactly why on this occasion I am not imposing for each of these three offences a sentence of one year consecutive but of three years, all to be concurrent, because that would qualify as one of the reasons why a court in future could pass a longer sentence on you." E

The court would like to draw attention to that, because it seems to the court wholly wrong in principle that the nature of the sentence given today should be determined by the manner in which the court would like to deal with the prisoner if he went on and committed some offence in the future. He must be sentenced for the current offence in the appropriate way, regardless of what effect that may have on any sentence which might have to be meted out to him in the future. This court has already said, however, that the sentence of three years on each count concurrent was a perfectly proper sentence, and there is no ground for interfering with it. F

*Appeal dismissed.*

Solicitors: *Registrar of Criminal Appeals* (for the appellant).

[Reported by N. P. METCALFE, Esq., Barrister-at-Law.] G

## CORRIGENDUM.

### HAKLUYTT V. HAKLUYTT.

In the report of *Hakluytt v. Hakluytt*, p. 868, letter B, lines 4, 5 delete the words from "who had" to "adultery, and". I

The publishers apologize for the inclusion in error of the words deleted.

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(1) Under s. 37 of the Criminal Justice Act 1967, see footnote \*, p. 1021, ante.



A

## B.R.B. v. J.B.

[COURT OF APPEAL, CIVIL DIVISION (Lord Denning, M.R., Diplock and Sachs, L.J.J.), May 24, 27, 1968.]

B

*Divorce—Infant—Jurisdiction—Paternity of child in issue—Blood test—Power of High Court judge to order blood test—Power not extending to divorce county court.*

A judge of the High Court has power to order a blood test of an infant to be taken whenever it is in the best interests of the child (see p. 1025, letter I, p. 1027, letter A, and p. 1028, letter D, post).

C

Dictum of LORD DENNING, M.R., in *Re L.* ([1968] 1 All E.R. at p. 25) applied.

D

Per LORD DENNING, M.R., and DIPLOCK, L.J.: the jurisdiction to order a blood test on behalf of a child is vested in the High Court alone and is not transferred to a divorce county court by the Matrimonial Causes Act 1967, s. 2 (see p. 1025, letter E, and p. 1027, letter C, post); nor (per LORD DENNING, M.R.) has a magistrates' court any power to order a blood test against the will of the parties (see p. 1025, letter G, post).

E

Per LORD DENNING, M.R.: if the child is of tender years and thus unable to give consent, then the High Court judge can order a blood test without consulting the child: if the child is older, say fourteen or fifteen years of age, then the views of the child should be taken into consideration, but the child's views are never decisive (see p. 1025, letter D, post).

Per SACHS, L.J.: it is to be hoped that a welfare report will normally be obtained in cases where a blood test of a child may be ordered to be taken (see p. 1029, letter E, post).

Appeal dismissed.

F

[As to the Official Solicitor as guardian ad litem for infants, see 9 HALSBURY'S LAWS (3rd Edn.) 334, 335, para. 998.

For the Supreme Court of Judicature (Consolidation) Act, 1925, s. 18, see 5 HALSBURY'S STATUTES (2nd Edn.) 347.

For the Matrimonial Causes Act 1965 s. 33, s. 34, see 45 HALSBURY'S STATUTES (2nd Edn.) 490, 491.

For the Matrimonial Causes Act 1967 s. 2, see 47 HALSBURY'S STATUTES (2nd Edn.) 777.]

G

Cases referred to:

*Apted v. Apted and Bliss*, [1930] P. 446; 99 L.J.P. 73; 143 L.T. 353; 28 Digest (Repl.) 428, 3588.

*Blunt v. Blunt*, [1943] 2 All E.R. 76; [1943] A.C. 517; 112 L.J.P. 58; 169 L.T. 33; 28 Digest (Repl.) 429, 3589.

H

*Hardcastle v. Hardcastle* (1968), The Times, Feb. 13.

*L. v. Re*, [1968] 1 All E.R. 20; [1968] P. 119; [1967] 3 W.L.R. 1645.

*L. v. L.*, (1968), The Times, Mar. 15; 112 Sol. Jo. 294.

*W. v. W.* (No. 4), [1963] 2 All E.R. 386, sub nom. *W. v. W.* [1963] P. 67;

[1963] 3 W.L.R. 540; *affd.*, C.A., [1963] 2 All E.R. 841; sub nom.

*W. v. W.*, [1964] P. at p. 72; [1963] 3 W.L.R. 540; Digest (Cont. Vol. A)

I

703, 2267a.

### Appeal.

This was an appeal by the Official Solicitor as guardian ad litem of an infant child from an order of Mr. Commissioner JUDGE SIR OWEN TEMPLE-MORRIS, Q.C., dated Mar. 22, 1968, ordering in a paternity issue that a blood test of the child be taken. The facts are set out in the judgment of LORD DENNING, M.R.

*J. P. Comyn, Q.C.*, and *D. B. Williams* for the Official Solicitor as guardian ad litem for the child.

*Joseph Jackson, Q.C., and M. C. Nicholson for the husband.*  
*T. Watkins, Q.C., and Michael Evans for the wife.*

**LORD DENNING, M.R.:** In *Re L.* (1), this court held that, in proceedings relating to the custody of a child, any judge of the High Court can order a test to be taken of the child's blood. The question now arises whether a judge can order a blood test on a paternity issue, or indeed on any other issue. We are told that many cases are waiting the determination of this one.

The facts are these. Mr. Barnes, the husband, brought a petition for divorce against the wife alleging that she had been guilty of adultery with the co-respondent. In his petition, he said that there were no children of the family, that is, of himself and the wife; but he said that the wife had committed adultery with the co-respondent in about October, 1963, as a result of which she gave birth to a son on Aug. 22, 1964. It was an undefended case. When the husband gave evidence before the commissioner, JUDGE GEOFFREY HOWARD, he was asked when he last lived with his wife. He said: "I saw her for one night approximately on Nov. 17, 1963"; and that he had sexual intercourse with her on that night. If that statement was correct, it would mean that he was possibly the father of the child. He himself did not think that he was the father. Nor did the wife. When the child was born, the wife and the co-respondent registered the co-respondent as the father. Nevertheless, when it appeared that the husband had had intercourse with the wife about the time that the child was conceived, the commissioner thought that he ought to get to the bottom of it. It was the commissioner's duty under s. 33 (1) of the Matrimonial Causes Act 1965 to be satisfied "as respects every relevant child" that proper arrangements had been made for his care and upbringing. The commissioner could not determine whether this child was "a relevant child", that is, a child of both parties to the marriage, unless the paternity was settled. So the commissioner directed that an issue should be tried as to whether the boy was a child of the family. He ordered that the child was to be made a party to the issue through a guardian ad litem. The Official Solicitor was appointed guardian ad litem. The paternity issue came before the commissioner, JUDGE SIR OWEN TEMPLE-MORRIS, Q.C., on Mar. 22, 1968. The question arose whether the child should have a blood test. All three of the adults, the husband, the wife and the co-respondent, have had a blood test. It has been taken by an expert, Dr. Alan Grant of Guy's Hospital. As a result, Dr. Grant says that, if a blood test is taken of the child, he can say with certainty which of the two men is the father of the child. He will be able to say whether it was the husband, or the co-respondent. The commissioner, in the circumstances, thought that it was in the best interests of the child to have a blood test. The Official Solicitor objected. He said that the commissioner had no power to order it on a paternity issue. The commissioner overruled the objection. He ordered a blood test to be taken. The Official Solicitor appeals to this court. He is anxious for the court to lay down a rule, so that he shall know where he stands.

There is a difference of opinion among the judges of the Divorce Division on this point. WRANGHAM, J., in *L. v. L.* (2), declined to order a blood test. He said that he had no power to order a blood test on a paternity issue. LANE, J., in *Hardcastle v. Hardcastle* (3), ordered a blood test, even in an adultery issue. She thought that it was in the best interests of the child so to do. In view of this difference of opinion, it is clearly desirable for this court to lay down a definite rule. It is unnecessary to review the matter at length. That was done in *Re L.* (1). Suffice it to say that, after full discussion, we see no reason for confining the jurisdiction, as WILLMER, L.J., did (4), to the court's custodial jurisdiction. The

(1) [1968] 1 All E.R. 20; [1968] P. 119.

(2) (1968), *The Times*, Mar. 15; 112 Sol. Jo. 291.

(3) (1968), *The Times*, Feb. 13.

(4) [1968] 1 All E.R. at p. 34; [1968] P. at p. 171.

A jurisdiction is unlimited in a judge of the High Court. He can order a blood test to be taken whenever it is in the best interests of the child. I repeat what I said in that case (5):

B “So also in a paternity issue, or any proceedings where it is in the best interests of the child to have its paternity settled one way or the other, the court can order a blood test. Even in a petition for divorce on the ground of adultery, the judge can in my view order a blood test on the child, for there too the child is vitally affected by the outcome.”

C That being so, I hold that JUDGE SIR OWEN TEMPLE-MORRIS, Q.C., was entitled to make the order that he did. It is clearly in the child's interest to have a blood test, since it will settle definitely one way or the other which of the men is the father. As it happens, we are told that the child has already had the blood test. It only awaits the order of this court for it to be made known to the parties. So now all is straightforward.

D A question was asked as to the extent to which the child should be consulted. If the child is of tender years—say under seven years, and thus unable to give consent, one way or the other—then the High Court judge can order a blood test without consulting the child. If the child is older, say fourteen or fifteen years of age, then the views of the child should be taken into consideration; but the child's views are never decisive. Even if the child is difficult, the court can order a blood test if it is clearly in the interests of the child, just as it can order an operation in the case of a ward of court.

E I would stress, however, that the jurisdiction to order a blood test is vested only in the High Court, and not in the county court. There is a new Act, the Matrimonial Causes Act 1967, which gives jurisdiction to the county courts to try undefended divorce cases. So far as I can see at present, the only jurisdiction which is vested in the county court judges under the Act of 1967 is the statutory jurisdiction in divorce. There is not vested in them the parental jurisdiction of a judge of the High Court. That is derived from the Crown as *parens patriae* and not from any statute. No doubt in some of the undefended cases which come before F the county court under the Act of 1967, it may be desirable in the interests of the child to have a blood test. If so, the procedure is simple. The county court judge will refer it to a High Court judge as a matter suitable for ancillary relief; and the High Court judge can order the blood test. Likewise, of course, a magistrates' court has no power to order a blood test against the will of the parties. The G magistrate can only do it by consent of those concerned, namely, the grown-ups and the mother on behalf of the child; but, nevertheless, if any of them does not consent, the magistrate can take that refusal into account. I adhere to the view which I expressed in *Re L.* that (6):

H “If an adult unreasonably refuses to have a blood test, or to allow a child to have one, I think that it is open to the court in any civil proceedings (no matter whether it be a paternity issue or an affiliation summons, or a custody proceeding) to take his refusal as evidence against him, and may draw an inference therefrom adverse to him. This is simply common sense.”

I The conclusion of the whole matter is that a judge of the High Court has power to order a blood test whenever it is in the best interests of the child. The judges can be trusted to exercise this discretion wisely. I would set no limit, condition or bounds to the way in which judges exercise their discretion. The object of the court always is to find out the truth. When scientific advances give us fresh means of ascertaining it, we should not hesitate to use those means whenever the occasion requires. I would, therefore, dismiss the appeal.

DIPLOCK, L.J.: I too would dismiss this appeal. Probably because of my unfamiliarity with the procedure in the Probate, Divorce and Admiralty Division,

(5) [1968] 1 All E.R. at p. 25; [1968] P. at pp. 157, 158.

(6) [1968] 1 All E.R. at p. 26; [1968] P. at p. 159.



I think that it is a simple question; but so I do. We are concerned here with the jurisdiction of the High Court—I emphasise that—of the High Court, not of any particular division of the High Court. In *W. v. W.* (No. 4) (7), decided in 1964, it was decided that the High Court has no jurisdiction to order an adult to submit to a blood test, because that would be an assault on the unconsenting adult; but adults can, of course, consent to submit to a blood test. A parent or guardian who has control of a child, can arrange for the child to have a blood test; and the evidence of a blood test so obtained, which today is highly cogent evidence as to paternity—or may be so—is admissible on any issue in which the parentage of a child is relevant. In *Re L.* (8), the question arose for the first time whether the courts could order a child to be submitted to a blood test where the child was a party to the proceedings and represented by the guardian ad litem. The Court of Appeal there held that the High Court had such a power, but that such power was not derived from the Matrimonial Causes Act 1965, but from the jurisdiction conferred on the High Court by s. 18 of the Supreme Court of Judicature (Consolidation) Act, 1925, which provides by sub-ss. (2) and (3):

“(2) There shall be vested in the High Court: (a) Subject as otherwise provided in this Act, the jurisdiction which was formerly vested in, or capable of being exercised by, all or any of the courts following:—(i) The High Court of Chancery, both as a common law court and as a court of equity . . .

“(3) The jurisdiction vested in the High Court shall, subject as otherwise provided in this Act, include the jurisdiction which was formerly vested in, or capable of being exercised by, all or any one or more of the judges of the courts aforesaid respectively sitting in court or chambers or elsewhere, when acting as judge or a judge, in pursuance of any statute, law or custom, and all powers given to any such court or to any such judges or judge by any statute, and also all ministerial powers, duties and authorities incident to any and every part of the jurisdictions so vested.”

The court's jurisdiction, accordingly, to order a child to be blood tested, which was in effect the jurisdiction by consent of the child to his or her blood being tested is thus part of the ancient paternal jurisdiction of the court.

In *Re L.* (8) the matter came before the court in proceedings under s. 34 of the Act of 1965 as to the custody of the child, and a controversy arose between the members of that court by way of obiter dicta whether the jurisdiction was confined to cases where the custody of the child was in issue. LORD DENNING, M.R., in the passage which he has already read, took the view that the jurisdiction was not so confined; but WILLMER, L.J., in a passage at the end of his judgment (9), said this:

“Having regard to what has been said by [LORD DENNING, M.R.], I think it right to add two further observations. First, I confine my judgment with regard to the court's power to order a test of a child's blood to cases arising, as this case does, within the court's custodial jurisdiction. I am not, as at present advised, prepared to hold that such a power exists in a paternity issue, and still less on a petition for divorce on the ground of adultery. So to hold would in my judgment be contrary to the decision of this court in *W. v. W.* (7).”

I need not deal with his next observation. DAVIES, L.J., said (10) that he concurred with the two reservations made by WILLMER, L.J., with the judgment of LORD DENNING, M.R.

In this case, we have to make our choice between the conflicting views expressed obiter by LORD DENNING, M.R., on the one hand, and WILLMER, L.J.,

(7) [1963] 2 All E.R. 841; [1964] P. 57.

(8) [1968] 1 All E.R. 20; [1968] P. 119.

(9) [1968] 1 All E.R. at p. 34; [1968] P. at p. 171.

(10) [1968] 1 All E.R. at p. 34; [1968] P. at p. 172.

A and DAVIES, L.J., on the other. Having heard full argument on the case, I am satisfied beyond any reasonable doubt (to use the expression used in rebutting the presumption as to legitimacy) that LORD DENNING, M.R., was right in saying that such an order may be made in any case where the child is made a party to the proceedings and in the opinion of the judge of the High Court it is in the child's best interests that it should be made. Where such a blood test is made, B whether, as in the present case, on an issue as to paternity, or whether where the judge thinks it is in the interests of the child on an issue as to adultery in a suit for dissolution of marriage, the evidence of that blood test is, in my view, clearly admissible in any proceedings in which the parentage of the child is relevant. I also agree with LORD DENNING, M.R., that this jurisdiction, being one conferred on the High Court alone by s. 18 of the Supreme Court of Judicature C (Consolidation) Act, 1925, and not by Part 3 of the Matrimonial Causes Act 1965, relating to the protection of children, the jurisdiction to order such a test on behalf of a child is not transferred to a divorce county court under s. 2 (1) of the Matrimonial Causes Act 1967, for that provides that

“ . . . a divorce court county court shall have jurisdiction to exercise any power exercisable under Part 2 or Part 3 of the Matrimonial Causes Act D 1965 in connection with any petition, decree or order pending in or made by such a court and to exercise any power under s. 22 or s. 24 of that Act.”

It does not purport to confer on a divorce county court the parental jurisdiction acquired by the High Court under s. 18 of the Act of 1925.

E I would add in passing that—since I have been speaking about the admissibility of blood tests as evidence—I reserve any views about the evidential inferences to be drawn by the refusal of anyone to take a blood test. As LORD DENNING, M.R., said in *Re L.* (11), that is a matter of common sense, and I would prefer to leave it to common sense. My unfamiliarity with the procedure in the Probate, Divorce and Admiralty Division to which I have already confessed makes it highly F undesirable that I should attempt to lay down any rules how this discretion should be exercised by the judge who exercises it in any particular case. His consideration must be what is in the best interests of the child, and I can conceive of cases where it may be in the child's interest to rely on the presumption of legitimacy rather than to put it to the risk. Such cases must, I think, be rare, because on the whole I agree with LORD DENNING, M.R., that in most cases it is in the best interests of everyone, including the child, that truth should out. In G the present case, however, there seems to me to be no doubt, and the learned commissioner had no doubt, that it is in the interests of the child that the blood test should be taken. Whether the test shows that the father is the former husband or that the child is the child of the present husband, who was the co-respondent in the suit, the child will be legitimated either by being the child of the marriage or because he will have been legitimated by the subsequent marriage of his two H parents. He cannot, therefore, in my view, in any way suffer by whatever the result of the blood test is. Here it is plainly a case where it is in the interests of the child that he should know who his father is.

I SACHS, L.J.: I agree that this appeal should be dismissed, but at the outset I emphasise that the Official Solicitor was entirely correct in bringing the matter before this court, for there are involved questions of transcending importance to many children. The sole issue raised in this case by counsel for the Official Solicitor has been as to the extent of the inherent jurisdiction of the court *qua* *parens patriae* to consent on behalf of the infant to the taking of a blood test of the child. In the present case, and, indeed, as appears to have been the case in *Re L.* (12), it is to be noted that the age of the infant is such that no questions of an order *in invitum* can arise. The sole question posed here today is whether that

(11) [1968] 1 All E.R. at p. 26; [1968] P. at p. 159.

(12) [1968] 1 All E.R. 20; [1968] P. 119.

jurisdiction qua parens patriae is limited to what has been referred to as custodial cases where it will be for the benefit of the infant to use that jurisdiction, or whether the jurisdiction extends to all cases where it would be of benefit to the infant that the test be made. In using the word "benefit", I have in mind the sense in which it is used in the exercise of the court's parens patriae functions, and would mention that, when I refer to benefit of the infant in other places in this judgment, it has to be interpreted in that particular sense.

As regards discretion, if the jurisdiction exists, counsel for the Official Solicitor specifically disclaimed any intention to discuss whether such a test was or was not in the above sense for the benefit of the infant in this particular case. What he did do was very properly to draw the attention of the court to the great range of different cases that could arise if the jurisdiction is unlimited. So great and so diverse is that range, that it includes many cases in which it would be extremely difficult to ascertain what is for the benefit of the infant or to determine whether the test is in truth being asked for the benefit of that infant or for the benefit of others.

On the issue of jurisdiction, once it had been decided by this court in *Re L.* (13) to exist at all, in a case where it was to the interests of the child, I cannot for my part see any ground for limiting it to any particular class of cases, unless it can in some instance be said that, as to the discretion in that class of case, it could never be for the benefit of a child for that jurisdiction to be exercised. It follows from my view that the sole test when exercising the jurisdiction is whether or not it is for that benefit.

To ascertain and declare the existence of the facet of the High Court's inherent jurisdiction with which we are today concerned may be said to have been relatively easy. It is no less easy to see that it is one of transcending importance on the lives of many infants. What troubles me is the question of the application of this jurisdiction; and that sub-divides itself into questions (i) relating to the procedure for determining whether the consent should be given; and (ii) how the discretion should be exercised. Perhaps I take a more cautious view of these matters owing to experience in the Division exercising divorce jurisdiction, but there seems to me no doubt that the taking of blood tests may produce a real revolution in the approach to many issues that are canvassed there. Moreover, from what has been said today at the Bar, it looks like producing a veritable flood of cases. That caution of mine may, perhaps, be reflected in the views of those two lords justices in *Re L.* (13) who were so experienced in their day in divorce matters and were not disposed readily to agree that the jurisdiction even existed in relation to determining paternity and adultery issues. Prominent to my mind is the fact that it is essential to remember that the parens patriae jurisdiction is one for the benefit and protection—I emphasise the words "and protection"—of the infant; and that it, it must be emphasised, can be something very different from the self-centred interests that adults may have in sorting out their own affairs. The latter interests may obviously be very different from those of the infant, who may in the course of the proceedings be deprived of the name which he thought he bore, not to mention the fortune which he might have inherited. Moreover, one must not wholly overlook the potential existence of cases where the adults wish so to manoeuvre that the infant comes out of his *prima facie* position. To bastardise a child may be in the interests of the adults or some other child, but not of the infant bastardised. The same may apply to the break-up of a parental home.

In some ways the position as to this new facet of the jurisdiction in the court, or, perhaps I should say, newly developed facet of its jurisdiction, has a parallel to that which obtained when the courts declared the existence of its important jurisdiction to insist on discretion statements in divorce proceedings. *Apted v. Apted and Bliss* (14), which discussed the measure of the discretion to be exercised,



A was followed first by practice directions (cf., *RAYDEN ON DIVORCE* (3rd Edn.) p. 588), and later by rules of court: but it was not until 1943, some thirteen years later, that in *Blunt v. Blunt* (15) the House of Lords finally laid down the principles on which the discretion should be exercised. In this instance, the Official Solicitor has expressed himself as being most anxious to have some guidance on matters, and manifestly needs it.

B In regard to these blood tests, it seems to me that without guidance great divergencies both of practice and of views on discretion may arise. Rules of practice seem to me to be an early and imperative necessity, and preliminary guidance on discretion would, no doubt, be helpful as soon as it can be obtained. In the absence of any real opportunity to consider what may be the answers to some of the problems which have been raised today in this court, I naturally do not propose to propound rules either of practice or of discretion, but to call attention to matters which have come to the surface in the course of helpful submissions by counsel very experienced in the work of one Division. First of all, as regards practice, the question arises whether the Official Solicitor should act without coming to the court for guidance. I say no more than that I would assume that, until matters have sorted themselves out, he would come to the court if he were in any doubt and would so advise the many solicitors who consult him. The next matter which arises is whether the tests should be ever ordered unless, as in the two cases which have so far been before this court, there is known (by reference to concluded tests on all relevant adults) to be a really substantial chance that the tests would resolve the issue which was troubling the court; I would doubt it. The next is whether there should be precautions against a possibility of abuse, or whether it can be said that the importance to an infant of his parentage and of his fortune are less than the importance of a chance of his being convicted under certain sections of the Road Traffic Acts. Finally, there is a question of practice and procedure, whether a welfare report ought not normally to be obtained in the same way as it was in *Re L.* (16): I would so hope.

Turning from practice to discretion again, a whole crop of problems became evident on the questions whether a child should be permitted to bastardise itself, and whether and to what extent the court should or should not try to put itself into the position of that child. I regret that neither in *Re L.* (16) nor in the present case has the court been so composed as to have on it a member who has had experience of the exercise of the Chancery wardship procedure at first instance and has been brought up in the principles there exercised. It is in courts of Chancery that the *parens patriae* functions were first conceived, and certainly those courts have had the main development of them—at any rate, until relatively recently.

Should the child be allowed or should the child not be allowed to consent to an order which will assist the break-up of the parental home? What happens if the child objects, knowing what is the purpose of the test? How should the court deal with the cases of affiliation and separation orders? All these are matters which need careful consideration. That consideration, I am very glad to say, is, at any rate, at the moment confined to judges of the High Court—a relatively small number of judges specially experienced in such matters. But, of course, one must envisage that there may well be a short Act transferring that consideration to the manifold county courts who deal with other matters ancillary to a divorce. Wherever the consideration lies, however, there is no doubt that the matters to be dealt with are such as to give scope, as was plainly shown *arguendo* in the present case, for deeply different individual judicial views as to what is and what is not in the interests of the child in relation to potential bastardisation on the given facts of any one case. For instance, is it or is it not held all over the country and in all sections of the community that it is

(15) [1943] 2 All E.R. 76; [1943] A.C. 517.

(16) [1968] 1 All E.R. 20; [1968] P. 119.

of no or of minimal importance to a child to call it out of its name? The sooner authoritative guidance can be given on that point, to my mind the better. Having said that, and having, I hope, put at any rate into the realm of consideration matters which may arise from a decision which will have such wide effects, I can do no more to help the Official Solicitor.

*Appeal dismissed. Leave to appeal to the House of Lords refused.*

Solicitors: *Official Solicitor*; *Myer Cohen & Co.*, Cardiff (for the husband); *D. C. Passmore, Walters & Co.*, Cardiff (for the wife).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

## C. MAURICE & CO. LTD. v. MINISTER OF LABOUR.

[COURT OF APPEAL, CIVIL DIVISION (Lord Denning, M.R., Diplock and Sachs, L.J.J.), May 21, 1968.]

*Selective Employment Tax—Refund—Appeal—Activities of employer qualifying for refund—Standard Industrial Classification, headings 500, 602—Determination of tribunal whether activities were within the scope of particular description in heading 602—Tribunal's decision on such a question not to be interfered with on appeal, if it could reasonably have been reached—Employer's business in laying electric cables—Whether engaged in distribution of electricity for public supply within heading 602—Selective Employment Payments Act 1966 (c. 32) s. 2 (2), (3).*

On the question whether the nature of the activities of an undertaking qualify or do not qualify for selective employment tax refund as being within the scope of, or outside, a particular heading of the Standard Industrial Classification, the decision of the tribunal (being in this respect the decision of a tribunal of fact) should not be interfered with on appeal unless it is one to which the tribunal could not reasonably have come (per LORD DENNING, M.R., and SACHS, L.J., DIPLOCK, L.J., dissenting; see p. 1032, letter F, p. 1034, letter D, and p. 1035, letter A, post).

Dictum of LORD WILBERFORCE in *Lord Advocate v. Reliant Tool Co.* ([1968] 1 All E.R. 162) applied.

The appellants were contractors who worked for an Area Electricity Board; their work included laying electric cables, joining them, and erecting sub-stations. Some area boards did the same work with direct labour. On appeal from a decision of the Divisional Court reversing the decision of an industrial tribunal that the appellants' activities were within heading 602 of the Standard Industrial Classification, as being distribution of electricity,

**Held** (DIPLOCK, L.J., dissenting): the decision of the tribunal should stand for the reasons stated at letter F, above, and the appellants were entitled, therefore, to refund of selective employment tax (see p. 1033, letter E, and p. 1036, letter H, post).

(ii) the words "distribution of electricity for public supply" in heading 602 extended to the work in the present case, which was work necessary to ensure that electricity would get to consumers (see p. 1032, letter D, and p. 1036, letter A, post).

Appeal allowed.

[As to Selective Employment Tax, see SUPPLEMENT to 33 HALSBURY'S LAWS (3rd Edn.) para. 479A.]

For the Selective Employment Payments Act 1966, s. 2, see 46 HALSBURY'S STATUTES (2nd Edn.) 171.]

## A Case referred to:

*Lord Advocate v. Reliant Tool Co.*, [1968] 1 All E.R. 162; [1968] 1 W.L.R. 205.

## Appeal.

This was an appeal by notice dated Nov. 23, 1967, given by the appellants, C. Maurice & Co., Ltd., from an order of the Divisional Court of the Queen's Bench Division (LORD PARKER, C.J., SALMON, L.J., and WIDGERY, J.), dated Oct. 18, 1967, setting aside a decision of the Industrial Tribunal, dated Jan. 16, 1967. The tribunal had decided that the appellants' establishment at Bishops Stortford and Thundersley, Benfleet, were establishments which satisfied the requirements of s. 2 (2) (a), (b) of the Selective Employment Payments Act 1966. The grounds of appeal from the Divisional Court were (i) that the court's judgment was wrong in law in that the court misdirected themselves as to the proper construction of headings 500 and 602 of the Standard Industrial Classification; (ii) that the judgment was wrong in that there was evidence before the tribunal to support its finding that both the appellants' establishments were engaged in activities falling under heading 602; (iii) that the judgment was wrong in law in that on the evidence and on the proper construction of headings 500 and 602 each of the appellants' establishments was engaged in activities falling within heading 602 and that both establishments satisfied the requirements of s. 2 (2) (a) and (b) of the Act of 1966.

*F. B. Purchas, Q.C.*, and *J. R. V. McAulay* for the appellants, the employers.  
*P. E. Webster, Q.C.*, and *G. Slyn* for the Minister of Labour\*.

LORD DENNING, M.R.: The appellants, a company called C. Maurice & Co., Ltd., are engaged in the electricity industry. They are contractors who do work for the area electricity boards. They lay electric cables, joint them up, reinforce the existing electric cables, erect sub-stations, and the like. At Bishops Stortford they have 184 employees, of whom 150 are engaged in laying cables and doing jointing work, etc. At Thundersley they have 243 employees, of whom 202 do such work. The question is whether this activity is a qualifying activity such as to entitle the company to a refund of the selective employment tax.

Several of the area electricity boards do precisely the selfsame work as this company, but they do it by direct labour employed by themselves. Other boards do not have the means to do it themselves and employ this company to do it. The tribunal stated:

"There is no doubt that what the company is doing is what the boards would themselves have to do to ensure the distribution of electricity for public supply."

There's the rub. When an area board does the work by direct labour, it does not have to pay the selective employment tax. Why should the company have to pay it when they do the selfsame work as contractors? If this be right, the public sector is given an unfair advantage over the private sector of industry. Five men may be working in a trench laying cables. If three are employed by an area electricity board, the board do not pay the tax. If two are employed by this company, they have to pay it. Is this fair?

Under the Selective Employment Payments Act 1966 s. 2 (2) and (3), the company is entitled to a refund if it is established that it is engaged by way of business wholly or partly in activities that come under heading 602 of the Standard Industrial Classification. Heading 602 provides: "Electricity. The production and distribution of electricity for public supply." If the activities of the establishments of the company fall within those words, they are entitled to the refund.

\* The functions of the Minister of Labour are transferred to the Secretary of State for Employment and Productivity by the Order, S.I. 1968 No. 729.



The Minister of Labour says that their activities do not come under heading 602. He says that they come under heading 500: "Construction", under which the company is not entitled to a refund. Heading 500 provides:

"Construction. Erecting and repairing buildings of all types. Constructing and repairing roads and bridges; erecting steel and reinforced concrete structures; other civil engineering work, such as laying sewers and gas mains, erecting overhead line supports and aerial masts, opencast coal-mining . . ."

The contest is simply whether the activities of this establishment fall under heading 602 or heading 500. The Industrial Tribunal held that the activities of this establishment came under heading 602 and that they were entitled to the refund. The Divisional Court reversed the tribunal. They held that the activities did not come under heading 602, but under heading 500. Now there is an appeal to this court.

I must say at once that I agree with the tribunal. It seems to me that, when men are laying cables and jointing cables, and so forth, they are engaged in the "distribution of electricity for public supply". They are doing the very things which are essential to the distribution. "Distribution" is not confined to switching on the current. It includes all the work necessary to ensure that the electricity will get to the consumers.

I would, however, hesitate to set up my view against so strong a Divisional Court, except for this: there has been recently a decision of the House of Lords in *Lord Advocate v. Reliant Tool Co.* (1) on appeal from Scotland. It was not on this very point, but it emphasises the weight which should be given to a tribunal's decision. The House of Lords has held quite plainly that many of the matters arising under the Act of 1966 are best left to the tribunal. It has a lawyer as chairman, with two industrialists sitting with him. When there is a line to be drawn between activities which qualify or do not qualify, it is for the tribunal to say on which side of the line any particular activity falls. Their decision should not be interfered with unless it was a decision to which they could not reasonably have come.

The mistake which the Divisional Court have made is that they have analysed the Standard Industrial Classification as if it were a lawyer's document, to be dealt with by lawyers, much as if they were construing a statute for a deed; but the Standard Industrial Classification is not a lawyer's document. It was prepared for use by statisticians, and not by lawyers. When Parliament came to impose the selective employment tax, they seized on this statistician's document and used it for purposes quite different from those for which it was originally intended. We should look at it broadly, remembering that the headings are only guides to a classification. They are illustrative, not exhaustive. Take one point which impressed the Divisional Court. It is about gas mains. Heading 601 provides: "Gas: The production and distribution of gas for public supply". Then heading 500 refers to "civil-engineering work, such as laying sewers and gas mains". Hence the Divisional Court say that the laying of gas mains comes within heading 500. It cannot be included in heading 601: "Distribution of gas for public supply." Thus they held that "distribution" does not include laying gas mains in heading 601. So also in heading 602 "distribution of electricity" does not include laying the electricity cables. That is very much a lawyer's approach. Even on a lawyer's approach, there is a countervailing argument. Heading 500 states "erecting overhead line supports and aerial masts" is construction. By expressly mentioning "erecting" it implies that the work of laying of the lines on the supports is not construction. By expressly mentioning "overhead" and "aerial" it implies that laying underground cables is not construction. So laying electric cables is not construction in this heading too, and falls under heading 602. That, too, is a lawyer's approach.

(1) [1968] 1 All E.R. 162.

A I reject both these approaches. I prefer to look at the classification somewhat broadly. Under "Construction", the guiding words are "civil engineering work". In ordinary parlance there is a distinction between civil engineering work and electrical engineering work. The tribunal adopted this distinction. They stated:

B "All its (the company's) work is work which the boards themselves would have to do to distribute. None of it falls directly within any wording of heading 500. It is not the type of work which in normal parlance could be called civil engineering work; it is essentially associated with the electrical engineering industry. In these circumstances we do not consider that classification as part of the distribution of electricity (under heading 602) is in any way put in dispute by particular words in heading 500. We come to the conclusion, therefore, that . . . it comes within 602."

C That seems to me to be quite a legitimate method of approach by the tribunal. I would not interfere with them. I would adapt to this case the words of LORD WILBERFORCE in *Lord Advocate v. Reliant Tool Co.* (2):

D "Exactly at what point [civil engineering work] ends and the [distribution of electricity] begins may often be a matter of opinion. This is for the tribunal of fact to decide. The courts can only overrule their findings if satisfied that no reasonable body could find as they have done."

E Apart from this, I am sure that the legislature did not intend that there should be a difference between the public sector and the private sector. It would be most unfair that the public sector (the area electricity boards) should escape the tax, and that the private sector should have to pay it. I think that the tribunal could themselves properly take that into account.

I would set aside the decision of the Divisional Court and restore the order made by the tribunal. I would allow the appeal accordingly.

F DIPLOCK, L.J.: As LORD DENNING, M.R., has pointed out, it is an appeal from three judges of the Court of Appeal to three other judges of the Court of Appeal. For my part, I find myself in agreement with the majority of my brethren. I agree with all three judgments delivered by the members of the Divisional Court. I agree with them that the distribution of electricity, which to me means the transmission of electric power from one place to another, does not include manufacturing or constructing the means for doing so. It does not seem to me that the tribunal in this case in arriving at the conclusion that they did reach were purporting to do anything else than seeking to apply to the Selective Employment Payments Act 1966 and to the standard industrial classification incorporated in the Act the ordinary principles of legal construction of a document. Indeed, as I read their decision, they arrived at their conclusion by applying what is a well-known technique adopted by lawyers, that is to say, applying to the descriptive words in heading 500, the maxim of construction, *expressio unius est exclusio alterius*. That is a very good maxim except when you apply it to words which are intended to be illustrative and nothing more, and incorporate expressions like "such as" and "et cetera". I think that they fell into error in applying that maxim. It seems to me that it is that application which led them to the conclusion at which they arrived, and where they added:

I "It is not the type of work which in normal parlance could be called civil engineering work; it is essentially associated with the electrical engineering industry,"

the tribunal were applying a contrast which was irrelevant to the proper construction of the Act of 1966. The question was not whether it was civil engineering or electrical engineering: it was whether, on the true construction of the

Act of 1966, it fell within "The production and distribution of electricity for public supply". A

I think that the Divisional Court were right in reversing the tribunal's decision. I need not rehearse their reasons for doing so; I simply adopt them. I for my part would dismiss this appeal.

**SACHS, L.J.:** Like **SALMON, L.J.**, when he was sitting as a member of the Divisional Court, I have not found this case easy to determine. In illustration of the difficulties, I may confess that when, by way of a first approach to this matter, I read the judgments of the Divisional Court, the reasoning in them seemed, as one would expect, impeccable and to leave no room for doubt in the realm of legal construction. When, however, I was introduced to the terms of the decision of the tribunal, I was no less impressed by the reasoning in the context of the wide field of industrial affairs. Now, on balance with, I would emphasise, the assistance of the speeches in *Lord Advocate v. Reliant Tool Co.* (3)—an assistance which the Divisional Court did not have—it seems to me that the case really hinges on certain findings of fact made by the tribunal to which I would respectfully suggest the Divisional Court did not give sufficient weight, as is shown by the somewhat sparse mention made of them in their judgments. B C D

The tribunal, after referring to the potential distinction between civil engineering work and electrical engineering work, stated in their decision:

"Certain things obviously fall under civil engineering work, certain things obviously fall under electrical engineering work";

and then later, when dealing with the work substantially being carried on by the company, further stated E

"It is not the type of work which in normal parlance could be called civil engineering work; it is essentially associated with the electrical engineering industry."

It is true that these two sentences are intertwined with much material which counsel for the Minister has labelled as "an exercise in interpretation". None the less, they seem to me, when taken in the context of the decision as a whole, to constitute a finding by an experienced industrial tribunal that the work of the company fell in the field of the electrical engineering industry and not in that of the civil engineering industry. F

As to the validity of such a finding I respectfully refer, as **LORD DENNING, M.R.**, has referred, to the speech by **LORD WILBERFORCE** in *Lord Advocate v. Reliant Tool Co.* (3). One finds this passage (4): G

"The administration of this scheme involves questions of classification. These are certain to be multitudinous and delicate, since no one enterprise is organised exactly like any other, and industrial activities do not readily lend themselves to precise categorisation. The decision of these questions has, therefore, been committed to industrial tribunals as fact-finding bodies." H

Then, in reference to the particular facts of that case, he goes on to use these words (5):

"Exactly at what point the preparation for manufacture ends and the process of manufacture begins may often be a matter of opinion. This is for the tribunal of fact to decide. The courts should only overrule their findings if satisfied that no reasonable body could find as they have done." I

For my part, the more I listened to argument in this case the more important it seemed to give the fullest weight to the factor that in relation to the structure of industry the tribunal has, and the courts have not, that important knowledge

(3) [1968] 1 All E.R. 162.

(4) [1968] 1 All E.R. at p. 172.

(5) [1968] 1 All E.R. at p. 173, letter D.



A and experience in the field of industrial affairs which is vital to the determination of issues in relation to that volume entitled "Special Standard Industrial Classification", as regards the composition of which I agree with all that has fallen from LORD DENNING, M.R.

For my part, I too would, adapting what LORD WILBERFORCE said, stress that at what point civil engineering work ends and at what point electrical  
B engineering work begins may be often a matter of opinion, but that is for the tribunal of fact to decide. Had the approach indicated by the above cited passages been available for adoption by the Divisional Court, it seems to me that it might well on balance have changed their decision.

I now turn to heading 500. Leaving out references to repairs, one finds that this is in substance a head labelled "Construction"; it deals with erection and  
C construction, with the aid of the phrase in the small type portion, "other civil engineering work such as . . ." It seems to me that the linking of the word "construction" and the words "other civil engineering work", leads to the conclusion that the Minister must bring within the ambit of "civil engineering work" any work he desires to say falls under heading 500—unless, of course, it is obviously brought into that heading by some specific later words. To my  
D mind the Minister had, on the finding of fact to which I have referred, failed to bring the work of this company within heading 500: indeed, I would go further say that prima facie at least that finding of fact positively excludes the company's work from that heading.

Let me now assume, contrary to my own view but taking the assumption most favourable to the Minister, that the company's work does not prima facie fall  
E within heading 602 because of the points made in the Divisional Court and notably those spelled out by SALMON, L.J., as to the meaning of the word "distribution". The result would have been that it would be for the tribunal to have to decide into which heading it fell, for as between heading 500 and heading 602. The decision to be reached in those circumstances seems to me primarily to be one for an industrial tribunal which really understands what work falls within  
F the scope of one industry rather than of another, and any finding of theirs seems to fall within the ambit of a finding of fact rather than a finding of a court seeking to achieve an answer by what must necessarily be a somewhat legalistic approach and by discussions which necessarily must appear to those who have real knowledge of industrial affairs to verge on the semantic.

Distinctions as between "distribution" and "means of distribution" come,  
G of course, readily to the mind of a court, but yet they may seem unrealistic in regard to the facts of a particular industry; and the same applies to phrases such as "acts preparatory" or "acts preliminary" to some other given function when the industrial tribunal may know on what side of some line the act is regarded as falling in industry. In this particular case the tribunal have found that the work falls within heading 601: that is a conclusion which it was fully  
H entitled to reach—and which indeed to my mind at any rate was an almost inevitable result of the finding that the work falls under the category of civil engineering. Those reasons are of themselves sufficient to make it wrong to disturb the tribunal's findings.

Nevertheless from another angle too that decision seems to me right and proper, because in effect this company provided a reserve unit of workmen for carrying  
I out the work of the area boards, all of whose work, to my mind, must normally fall prima facie within the ambit of heading 602, and should remain there unless expressly and clearly included in some other heading. Subject, of course, to there being some contrary evidence from experts, the main function of an area board must be to take such steps as are necessary to produce and distribute electricity, including laying any cables (a common task of such boards).

Difficulties in relation to an opposite view become apparent when, for instance, one considers a point relating to repairs. On that point, counsel for the Minister after conceding that repairs would naturally fall within the ambit of distribution,

felt it right—and from his point of view I think properly—to resile and to take a more neutral view of the position of “repairs”. It may, however, well be said that if repairs to an underground cable junction fall clearly, as it seems to me, within the ambit of the word “distribution”, that may give a further point in favour of the company’s contention in the present case. Indeed, upon my basic approach, both the laying and the repairs to the cable are industrially within heading 602. A

In that behalf there seems to be reinforcement available from points which may or may not have been fully ventilated before the tribunal or before the Divisional Court. I refer to that approach to the situation which first takes the governing word “Electricity” in heading 602 as being simply a reference to “the electricity industry”, and then looks at words such as “production”, “supply” and “distribution”, with the broadest industrial approach—remembering the words in the introduction to the Standard Industrial Classification at p. 1 where it states that the classification is based on industries. B

Further, on this sort of point, it is perhaps not irrelevant to note, first, that s. 2 (3) (a) (iii) of the Selective Employment Payments Act 1966 itself refers simply to “electricity . . . supply”, a very broad term. It may also not be irrelevant to note that so far as gas is concerned—the production and distribution of gas come under heading 601—a very wide approach might be supported in the way that counsel for the employers adumbrated this morning when he referred to the Gas Act, 1948, and portions of it such as s. 1 (2) (b), s. 74, and Sch. 3, para. 1. C

Those then are the points relevant to that broad approach which seems appropriate to the Standard Industrial Classification. If, however, one turns to a narrower approach and then looks in heading 500 to the words “other civil engineering work such as . . . erecting overhead line supports”, it seems really surprising (if the contentions put forward by counsel for the Minister were correct) that there have not been used the words “overhead lines and their supports”. It does not seem realistic in my opinion that there should be reference to supports without lines and then to say lines are covered; and I would incidentally reserve the point as to what sorts of “supports” an Industrial Tribunal would regard as being the subject-matter of that particular part of heading 500. D

Despite all the cogent points which I have recited, it may yet, in view of the strength of this particular Divisional Court and the judgment of DIPLOCK, L.J., naturally savour of temerity to take a view that the decision of the tribunal was correct—but that is my conclusion. Perhaps I will be comforted in certain future events by the possibility that whoever opens a case of this type seems to have the advantage. Be that as it may, for the reasons which I have given with, I hope, natural diffidence, I agree with LORD DENNING, M.R., that the appeal should be allowed. E

*Appeal allowed. Leave to appeal to the House of Lords granted.* F

Solicitors: *Barlow, Lyde & Gilbert*, agents for *H. Stanley Tee & Co.*, Bishops Stortford (for the employers); *Solicitor, Ministry of Labour*. G

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.] H

## HAVENHAND v. THOMAS BLACK, LTD.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Waller and Fisher, J.J.), May 17, 1968.]

*Employment—Redundancy Re-engagement Offer in writing Sale of part of business by vendor employers and re-engagement by purchasing employers—Circular letter not showing material differences between old and new terms of employment—Different terms as to notice, overtime wages and insurance scheme—Position as if re-engagement on new contract by vendor employers—Whether re-engagement was in pursuance of an offer in writing within Redundancy Payments Act 1965 (c. 62) s. 3 (2) (b), s. 13 (2).*

From 1963 the appellant was employed by the respondents in the coal transport division of their business as a tanker driver. On Aug. 10, 1967, he was notified by circular letter that this side of the business was to be sold to W., Ltd., with effect from Aug. 31, 1967. The circular stated that W., Ltd., "desire all the coal vehicle drivers . . . to remain in the employment of the business . . . and it is hoped that [the arrangements] will be accepted by all concerned . . .". Thereafter some meetings took place between members of the staff and the respondents' company secretary and a representative of W., Ltd. The appellant ceased working for the respondents on Aug. 31, 1967, and started work for W., Ltd. on the next day. About a fortnight later the appellant received from W., Ltd. a notice under s. 4 of the Contracts of Employment Act 1963, setting out the terms of his employment; those differed as to notice, overtime wages, and possibly the insurance scheme, from the terms of his employment with the respondent. The appellant claimed a redundancy payment from the respondents. By virtue of s. 3 (2) (b)\* and s. 13 (2)\* of the Redundancy Payments Act 1965, the appellant would not be regarded† for the purposes of redundancy payment as having been dismissed, and thus would not be entitled to such payment, if his re-engagement by W., Ltd. was in pursuance of an offer in writing within s. 3 (2) (b).

**Held:** the circular letter of Aug. 10, 1967, was not a sufficient offer in writing for the purposes of s. 3 (2) (b) of the Redundancy Payments Act 1965, because the letter did not show the material differences between the proposed new terms of re-engagement and the terms of the previously existing contract of employment, and because (per FISHER, J.) it was not an offer such as would bind in law the new employer, W., Ltd.; accordingly the appellant was entitled to a redundancy payment (see p. 1039, letter I, and p. 1040, letters, C and D, post).

[As to redundancy payments after a change in the ownership of a business, see SUPPLEMENT to 38 HALSBURY'S LAWS (3rd Edn.) para. 808C, 3.]

For the Redundancy Payments Act 1965 s. 3, s. 13, see 45 HALSBURY'S STATUTES (2nd Edn.) 293, 301.]

### Appeal.

This was an appeal on a point of law by the appellant, George Havenhand, against the decision of the Industrial Tribunal sitting at Sheffield on Dec. 13, 1967, dismissing the appellant's application to the tribunal claiming entitlement to a redundancy payment from the respondents, his former employers. In their reasons the tribunal stated that the appellant's case was virtually indistinguishable from that of a Mr. Jessop: their reasons for their decision in the case of Mr. Jessop are set out at p. 1039, letter G, post.

\* Section 3 (2), so far as material, is set out at p. 1039, letters C and D, post and s. 13 (2) is set out at p. 1038, letter I, to p. 1039, letter B, post.

† The considerations leading to this position are stated by LORD PARKER, C.J., at p. 1039, letter E, post, with whom the other members of the court concur (see p. 1039, letter I, and p. 1040, letter D, post).



*P. M. Beard* for the appellant.

The respondents did not appear and were not represented.

**LORD PARKER, C.J.:** The appellant, Mr. Havenhand, started work for the respondents on Dec. 2, 1963, as a tanker driver. At the hearing he was described as a tanker driver employed by the respondents on the basis of a fifty-five hour week, a guaranteed eleven hour day, and entitled to bonus under a bonus scheme. On Aug. 10, 1967, the appellant and all the staff of the respondents received a circular or notice entitled "To all drivers and garage staff". Paragraph 1 read:

"Thomas Black, Ltd. have arranged to dispose of the coal transport division of their business to Messrs. J. Wright & Sons, Ltd., ... with effect from the end of the working day on Thursday, Aug. 31, 1967, and Messrs. Wright desire all the coal vehicle drivers and all fitters to remain in the employment of the business which will be transferred to their base ... with the exception of one fitter who will be referred to in a later paragraph."

There then appear specific provisions dealing with tanker drivers of a particular kind and gas department vehicles. Paragraph 4 of the circular says:

"These arrangements have been made in the best interests of the company and of the employees and it is hoped that they will be accepted by all concerned and that the same loyalty will be shown to the new proprietors and that everyone will use their best endeavours to make the changeover and the continuance of the work as smooth and efficient as possible."

Thereafter there seem to have been a number of meetings between members of the staff and a Mr. Hartley, the company secretary, and on some occasion with a Mr. Wright of Wright & Sons, Ltd. In the result, the appellant and other members of the staff became employed on Sept. 1, 1967, by Messrs. Wright. Fourteen days later, the appellant, in company with others, received a notice from Wright & Sons, Ltd. under the Contracts of Employment Act 1963 purporting to set out their terms of employment. It is unnecessary to go through the details, but from that notice the appellant and others came to the conclusion that the terms on which they were employed by Wright & Sons, Ltd., differed in some respects from the terms on which they had been employed by the respondents: in particular the provision for notice was different, wages in regard to overtime were different, and possibly the insurance scheme was different. At any rate the appellant then, while still working in the employ of Wright & Sons, Ltd., claimed from the respondents, his old employers, a redundancy payment.

It is quite clear that his contract with his old employers, the respondents, had terminated; it is quite clear that it was terminated on the sale by the respondents of their coal business to Messrs. Wright, and accordingly it is further clear that he was entitled to a redundancy payment, unless the provisions of s. 13 (2) of the Redundancy Payments Act 1965 were satisfied. Accordingly, one looks at s. 13. The provisions of that section shall have effect, so states sub-s. (1), where

"(a) a change occurs (whether by virtue of a sale or other disposition or by operation of law) in the ownership of a business, for the purposes of which a person is employed, or of a part of such a business, and (b) in connection with that change the person by whom the employee is employed immediately before the change occurs (in this section referred to as 'the previous owner') terminates the employee's contract of employment, whether by notice or without notice."

I read that to make it clear that the next subsection applies in the facts of this case. It reads as follows:

"(2) If, by agreement with the employee, the person who immediately after the change occurs is the owner of the business or of the part of the business in question, as the case may be (in this section referred to as 'the

A new owner') renews the employee's contract of employment (with the substitution of the new owner for the previous owner) or re-engages him under a new contract of employment, s. 3 (2) of this Act shall have effect as if the renewal or re-engagement had been a renewal or re-engagement by the previous owner (without any substitution of the new owner for the previous owner)."

B Pausing there, this clearly was not a case of the new owner renewing the contract of employment, because, as I have already said, there were differences in the terms of employment. The appellant was in fact re-engaged under a new contract of employment and accordingly s. 3 (2) is to have effect as if the re-engagement had been a re-engagement by the previous owner. One then goes back to s. 3 (2), and one finds that:

C "An employee shall not be taken for the purposes of this Part of this Act to be dismissed by his employer if his contract of employment is renewed, or he is re-engaged by the same employer under a new contract of employment, and . . . (b) the renewal or re-engagement is in pursuance of an offer in writing made by his employer before the ending of his employment under the previous contract, and takes effect either immediately on the ending of that employment or after an interval of not more than four weeks thereafter."

D Paragraph (b) above is the one that applies in the present case. Accordingly, the effect of s. 3 (2), as I see it, is to provide that the position under s. 13 (2) is to be treated as the same as if the old employer had re-engaged the employee under a new contract of employment. Still on s. 3 (2), in such a case the employee is not to be taken as having been dismissed if in the case of re-engagement under a new contract there has been an offer in writing. Accordingly, as it seems to me, the sole question in this case is whether there has been an offer in writing. For my part, I find it quite unnecessary to go into the question who should give that offer in writing, whether it be the old employer [the respondents], F the old employer on behalf of the new employer, or by the new employer himself, or on behalf of the old employer. The only offer in the present case is the circular of Aug. 10 to which I have referred. The tribunal came to the conclusion that that was a sufficient offer in writing to satisfy the terms of s. 3 (2) (b) of the Act of 1965. The way in which they put it was this, and I am reading from their long decision which they gave in a similar case of a man called Jessop:

G "We feel, however, that on balance, this notification of Aug. 10 does, if taken with the background of interviews and meetings, amount to a sufficient offer in writing of the new contract of employment. Having taken that view it is necessary to say that para. 1 of this notification of Aug. 10 probably could not stand by itself as a sufficient offer, but we do regard it as amplified and clarified by the meetings that took place which were plainly designed H for that very purpose. We find it was a sufficient offer in writing."

In my judgment the tribunal erred in law in coming to that conclusion. It may well be that an offer can and often would be supplemented and explained by subsequent oral interviews, but it is I think clear that the offer in writing which is provided for by s. 3 (2) (b) of the Act of 1965 must be an offer in writing which sets out the material terms of the proposed contract. In a case such as the I present, where the terms of the new contract are different, the offer must descend to sufficient detail to bring to light and show the differences between the proposed contract and the old one. In those circumstances, I have come to the conclusion that this appeal should be allowed and the matter will be remitted to the tribunal to determine the amount of the redundancy payment in default of agreement.

WALLER, J.: I agree. I would add only this, that in my view the provision for an offer in writing is to enable an employee to know the terms of his

new contract. This position is made clear from a perusal of the whole of s. 3 (2), of the Redundancy Payments Act 1965, which appears to draw a distinction between the renewal of contracts or the re-engagement of employees where the other terms and conditions of the employment do not differ from the corresponding provisions of the previous contract, when no offer in writing would be required: and other cases in sub-s. (2) (b) where the contrast is drawn that in other cases the renewal or re-engagement has to be in pursuance of an offer in writing. In my view that contrast shows clearly that an offer in writing is designed to give to the employee notice of the different terms of his new contract of employment. Obviously an employee who is terminating one employment wishes to know precisely what the different terms will be if he is re-engaged under a new contract of employment. I agree that this document could not possibly be described as an offer in writing in pursuance of sub-s. (2) (b), because, whatever else it did, it did not mention either of the terms which were different from his old contract of employment.

**FISHER J.:** I agree. Section 3 (2) (b) of the Redundancy Payments Act 1965 applies only in a case where the renewal or re-engagement is in pursuance of an offer in writing. In my judgment in a case where s. 13 (2) applies the offer must at any rate be such as in law to bind the new employer.

*Appeal allowed.*

Solicitors: *Bell, Brodrick & Gray*, agents for *Michael G. Archer & Co.*, Sheffield (for the appellant).

[*Reported by N. P. METCALFE, ESQ., Barrister-at-Law.*]

## R. v. BOND.

[COURT OF APPEAL, CRIMINAL DIVISION (Davies, L.J., Brabin and Browne, JJ.), May 24, 1968.]

*Road Traffic—Disqualification for holding licence—Life disqualification—Offender aged twenty-eight—Previous disqualifications extending for some twelve years—Disqualifications not for bad driving—Whether life disqualification, depriving offender of all future opportunity for driving, should stand—Road Traffic Act, 1962 (10 & 11 Eliz. 2 c. 59), s. 5.*

By reason of the cumulative effect of prior disqualifications for offences that did not include bad driving, the appellant was already disqualified under s. 5 of the Road Traffic Act, 1962, for holding or obtaining a driving licence until November, 1980, when he was convicted in June, 1966, of taking and driving away a vehicle and driving whilst disqualified. He was disqualified for life for those offences. In August, 1967, he was convicted of similar offences and was again disqualified for life. On appeal against the life disqualifications imposed in 1966 and 1967,

**Held:** disqualification for life was not appropriate since the appellant should be allowed some hope of driving in the future; accordingly the two orders for life disqualification would be set aside and for each there would be substituted an order for twelve months' disqualification (see p. 1041, letter F, and p. 1042, letter B, post).

[As to disqualification for offences under the Road Traffic Acts, see SUPPLEMENT to 33 HALSBURY'S LAWS (3rd Edn.), para. 1080; and for cases on the subject, see 45 DIGEST (Repl.) 118-119, 409-422.

For the Road Traffic Act, 1962, s. 5, see 42 HALSBURY'S STATUTES (2nd Edn.) 891.]

### Appeal.

The appellant, Ernest Brian Bond, appealed against orders disqualifying



A him for holding or obtaining a driving licence which were made on June 22, 1966, and Aug. 1, 1967; leave for this appeal being granted on Jan. 23, 1968, time being then extended for appealing against the order of June, 1966. Diplock, L.J., giving the decision of the court granting leave, stressed that it was the disqualification and not the prison sentences passed on the appellant which the court desired should be considered. The appellant was twenty-eight years of age and there had been many previous orders of disqualification in respect of him, but these orders, particulars of which are in the judgment, were not for offences based on bad driving.

The case noted below\* was cited during the argument.

W. E. Denny for the appellant.

The Crown was not represented.

C DAVIES, L.J., delivered the following judgment of the court: This case illustrates the complications that arise out of consecutive periods of disqualification from holding or obtaining a licence to drive a motor vehicle. It has been said more than once that excessive periods of disqualification really do more harm than good, particularly in the case of a man whose occupation is that of a motor driver and whose offences, many and multifarious though they may have been, do not include any offences for careless driving or dangerous driving or anything of that kind, indicating, as in the present case, that he is probably a skilful and good driver but that, possibly by force of circumstances, he will not refrain from taking and driving away motor cars and driving them whilst disqualified and driving them while not insured, as a result of which he now finds himself in the position that as things stand he may never be able lawfully to drive a motor car again. Presumably he will go on driving motor cars, presumably he will go back into prison and remain disqualified all the time. It seems to the court that, although inevitably in the circumstances of this case he is bound to be subject to considerable periods of disqualification, subject to any right that he may have to apply for the restoration of his licence, it is not right to slam the door permanently and for life in his case, and that it would be proper in so far as the court has the power to do so to reduce the overall periods of disqualification to such a time as gives him at least some hope that in the future he may be able to drive a motor car.

I think it is right that I should shortly go through the appellant's recent history with regard to disqualification. On Aug. 23, 1962, he was disqualified for two years; on Oct. 25, 1963, for taking and driving away and driving while disqualified for a further period of three years; on Dec. 4, 1963, in Essex, a further period of ten years' disqualification; on Jan. 22, 1966, at Tower Bridge for similar offences, a further period of eighteen months' disqualification; on May 31, 1966, at Lambeth magistrates' court a further twelve months' disqualification. The court cannot interfere with any of those periods of disqualification, and we are informed by counsel that those disqualifications take him down to Nov. 23, 1980.

Then come the two more recent convictions which are before the court. On June 22, 1966, at Inner London Sessions he was sentenced to eighteen months' imprisonment for taking and driving away and driving whilst disqualified, and disqualified for life. On Aug. 1, 1967, at Inner London Sessions for similar offences before the same chairman he was again sent to prison and disqualified for life. So that if those disqualifications stand the appellant can never, subject to any opportunity he may have of getting his licence back, drive again.

With regard to the sentence of disqualification on Aug. 1, 1967, the court on Jan. 23, gave him leave to appeal against that disqualification, and also extended his time for applying for leave to appeal against the disqualification of June, 1966.

\* *R. v. Lambeth Metropolitan Magistrate, Ex p. Everett*, [1967] 3 All E.R. 648; [1968] 1 Q.B. 446.

The court refused an application for leave to appeal against the sentence of imprisonment, and so that is not before this court today. A

For the reasons that I attempted to indicate at the beginning of this judgment, we have come to the conclusion that these sentences of life disqualification ought not to stand. The appellant should be given some hope of driving in the future. What the court proposes to do is to impose in respect of the June, 1966, and August, 1967, offences, the minimum periods of disqualification which any court has power to impose, that is to say, twelve months in each case. The two sentences of life disqualification will be set aside, and instead there will be substituted in each case an order for twelve months' disqualification consecutive to each other and consecutive to his existing period of disqualification. B

*Appeal allowed.* C

Solicitors: *Henry Pumfrey & Son* (for the appellant).

[Reported by OM. P. MIDHA, *Barrister-at-Law.*]

## LUPTON (Inspector of Taxes) v. F. A. & A. B., LTD. D

[CHANCERY DIVISION (Megarry, J.), March 25, 26, 27, 1968.]

*Income Tax—Relief—Losses—“Trade” and stock-in-trade—Company dealing in shares and securities—Purchase of shares in other companies—Profit to be made by recovery of income tax on loss claims—Companies' dividends depreciating value of shares—Dividends to accrue over period of years—Not an adventure or concern in the nature of trade—Principle applicable in determining whether such a transaction was a trading transaction—Dividends paid partly out of accumulated profits to which s. 4 of the Act of 1955 applied—Income Tax Act, 1952 (15 & 16 Geo. 6 and 1 Eliz. 2 c. 10), s. 341—Finance (No. 2) Act, 1955 (4 & 5 Eliz. 2 c. 17), s. 4.* E

If, on analysis of a transaction in question, its significant elements are found to have a trading purpose, or a purpose of which trade provides the explanation, the presence also of fiscal motives, or elements whose purpose is procuring a benefit from tax consequences, will not necessarily prevent the transaction ranking as one carried on in a trade, for the purpose of a claim for relief for loss under s. 341 of the Income Tax Act, 1952, the question being whether the transaction viewed as a whole is one which can fairly be regarded as a trading transaction (see p. 1051, letters A to D, post). F

*Griffiths (Inspector of Taxes) v. J. P. Harrison (Watford), Ltd.* ([1962] 1 All E.R. 909) and *Bishop (Inspector of Taxes) v. Finsbury Securities, Ltd.* ([1966] 3 All E.R. 105) considered. G

In December, 1959, an unlimited company passed a resolution to increase its capital by creating two thousand preferred ordinary shares of £1 each. Subject to the dividends payable on the company's preference shares, the new shares were to carry for a period of five years all dividends that would become payable out of the profits of the company, and after the five years the new shares were to become fixed non-cumulative preference shares carrying a dividend of eight per cent. On a liquidation the shareholders were to be repaid only the amount paid on the shares, and the company could at any time cancel the shares on paying the shareholders the amount paid up. The shares carried no voting rights. They were allotted to the holders of the ordinary shares and credited as fully paid. On the day following the allotment the taxpayer company, a company carrying on a trade as dealer in stocks and shares, purchased the two thousand shares from the nine shareholders for £625,000 in cash, the shareholders warranting that interim dividends of £125,000, net of tax, would be declared in respect of the current H I

A accounting period ending Dec. 31, 1959, and that over the ensuing five years further dividends would be paid amounting to £500,000 net of tax (with provision for damages for breach of warranty for any shortfall). A stakeholder was to hold £500,000 of the purchase price, releasing equivalent amounts as subsequent dividends were paid. Early in 1960 the unlimited company paid dividends of £170,000 net of tax to the taxpayer company (B (£45,000 more than the £125,000 warranted). In March, 1960, the taxpayer company sold the shares to an associated company for £455,000. It claimed to deduct the reduction in price of the shares of £170,000 (plus £3,572 expenses) as a loss sustained in its trade as dealer in stocks and shares, in the computation of its profits for income tax purposes. In four other transactions by the taxpayer company a similar issue was involved. The Special Commissioners of Income Tax found that in each case the process of dividend-stripping was entered into "with the object of making money, bearing in mind the fiscal advantage which it was expected would flow from the transactions": they found that in four cases (including the unlimited company's case) the transaction "would produce loss to [the taxpayer company] unless repayment of income tax was obtained", and in one case "there could be no profit to [the taxpayer company] without such a repayment". In the transaction with the fifth company there was no minimum period for the scheme to work itself out and no special shares were created with special dividend rights, warranties, etc., but there was in effect a warranty of obtaining tax recovery up to £200,000 with supporting arrangements. In two of the transactions the Special Commissioners found that "the dividends were dividends paid partly out of accumulated profits to which the provisions of s. 4 of the Finance (No. 2) Act, 1955 applied".

E **Held:** (i) (a) applying to the facts of the present case, (viz., to the transaction involving the £170,000 loss) the principle deduced from the authorities (summarised at p. 1042, letter G, ante), the transaction as a whole was a tax device, not a trading transaction, having regard to the significant elements summarised at (b) below, with the consequence that the taxpayer company was not entitled under s. 341 of the Income Tax Act, 1952, to deduction of the £170,000 in computing its profits for income tax purposes (see p. 1054, letter D, post).

F *Cooper (Inspector of Taxes) v. Sandiford Investments, Ltd.* ([1967] 3 All E.R. 835) applied.

G (b) significant elements in the transaction in the present case were (first) the elaborate structure of dealing which it involved and that there was little or no other explanation for the inclusion of some provisions than fiscal advantage, (second) that the shares would have to be retained for a substantial period if the full fiscal benefit were to be reaped, and (third) that the creation of special shares carrying special rights as to dividends was involved and these rights were supported by special arrangements to secure payment of stated amounts of dividend (see p. 1053, letters C, E and H and p. 1054, letter A, post).

H (ii) the fifth company's transaction was also a tax device, not a trading transaction, although there was no creation of special shares nor minimum period of operation, because the warranty as to tax recovery coupled with the general motive and purpose of the dealing put the transaction into the same category as the other four (see p. 1054, letter G, post).

I (iii) the fact that in two transactions dividends were paid partly out of accumulated profits to which s. 4 of the Finance (No. 2) Act, 1955, applied did not involve the consequence that the transactions must be trading transactions, for that enactment was not confined to profits acquired by means of trading transactions (see p. 1055, letter A, post).

Appeal allowed.



[As to relief in respect of trading losses, see 20 HALSBURY'S LAWS (3rd Edn.) 465, para. 880; as to the meaning of trade, see *ibid.*, pp. 113-124, paras. 207-219; and for cases on the subject, see 28 DIGEST (Repl.) 20-38, 78-173.] A

As to dividend-stripping, see 20 HALSBURY'S LAWS (3rd Edn.) 201, 202, para. 356.

For the Income Tax Act 1952, s. 341, see 31 HALSBURY'S STATUTES (2nd Edn.) 327; and for the Finance (No. 2) Act, 1955, s. 4, see 35 HALSBURY'S STATUTES (2nd Edn.) 293.] B

Cases referred to:

*Bishop (Inspector of Taxes) v. Finsbury Securities, Ltd.*, [1966] 3 All E.R. 105; [1966] 1 W.L.R. 1402; *reusg. sub nom. Finsbury Securities, Ltd. v. Bishop (Inspector of Taxes)*, [1965] 3 All E.R. 337; [1965] 1 W.L.R. 1206; *affg.* [1965] 1 All E.R. 530; [1965] 1 W.L.R. 358; Digest (Cont. Vol. B) 422, 1352b. C

*Cooper (Inspector of Taxes) v. Sandiford Investments, Ltd.*, [1967] 3 All E.R. 835; [1967] 1 W.L.R. 1351; Digest (Repl.) Supp.

*Griffiths (Inspector of Taxes) v. J. P. Harrison (Watford), Ltd.*, [1962] 1 All E.R. 909; [1963] A.C. 1; [1962] 2 W.L.R. 909; 40 Tax Cas. 281; Digest (Cont. Vol. A) 848, 173k. D

*Inland Revenue Comrs. v. Livingston*, 1927 S.C. 251; 11 Tax Cas. 538; 28 Digest (Repl.) 45, 121.

*Iswera v. Inland Revenue Comrs.*, [1965] 1 W.L.R. 663; Digest (Cont. Vol. B) 395, 169a.

*Note*, [1966] 3 All E.R. 77; *sub nom. Practice Statement*, [1966] 1 W.L.R. 1234; Digest (Cont. Vol. B) 473, 646a. E

#### Case Stated.

The taxpayer company appealed to the Commissioners for the Special Purposes of the Income Tax Acts against an assessment to income tax in the sum of £1,000 made on it for 1960-61 and claimed relief from tax under s. 341 of the Income Tax Act, 1952, for the years 1959-60, 1960-61 and 1961-62 in respect of losses claimed by the company to have been sustained by it in those years in its trade as a dealer in stocks and shares. The questions for decision remaining in issue before the commissioners were: (i) whether or not shares which the taxpayer company acquired in five other companies were acquired by the taxpayer company in the course of its trade as a dealer in stocks and shares and accordingly formed part of its stock-in-trade; and (ii) whether or not a sum of £13,325 formed part of the cost to the taxpayer company of shares which it acquired in one of the five companies. The commissioners found the following facts, among others. During the years 1959-60, 1960-61 and 1961-62 the taxpayer company was admittedly trading as a dealer in stocks and shares. During the years 1959 and 1960 the taxpayer company acquired certain holdings of shares in S. & Co., L.N.P., Ltd., W.P., Ltd., O.I., Ltd., and B.P., Ltd. The transactions entered into in shares of each of these companies were dividend-stripping transactions. The transaction with S. & Co. is taken in the judgment by way of example and the facts in regard to it are summarised at p. 1046, letter I, post. The transactions with three other companies are not necessary to be stated in this report. The commissioners found that the transaction involving O.I., Ltd., which was also a dividend-stripping transaction, did not involve any creation of shares with special rights. O.I., Ltd., was an investment company which was the parent company of a group of companies carrying on business as copper processors and smelters. By an agreement dated Mar. 30, 1960, the taxpayer company agreed with certain shareholders to purchase 99,702 ordinary shares, 199,404 deferred ordinary shares and 54,851  $6\frac{1}{2}$  per cent. cumulative preference shares of O.I., Ltd., which amounted to the whole of the ordinary, deferred ordinary and preference shares of the company for a total consideration of £1,323,946, payable on completion of the purchase on the following day. F G H I

A A company, Elm Tree Industrial Finance Co., Ltd., was a wholly-owned subsidiary of O.I., Ltd. By cl. 5 (d) of the agreement, to which reference is made at p. 1054, letter E, post, the principal shareholders warranted to the taxpayer company—

B “(d) That the profits of [Elm Tree Industrial Finance Co., Ltd.] at the date hereof (other than profit on capital account) available for distribution by way of dividend to [O.I., Ltd.] shall be sufficient to declare a gross dividend which after deduction of tax at the standard rate in force at the date of payment shall leave the net sum of £800,000 and that if a dividend or dividends shall be declared at any time by [I.O., Ltd.] to [the taxpayer company] out of the said dividend so received by it [the taxpayer company] shall be entitled to and shall recover from the Commissioners of Inland Revenue either directly or by way of set off the tax deducted by [O.I., Ltd.] in paying such dividend Provided always that if [the taxpayer company] shall fail to recover any such tax the shareholders will pay to [the taxpayer company] by way of [liquidated] damages for breach of this undertaking the difference between a sum equal to one half of the tax recovered in the sum of £200,000.”

D The total expenditure incurred by the taxpayer company in connexion with the transaction involving O.I., Ltd. amounted to £1,678,932. During the year ended Mar. 31, 1961 the taxpayer company received dividends on shares acquired by it in O.I., Ltd. amounting in all to £800,000 net of tax. The net value of the combined assets and liabilities of O.I., Ltd. as at Mar. 31, 1961, was £695,952, and in the accounts of [the taxpayer company] for the year ended Mar. 31, 1961, the shares held in O.I., Ltd. were written down to that figure. On the basis of the Mar. 31, 1961, value of £695,952 the taxpayer company sustained a net loss on the O.I., Ltd. transaction at that date, after taking account of the net dividend received, of £182,980, subject, however, to the undertaking contained in the proviso to cl. 5 (d) of the sale agreement. The trading loss claimed by the taxpayer company to have been sustained by it in 1960-61 in respect of this transaction was £182,980 plus £800,000, viz., £982,980.

E The Crown contended before the commissioners as follows: (i) that the transactions whereby the taxpayer company acquired shares in S. & Co., L.N.P., Ltd., W.P., Ltd., O.I., Ltd., and B.P., Ltd. were not transactions entered into by the taxpayer company in the course of trade; (ii) that the shares in these companies acquired by the taxpayer company did not at any time form part of the taxpayer company's stock-in-trade; and (iii) formally, but without argument, that the four transactions involving forward dividend-stripping were not trading transactions because they necessarily involved acquisition with a view to holding and so were akin to investments.

G The taxpayer company contended before the commissioners: (a) that the shares which it acquired in S. & Co., L.N.P., Ltd., W. P., Ltd., O.I., Ltd., and B.P., Ltd., were acquired by it in the course of its trade as a dealer in stocks and shares and formed part of its stock-in-trade; and (b) that the claims made by the taxpayer company under s. 341 of the Income Tax Act 1952 for the years 1959-60, 1960-61 and 1961-62 should accordingly be allowed.

H The commissioners held, *inter alia*, that

I As regards the five transactions involving dividend-stripping, the dividend-stripping transactions which were in issue in *Griffiths (Inspector of Taxes) v. J. P. Harrison (Watford), Ltd.\** and *Bishop (Inspector of Taxes) v. Finsbury Securities, Ltd.†*, were there held to be within the scope of a trade of dealing in shares. Bearing in mind the opinions given in the House of Lords in the former, and the judgments given in the Court of Appeal in the latter, of these cases, the commissioners found on the evidence adduced in the present

\* [1962] 1 All E.R. 909.

† [1965] 3 All E.R. 337.

case that the five dividend-stripping transactions entered into by [the taxpayer company] formed part of that company's trade of dealing in shares. They concluded accordingly that [the taxpayer company] was entitled for the years 1959-60, 1960-61 and 1961-62 to relief from tax under s. 341 of the Income Tax Act 1952 on an amount of its income equal to the amount of any loss sustained by it for those years in its trade of dealing in shares, such loss being computed on the basis that the above-mentioned transactions formed part of that trade.

The Crown appealed by way of Case Stated to the High Court.

The case noted below\* was cited during the argument in addition to the cases referred to in the judgment.

*Hubert H. Monroe, Q.C., J. R. Phillips and J. P. Warner* for the Crown.  
*Heyworth Talbot, Q.C., and M. P. Nolan* for the taxpayer company.

**MEGARRY, J.:** This is a Case Stated by the Special Commissioners. It relates to relief claimed by the taxpayer company, F.A. & A.B., Ltd., under s. 341 of the Income Tax Act, 1952, in respect of the years 1959-60, 1960-61 and 1961-62. The claim relates to losses in the taxpayer company's trade as a dealer in stocks and shares. It is accepted on all hands that during these years the company was trading as a dealer in stocks and shares. Throughout there has been no suggestion that any of the transactions concerned were sham or in any way otherwise than they appeared to be.

The case relates to five transactions involving dividend-stripping, for the most part forward dividend-stripping but in some cases involving some backward dividend-stripping. The commissioners found in each case that the taxpayer company entered into the transactions

"with the object of making money, bearing in mind the fiscal advantages which it was expected would flow from the transactions."

They found that these transactions formed part of the taxpayer company's trade of dealing in shares, and on this footing held that the trading losses for the three years were, for 1959-60, £46,644; for 1960-61, £1,016,477; and for 1961-62, £15,425. The question of law, which is more fully stated in para. 9 (5), (6) and para. 12 of the Case Stated is, shortly, whether there was evidence on which the Special Commissioners could come to this conclusion. Both sides accept that the question for this court is one of law as, indeed, *Bishop (Inspector of Taxes) v. Finsbury Securities, Ltd.* (1) to which I am about to refer goes far to establish (2).

Much of the argument in the case has turned on two decisions of the House of Lords on dividend-stripping, *Griffiths (Inspector of Taxes) v. J. P. Harrison (Watford), Ltd.* (3) and *Bishop (Inspector of Taxes) v. Finsbury Securities, Ltd.* (1). The *Harrison* case (3), which was decided by a majority of three to two in favour of the taxpayer, was duly considered by the commissioners. On the other hand, the *Finsbury* case (1), a decision in favour of the Crown, had not been decided by the House of Lords at the time, and the commissioners had before them only the majority decision of the Court of Appeal (4) in favour of the taxpayer, a decision which the House of Lords was later unanimously to reverse.

I will take the facts of the first of the five transactions as an example of the problem. This, next to the fourth transaction, was the transaction which counsel for the taxpayer company selected as being most favourable to his case, a selection with which counsel for the Crown agreed. The facts are fully set out in the Case and I refer to the essentials only. It concerns the firm of Sotheby & Co., which is an unlimited company. The first step was that on Dec. 21, 1959, Messrs. Sotheby held an extraordinary general meeting, and at that meeting a resolution

\* *Edwards (Inspector of Taxes) v. Bairstow*, [1955] 3 All E.R. 48.

(1) [1966] 3 All E.R. 105.

(3) [1962] 1 All E.R. 909; 40 Tax Cas. 281.

(2) [1966] 3 All E.R. at p. 108.

(4) [1965] 3 All E.R. 337.



- A to increase the capital by creating two thousand preferred ordinary shares of £1 each was duly passed. The shares themselves were extraordinary to the extent that, subject to the dividends payable on Messrs. Sotheby's preference shares, the new shares for a period of five years carried all dividends out of the profits of the company (other than profits on capital account), and thereafter became fixed non-cumulative preference shares carrying a dividend of eight
- B per cent. Further, on liquidation there was to be a repayment of the amount paid up, and no more. It was also provided that Messrs. Sotheby could at any time cancel the shares on paying the shareholders an amount equal to the amount paid up on the shares. The shares carried no other rights as to voting or otherwise. These new shares were duly allotted, credited as fully paid, among the holders of the ordinary shares.

- C The next day, on Dec. 22, 1959, the taxpayer company entered into a contract with the nine shareholders in Messrs. Sotheby for the purchase of these two thousand shares for £625,000 cash down, with completion that day. The shareholders undertook and warranted to the taxpayer company that interim dividends of £125,000, net of tax, would be declared in respect of the current accounting period ending Dec. 31, 1959, and would be paid to the taxpayer company within
- D seven days of completion. There was also a warranty that further dividends would be paid to the taxpayer company during the five years from the date of the contract amounting (net of tax) to £500,000; and there was an agreement to pay to the taxpayer company as liquidated damages for breach of warranty a sum equal to any shortfall, with a further sum if less than £100,000 was paid.

- E On the same day the taxpayer company, the shareholders and a company called Northern Holdings, Ltd., made a contract whereby Northern Holdings, Ltd. (who were described as "the stakeholders") were to hold £500,000 out of the £625,000 paid by the taxpayer company. This was to be held on behalf of the shareholders and also as security for the undertaking and warranty for the benefit of the company. As and when dividends were paid in excess of the initial £125,000, the stakeholders were to release equivalent amounts out of the
- F £500,000 to the shareholders; and if there was any breach of warranty by the shareholders the stakeholders were to pay the taxpayer company the damages out of the £500,000. By a letter dated the same day from Hambros Bank to the taxpayer company the bank undertook to "extend sufficient facilities" to the stakeholders to enable them to carry out their obligations under the agreement.

- G Between then and Mar. 31, 1960, Messrs. Sotheby declared dividends which were paid to the taxpayer company amounting to £170,000 net of tax. These dividends consisted of the £125,000 together with £45,000 more. On Mar. 31, 1960, the taxpayer company sold the shares to another company called U.G.S. Finance, Ltd., for £455,000. Both the taxpayer company and U.G.S. Finance, Ltd., were members of a group of companies of which Barro Equities, Ltd., was the parent company. The taxpayer company incurred legal costs and
- H stamp duty amounting to £3,572. Commercially, the result of the course of dealing was that the taxpayer company received net dividends of £170,000 and sold the shares for £170,000 less than the company had paid for them, so that the net loss was merely the expenses of £3,572. But for the purpose of s. 341 of the Income Tax Act, 1952, the dividends (which had already suffered deduction of tax) must be ignored, and so the loss claimed is £173,572. If that
- I sum is a "loss" which the taxpayer company has sustained "in any trade . . . carried on by" the company within s. 341, the claim is valid. The question is whether it is such a loss. By s. 526 (1) of the Act of 1952, except so far as is otherwise provided or the context otherwise requires, "trade" includes "every trade, manufacture, adventure or concern in the nature of trade". The term "trade" is thus left undefined; for this provision relates to the ambit of the word "trade" rather than its meaning, and if it were to be treated as a definition it would be open to the valid semasiological thrust that there is little profit in seeking to define a word in terms of itself.

I now turn to the two leading cases of *Harrison* (5) and *Finsbury* (6). In *A Harrison* (5) the company bought all the shares in C., Ltd., for £16,900. C., Ltd., declared a net dividend of some £15,900, and the company then sold the shares for £1,000, claiming a loss of £15,900 for the purposes of s. 341. The Special Commissioners held that this was not a trading loss, but *DANCKWERTS, J.*, the Court of Appeal (with *DONOVAN, L.J.*, dissenting), and the House of Lords (with *LORD REID* and *LORD DENNING* dissenting), all held that they were wrong. *B VISCOUNT SIMONDS* said this (7):

"I hope that I do no injustice to the argument for the Crown if I say that it rested entirely on the proposition that the essence of a trading transaction is that its object is to make a profit and that the found object of this transaction was the ulterior one of obtaining a dividend against which it could claim to set off its losses."

This contention he rejected, and he held that a transaction could perfectly well be a trading transaction even though it made and was intended to make a loss. On this point I may observe that during the argument of this case examples were taken such as the well-known "loss leaders" which certain supermarkets offer for sale, being goods on which no profit or, indeed, an outright loss, will be made, in the hope that the attractions of these goods will bring customers to the store who will purchase other goods which will show the store a profit. Again, the instance was taken of a company trading at a loss under difficult commercial conditions because it wishes to keep its experienced staff together and has future developments in mind which it hopes will shortly restore its profits, if only it still has that staff.

*LORD SIMONDS* also said this (8):

"It appears to me to be wholly immaterial, so long as the transaction is not a sham, . . . what may be the fiscal result or the ulterior fiscal object of the transaction, and since this can be the only ground on which the commissioners could have reached their determination, I must conclude that it cannot be upheld."

He thus rejected the test of looking to see whether the purposes of the transaction is a fiscal purpose.

*LORD MORRIS OF BORTH-Y-GEST* said this (9):

"... it seems to me that a trading transaction does not cease to be such merely because it is entered into in the confident hope that, under an existing state of the law, some fiscal advantage will result. In judging the essential nature of a transaction it will often be relevant and of assistance to consider the objects and intentions which are the inspiration of the transaction. In the present case, however, I cannot think that there is room for doubt as to the essential nature of the transaction: it was a transaction which was demonstrably of a trading nature and it was not divested of that nature merely because it was entered into with the expectation that as a result (but not as part of the trading activity of the company as such) some tax recovery might be claimed."

*LORD GUEST* (10) said that it

"... by no means follows, that the absence of an intention to make a profit or the intention to make a loss negatives trading. The test is an objective one. The question to be asked is not, *quo animo* was the transaction entered into but what in fact was done by the company . . ."

He added that (10), in his opinion,

(5) [1962] 1 All E.R. 909; 40 Tax Cas. 281.

(7) [1962] 1 All E.R. at p. 912; 40 Tax Cas. at p. 293.

(8) [1962] 1 All E.R. at p. 912; 40 Tax Cas. at p. 294.

(9) [1962] 1 All E.R. at p. 919; 40 Tax Cas. at p. 301.

(10) [1962] 1 All E.R. at p. 921; 40 Tax Cas. at p. 304.

(6) [1966] 3 All E.R. 105.

- A "...one has to look at the transaction by itself irrespective of the object, irrespective of the fiscal consequences, and ask the question in Lord President CLYDE's words in *Inland Revenue Comrs. v. Livingston* (11): 'whether the operations involved in it are of the same kind, and carried on in the same way, as those which are characteristic of ordinary trading in the line of business in which the venture was made'."
- B It seems to me that this is a narrow decision on a narrow point. The case merely decides that a transaction is not prevented from being a trading transaction merely because its object is not to make a trading profit but to obtain a tax advantage. The transaction involved was a simple transaction of purchasing, reaping the dividend, and selling. It involved no superstructure of specially created shares of an extraordinary nature, or warranties, or a stakeholder or the like. So far as the purpose of the transaction is concerned it appears that LORD SIMONDS and LORD GUEST were taking the view that this had to be disregarded, whereas LORD MORRIS said that it was often relevant. A possible answer, simply on that decision alone, might be this: that if, as in that case, the nature of the transaction is clear, then the object or purpose does not affect it, but that if the nature of the transaction is less than clear then it may be
- D permissible to look at the objective in order to explain the nature of the transaction.
- In the *Pinsbury* case (12) the headnote summarises the arrangement in the majority of the fifteen cases in question in the following way:
- E "The company to be 'stripped' created a small number of preference shares which, in addition to a normal fixed interest dividend, were to carry, for short periods of years, special net dividends amounting to the whole of the company's anticipated net profits from its business for the period of years, up to a stated maximum. The respondent thereupon bought those shares, the purchase price being the stated maximum (which was to be reduced to the extent that the special dividends over the period fell below that maximum) plus one-half of any referable tax repayments on any loss claim established by the respondent under s. 341. Each year the value of the shares fell by reason of the dividends paid. In the minority of the fifteen cases the respondent bought the shares of a company having one asset which it expected to turn into a profit in about a year, and the respondent took that profit in the form of a dividend, leaving the shares with a nominal value only."
- F
- G The Special Commissioners in that case held that the case was not distinguishable from the *Harrison* case (13) and found for the company on this point. BUCKLEY, J. (14) upheld this decision, and in the Court of Appeal (15) the decision was affirmed on somewhat different grounds, LORD DENNING, M.R., dissenting. The House of Lords (16) unanimously allowed the appeal by the Crown, and all their Lordships concurred in the speech delivered by LORD MORRIS OF BORTH-Y-GEST. In that speech (17) he distinguished the *Harrison* case (13) on the ground that the arrangements there were essentially different. There,
- H "...the transaction was demonstrably a share-dealing transaction. Shares were bought: a dividend on them was received: later the shares were sold."
- I LORD MORRIS went on to deal with the question of motive. He said this (17):
- "There may be occasions when it is helpful to consider the object of a transaction when deciding as to its nature. In the *Harrison* case (13) my view was that there could be no room for doubt as to the real and genuine

(11) (1927), 11 Tax Cas. 538.

(12) [1966] 1 W.L.R. 1402.

(13) [1962] 1 All E.R. 909; 40 Tax Cas. 281.

(14) [1965] 1 All E.R. 530.

(15) [1965] 3 All E.R. 337.

(16) [1966] 3 All E.R. 105.

(17) [1966] 3 All E.R. at p. 111, letter G.



nature of the transaction. The fact that the reason why it was entered into was that the provisions of the revenue law gave good ground for thinking that welcome fiscal benefit could follow did not in any way change the character of the transaction."

It seems to me that LORD MORRIS is there saying that, if, looking at the transaction, it is clear that it is or is not a trading transaction, motive is irrelevant. In choosing what dealings to transact a trader does not cease to trade merely because he prefers to transact those dealings which are fiscally beneficial and to reject those that lack this advantage. The discovery of a motive for carrying out a transaction must not be confounded with an analysis of the nature of the transaction itself.

What, then, are the "occasions when it is helpful to consider the object of a transaction when deciding as to its nature"? (I again quote the words of LORD MORRIS (18).) I do not think that it can merely be that the transaction is unusual or extraordinary. The question under s. 341 is not that of a loss in any "ordinary trade" but that of a loss in a "trade", simpliciter; and many transactions, though clearly extraordinary, are nonetheless trading transactions. Nor, for the reasons that I have just given, do I consider that the test can be whether the transaction would have been entered into if there had been no question of tax advantage; in any case that would, I think, be contrary to the *Harrison* case (19). But if when the constituent elements of a transaction are examined it is found that there are many elements the presence of which cannot be explained on any sensible trading ground but which are readily intelligible on fiscal grounds, then, in my judgment, the fiscal grounds may become relevant; for the fiscal element has invaded the transaction itself, moulding and explaining it, and is not merely the purpose or object for which a trading transaction is carried through.

I think this view gains some support from the words of a strong Board of the Judicial Committee in a Privy Council case from Ceylon, *Iswera v. Inland Revenue Comrs.* (20). There, in considering the words "every trade and manufacture, and every adventure and concern in the nature of trade" in what was said to be a definition of "trade", LORD REID, speaking for the Board, said this (21):

"If, in order to get what he wants, the taxpayer has to embark on an adventure which has all the characteristics of trading, his purpose or object alone cannot prevail over what he in fact does. But if his acts are equivocal his purpose or object may be a very material factor when weighing the total effect of all the circumstances."

As in all such cases, it may well be difficult to draw the line. At one extreme lies a transaction which is merely a trading transaction. In such a case the transaction is not deprived of its trading nature merely by the presence of a fiscal motive for carrying it out nor by the fact that as a trading transaction it makes a loss and not a profit. That, in the barest of outlines, is the *Harrison* case (19). At the other extreme lies a transaction that is far removed from trading, designed to secure a tax advantage. There, the mere fact that the transaction includes the purchase and sale of shares by a trader in shares does not of itself suffice to make it a trading transaction. That, again in the barest of outlines, is the *Finsbury* case (22). Between these two extremes lies a continuous spectrum of possible transactions in which the elements of trading become smaller and smaller in relation to the elements of securing a tax advantage. A sufficiency of reported cases may in due course provide the co-ordinates which will make it possible to plot the position of the dividing line; but in this case I am not

(18) [1966] 3 All E.R. at p. 111, letter G.

(19) [1962] 1 All E.R. 909; 40 Tax Cas. 281.

(20) [1965] 1 W.L.R. 663.

(21) [1965] 1 W.L.R. at p. 668.

(22) [1966] 3 All E.R. 105.

A required to do more than decide whether these transactions fall on the right side or the wrong side of any reasonable line that could be drawn.

In doing that, it seems to me that I must have regard to the following principles. If on analysis it is found that the greater part of the transaction consists of elements for which there is some trading purpose or explanation (whether ordinary or extraordinary), then the presence of what I may call "fiscal elements",  
B inserted solely or mainly for the purpose of producing a fiscal benefit, may not suffice to deprive the transaction of its trading status. The question is whether, viewed as a whole, the transaction is one which can fairly be regarded as a trading transaction. If it is, then it will not be denatured merely because it was entered into with motives of reaping a fiscal advantage. Neither fiscal elements nor fiscal motives will prevent what in substance is a trading transaction from  
C ranking as such. On the other hand, if the greater part of the transaction is explicable only on fiscal grounds, the mere presence of elements of trading will not suffice to translate the transaction into the realms of trading. In particular, if what is erected is predominantly an artificial structure, remote from trading and fashioned so as to secure a tax advantage, the mere presence in that structure of certain elements which by themselves could fairly be described as trading  
D will not cast the cloak of trade over the whole structure. In speaking of the greater part of the transaction I am not, of course, referring to mere bulk. A long document, like a long speech, may do and say remarkably little. What seems to me to be of particular importance is the relative extent of the significant provisions which are made.

One may look at matters in a slightly different way. I think that some assistance might be gained from considering the comment which a hypothetical, sapient and impartial trader in shares would make when confronted with the details of a transaction. Is he to be imagined as saying: "That's obviously share trading", or, perhaps, "What an unusual but interesting way of share trading", or would he exclaim: "Whatever that is, it is not share trading"?  
E If he were to be endowed with the qualities of a professional accountant as well, perhaps the answers might be rephrased as: "That's an adventure or concern  
F in the nature of trade" on the one hand, and on the other: "If this can be called an adventure or concern at all, its nature is that of a tax recovery device remote from trade."

With these considerations in mind I must deal with certain submissions made by counsel for the taxpayer company. In the forefront of his argument was his  
G emphasis on the differences between the facts of the present case and those in the *Finsbury* case (23). There, the vendors of the shares were to have half of the tax recovered, so that the sale price would be augmented, and the transaction was at least in part for their benefit. Here, there was a fixed sale price in each of the five cases, he said, with no provision for augmentation out of any tax recovered. Only in two cases (Nos. 3 and 5) did the tax recovery affect the  
H vendors, and then only to accelerate the payment of the instalments to the vendors. Secondly, he said that in the *Finsbury* case (23) there was an obligation on the company (which seems to have been a contractual obligation) to hold the shares for the mutual benefit of vendors and purchaser. Here, there is no such obligation. Counsel for the taxpayer company carefully analysed the speech of LORD MORRIS (24), and urged with force and clarity that as there were these  
I differences the *Finsbury* case (23) did not apply, and the present case therefore fell within the embrace of the *Harrison* case (25). With all proper decorum he submitted that it was not for me to say whether the facts of this case sufficed to distinguish it from the *Harrison* case (25); once he had demonstrated that the facts of this case were significantly different from those of the *Finsbury* case (23), it must be left to the House of Lords to say whether those facts justified

(23) [1966] 3 All E.R. 105.

(24) [1966] 3 All E.R. at p. 112.

(25) [1962] 1 All E.R. 909; 40 Tax Cas. 281.

another exception or qualification being made to the principles of the *Harrison* case (26), to stand side by side with the *Finsbury* case (27). A

I hope that I do not fall too gravely below the accustomed standards of courtesy of counsel for the taxpayer company when I say that I have never met this approach to the doctrine of precedent before, and I hope never to meet it again. In my judgment, it is plainly heterodox. As I conceive it, my duty is to distil from the authorities the principles of law laid down in them and then to apply those principles to the case before me, whatever the facts. Principles, not facts, are the life of the doctrine of precedent; and to those who seek to apply the doctrine by matching fact against fact, I would say *qui haeret in litera haeret in cortice*. Certainly I do not read the *Finsbury* decision (27) as saying that where the particular facts of that case exist, then to that extent, and to that extent only, an inroad is made on the *Harrison* rule (26). That would accord to the *Harrison* case (26) an unwarranted paramountcy; and, in saying that, I do not forget that the pronouncement in the House of Lords which modified the former practice of treating the House as being strictly bound by its own decisions (28) was made immediately before judgment in the *Finsbury* case (27) was delivered. As I see it, my duty is to apply the principles that I find in the two cases when fairly read together. As I have already indicated, I consider that the *Finsbury* case (27) is far broader in its principles than counsel for the taxpayer company would have me recognise. The facts of that case mentioned in the report (29) were the foundation for the decision of the House of Lords that the transactions were not in the nature of trade but were solely artificial devices remote from trade to secure a tax advantage. Other facts in other cases may well reveal that other transactions merit the same classification; and if they do, I conceive it the duty of any court or tribunal, however lowly, to say so. It would be wrong to confound the facts of a case in which a principle emerges with the principle itself. B

In this view, I derive some comfort from the judgment of BUCKLEY, J., in *Cooper (Inspector of Taxes) v. Sandiford Investments, Ltd.* (30), a case on which counsel for the Crown relied but counsel for the taxpayer company abstained from comment. The facts there were very different; but the judge had the two House of Lords decisions before him, and in reaching his conclusion that the case before him was on the *Finsbury* (27) side of the line, he relied on three main points. These were, first, the complexity of the transactions; secondly, the fact that it was manifest that there would be a loss unless the transactions were held to be trading transactions; and thirdly, that the scheme would be profitable only if the shares were held until the scheme was worked out. He said (31): C D E F G

“These considerations all seem to me to indicate not merely that this was not an ordinary trading transaction, but that it was a transaction entered into with the primary and indeed the only object of obtaining a profit by means of the fiscal consequences which will flow from the scheme if the taxpayer company's claims can be substantiated. In other words the shares in Fragmap company were not acquired by the taxpayer company in order to derive a profit in the course of carrying on their business of traders in securities, but were acquired in order to obtain a profit from them in consequence of the fiscal consequences which, if the company's claims were right, would result in a profit. If, however, their claims were not sustainable the H I

(26) [1962] 1 All E.R. 909; 40 Tax Cas. 281.

(27) [1966] 3 All E.R. 105.

(28) See *Note*, [1966] 3 All E.R. 77.

(29) [1966] 3 All E.R. at p. 112.

(30) [1967] 3 All E.R. 835.

(31) [1967] 3 All E.R. at p. 842.



- A transaction would involve the taxpayer company in a loss. These considerations, in my judgment, deprive this transaction of the character of a trading transaction. It becomes, I think, much more like what the House of Lords had to consider in the *Finsbury Securities* case (32) and is appropriately described as an artificial device remote from the taxpayer company's trading activities, designed to secure a tax advantage. It was, in my judgment, a
- B transaction into which the taxpayer company would never have entered at all but for the hope that it would result in fiscal advantages."

These last words, I think, clearly relate not merely to motive but also to the shape of the transaction itself. Like BUCKLEY, J., I would regard the constituent parts of each of these transactions with which I am concerned "as part and parcel of one composite transaction": I take this phrase from his judgment (33). So regarded, the question for me is whether these five transactions are on the *Harrison* side (34) of the line or the *Finsbury* side (32).

- C In answering this question, I would look, first, at the somewhat elaborate structure of dealings in each case. That by itself would not necessarily take the transactions out of the category of trading, for there may be trading transactions of great complexity. Indeed, at one stage of the argument counsel for the taxpayer company roundly asserted that the greater the complexity the more assured it was that there was trading. I would agree with him if the complexity is a trading complexity. For in my view the answer to his assertion is that complexity per se proves little; what matters is the kind of complexity. A complexity of trading provisions will reinforce the trading nature of a trading transaction; a complexity of fiscal provisions will subtract from it. Here there is little or no explanation for the inclusion of some of the provisions other than
- D fiscal advantage. The Special Commissioners have found that
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- "the five transactions involving dividend-stripping summarised in the previous sub-paragraph were entered into by [the taxpayer company] with the object of making money, bearing in mind the fiscal advantages which it was expected would flow from the transaction. In relation to S. and Co., W.P., Ltd., O.I., Ltd., and B.P., Ltd., the transaction in each case would produce a loss to [the taxpayer company] unless repayment of income tax was obtained, and in relation to L.N.P., Ltd., there could be no profit to [the taxpayer company] without such a repayment."
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- G The wording of this finding might perhaps have been more explicit, but, read fairly, I think it is reasonably plain that the Special Commissioners are saying that the sole purpose of the transactions was to obtain the fiscal advantages that they would confer. I find this far from surprising; and on this footing it is not unexpected to find that the fiscal objective has failed to remain aloof and on the horizon, and has thrust into the transactions substantive provisions designed to achieve the fiscal purpose.
- H

- I Secondly, although there is no contractual requirement that the shares should be retained for any particular period, the arrangements are such that in order to reap the full fiscal benefit for the vendor and the taxpayer alike, the shares must be retained by the company, or by a member of the company's group, for a substantial period which will allow the scheme to work itself out. In three cases there is a maximum period of five years, and in one, the W.P., Ltd. case, it is about a year and a half. In the remaining case, that of O.I., Ltd., there is no such period. In the four cases, if during the period of the scheme the shares were sold outside the group, the tax advantage would to this extent be lost. Accordingly, the carrying out of the scheme renders the shares less readily

(32) [1966] 3 All E.R. 105.

(33) [1967] 3 All E.R. at p. 839, letter C.

(34) [1962] 1 All E.R. 909; 40 Tax Cas. 281.

saleable; and this can hardly be a characteristic of trading in shares. Thirdly, in all the cases except one (that of O.I., Ltd.) the scheme involved the creation of special shares which carried special rights as to dividends, supported by an arrangement which by warranties or otherwise secured the payment of stated amounts by way of dividend. A

I do not think that the right approach is, after analysing each transaction meticulously, to compare the constituent elements with those present or absent in other cases and then to decide the matter on the degree of correspondence or divergence. Instead, I consider that each arrangement should be regarded as a whole in the light of the principles which I have derived from the cases. If at the end of the day a transaction, viewed as a whole, appears to be merely, or substantially, a trading transaction, then despite the presence of fiscal elements or fiscal motives a trading transaction it remains. If, on the other hand, the transaction as a whole appears to be no trading transaction but an artificial device remote from trade to secure a tax advantage, then the presence of trading elements in it will not secure its classification as a trading transaction. When I look at the matter in that light and bear in mind the documents in each transaction, which I have carefully re-read in the light of the arguments advanced before me, I reach the clear conclusion that four out of the five transactions (that is, all except No. 4, the O.I., Ltd., case) are not trading transactions but tax devices. I would accordingly in those four cases reverse the decision of the Special Commissioners, who, of course, lacked my advantage of being able to consider the decision of the House of Lords in the *Finsbury* case (35). B C D

That leaves me with No. 4, the O.I., Ltd. case. This differs from the other cases in the manner that I have indicated. Counsel for the Crown has pointed to certain elements in the O.I., Ltd. case which nevertheless suffice, he says, to bring it into the same category as the other four. What he relies on is primarily cl. 5 (d) of the sale agreement, which contains what is in effect a warranty of obtaining tax recovery up to an amount of £200,000. This provision is supported by the provisions of cl. 9 (b) and is further supported by cl. 3 of the stakeholding agreement. Counsel accepted that there was no period of duration written into the agreement, other than a provision in the stakeholding agreement which released the stakeholder after a period of three years. Apart from these elements he was able to point to nothing in the transaction (except, of course, the general motive and purpose of the dealing) which put it into the same category as the other four. The short question, which I have found difficult, comes to whether the significance of the provisions he has referred to, viewed in the context of the transaction as a whole, is sufficient to put the case into the same category as the others. My mind has fluctuated more than once in the course of the argument, but in the end, though I confess with some hesitation, I have come to the conclusion that these provisions are of sufficient significance to achieve this result; and accordingly the decision in that case will be the same as in the others. E F G

Finally, I must mention one other point which counsel for the taxpayer company advanced with what in the circumstances may equally be described as appropriate force and appropriate diffidence. In the first and fifth of the transactions, he said, the Special Commissioners had held that H

“the dividends were dividends paid partly out of accumulated profits to which the provisions of s. 4 of the Finance (No. 2) Act, 1955, applied.” I

I read from the statement in the first of the cases; the statement in the fifth is almost identical. This, he said, showed that the transactions were trading transactions: the Crown could hardly apply the section to a part of the profits and in the same breath say that the transactions were not trading transactions.

- A The answer, I think, lies in the terms of s. 4 (1) of the Act of 1955 (36). There is nothing in the section to confine it to cases where the profits were acquired by means of a trading transaction. True, the section is confined in its application to those who are engaged in a trade consisting of or comprising dealings in shares or other investments; but it is not, at any rate in terms, limited to acquisitions made by way of trading in shares. The subsection speaks as to the activities
- B carried on by the person acquiring the shares and not as to the mode of acquisition of those shares. All that is required is that the shares should have been sold or issued to him or otherwise acquired by him within certain limits of dates. In such cases the section bites; and a dealer in shares should accordingly have a care in acquiring for any purpose, whether or not for resale or other dealings, any shares to which the section can apply. In any case, I very much doubt
- C whether the Special Commissioners were intending to do more than say that the accumulated profits were profits of a type which fell within s. 4; and I would not attempt in this oblique way to spell out of their words a finding as to the mode of acquisition. Even if there were such a finding, I may add, it might be wrong in law. I do not think there is anything in this point save the initial elegance of what, on examination, emerges as a fallacious dilemma.

D *Appeal allowed.*

Solicitors: *Solicitor of Inland Revenue; Herbert Smith & Co.* (for the taxpayer company).

[*Reported by F. A. AMIES, ESQ., Barrister-at-Law.*]

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(36) Section 4 (1), so far as relevant, provides: "Purchases of shares by financial concerns and persons exempted from tax.—Where a person engaged in carrying on a trade which consists of or comprises dealings in shares or other investments becomes entitled to receive a dividend on a holding of shares of any class to which this section applies, . . . and the dividend is to any extent paid out of profits accumulated before the date on which the shares were so acquired, then, if those shares, or those shares together with—

(a) any other shares the dividend on which is payable to that person and which were sold or issued to him or otherwise acquired by him . . . not more than six years before the date on which the dividend becomes payable, and

(b) in a case where the trade is under the same control as another trade which consists of or comprises dealings in shares or other investments, any shares the dividend on which is payable to the person engaged in carrying on that other trade and which were sold or issued to him or otherwise acquired by him . . . more than six years before the date on which the dividend becomes payable, and

(c) any such shares as are to be brought into account under subsection (3) of this section,

amount to ten per cent. or more of the issued shares of that class, the net amount of the dividend received on the shares in the holding shall, to the said extent to which it was paid out of profits accumulated before the shares were acquired, be brought into account in computing the profits or gains or losses of the trade as if it were a trading receipt which had not borne tax."



## R. v. HUNT.

[COURT OF APPEAL, CRIMINAL DIVISION (Lord Parker, C.J., Davies, L.J. and Brabin, J.) May 27, 1968.]

*Criminal Law—Verdict—Inconsistent verdicts—Burden on appellant to satisfy the court that the verdicts could not stand together—Charges of grievous bodily harm to B. and of assault occasioning actual bodily harm to H.—Charges arising out of acts on same occasion—Issue of identity of single assailant—Appellant acquitted of causing grievous bodily harm to B. but convicted of assault occasioning actual bodily harm to H. Whether verdicts could stand together.*

B

On an evening in August, 1967, H., his wife and B. were walking in the street and met four young men, F., T., R. and the appellant, walking abreast. H. was struck with the knee by one of the men and was hit a glancing blow with his fist, and B. was struck in the face with a fist and fell, suffering a fractured skull. At the trial of the appellant neither H. nor his wife could identify H.'s assailant, though she testified that the same man assaulted both H. and B. F. and T. gave evidence that it was the appellant who assaulted H. and B. The appellant's defence was that T. was the assailant, and that, as the appellant had a damaged hand (which was the fact), he could not have assaulted B. with the force alleged. The appellant was acquitted on counts 1 and 2 (which charged causing grievous bodily harm to B. with intent, and inflicting grievous bodily harm on B.), but he was convicted on count 3 (which charged assaulting H., thereby occasioning him actual bodily harm). The jury's verdict was expressed on counts 1 and 2 as "insufficient evidence" and so not guilty, but on count 3 they found the appellant guilty. On appeal against conviction on count 3, on the ground that the verdict on count 3 was inconsistent with the verdict on counts 1 and 2,

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**Held:** the burden of establishing inconsistent verdicts which could not stand together because a reasonable jury could not have reached them, or which it would be unsafe to allow to stand, was on the appellant; in the present case the court was not satisfied that only an unreasonable jury could have reached these verdicts (e.g., the first two counts charged grievous bodily harm, and the appellant's damaged hand might have left the jury in doubt whether he could have struck the blow that knocked B. down), and accordingly the verdict on count 3 should stand (see p. 1058, letters F and H, post).

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Dictum of DEVLIN, J., in *R. v. Stone* ((1954), unreported) applied.  
Appeal dismissed.

[As to unreasonable verdicts, see 10 HALSBURY'S LAWS (3rd Edn.) 536, 537, para. 986; and for cases on the subject, see 14 DIGEST (Repl.) 350-352, 3397-3408. For the Offences against the Person Act, 1861, s. 20, s. 47, see 5 HALSBURY'S STATUTES (2nd Edn.) 795, 805.]

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Case referred to:

*R. v. Stone* (Dec. 13, 1954), C.C.A., unreported.

### Appeal.

This was an appeal by Ronald Richard Hunt against his conviction on Oct. 13, 1967, at Bedford Assizes before GEOFFREY LANE, J., and a jury, on count 3 of an indictment of assaulting one Harlow and occasioning him actual bodily harm. He was convicted also on count 4 of a similar offence against Police Sgt. Jackson. The appellant had pleaded guilty to assaulting Sgt. Jackson (count 5) in the execution of his duty and to escaping from lawful custody (count 6). He was also in breach of a probation order. He was sentenced to concurrent terms of one years' imprisonment on count 5 and of six months' imprisonment on count

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A 6, and of one year's imprisonment for breach of a probation order. On count 3, the assault on Mr. Harlow, the appellant was sentenced to one year's imprisonment consecutive to the other sentences, making three years in all. The appellant had been acquitted on two other counts of the indictment, viz., count 1, causing to one Bourne grievous bodily harm with intent, and, count 2, inflicting grievous bodily harm on Mr. Bourne. On May 6, 1968, the court (LORD PARKER, C.J., B WINN, L.J., and ROSKILL, J.) gave leave to appeal on count 3, on the question whether the verdict convicting the appellant of assault on Mr. Harlow could stand with the verdicts of acquittal of attacks on Mr. Bourne (counts 1 and 2), the principal issue being one of the identity of the assailant of both Mr. Harlow and Mr. Bourne. The facts are set out in the judgment of the court.

C The cases noted below\* were cited during the argument in addition to the cases referred to in the judgment of the court.

*Eric Stockdale* for the appellant.

*S. C. Desch* for the Crown.

LORD PARKER, C.J., delivered the following judgment of the court:  
At Bedford Assizes, on Oct. 13, 1967, the appellant was convicted of assaulting D Police Sergeant Jackson, thereby occasioning him actual bodily harm. He also pleaded guilty to assaulting Sergeant Jackson in the execution of his duty and finally to escaping from lawful custody. In respect of those offences he was sentenced to a total of two years' imprisonment. There is no appeal in regard to those offences. However, on another count, which was in fact count 3 of the indictment, he was convicted of assaulting a Mr. Harlow, thereby occasioning him E actual bodily harm, and in respect of that he was sentenced to a further year consecutive to the two years, the total on the other counts. He now appeals by leave of the court against his conviction and sentence on that count 3.

The short facts were that late in the evening on a day in August, 1967, a Mr. and Mrs. Harlow and a Mr. Bourne were walking along the pavement and coming towards them were four young men, Farrell, Tull, Richards and the appellant, F all walking abreast. According to Mr. Harlow, he let go of his wife's arm and brushed against one of these men who came in between him and his wife. He could not identify the appellant as being that man but he said that that man immediately turned round, struck him with his knee in the groin and also a glancing blow in the face with his fist. He then went on to say that almost immediately one of the four men, and indeed the same man, he thought, as had struck him, G turned and struck Mr. Bourne. Mr. Bourne was struck by a fist on the chin, knocked over and unfortunately hit his head on the pavement, fracturing his skull. As I have said, Mr. Harlow was unable to identify the man who hit him and who hit Mr. Bourne. Mrs. Harlow was again unable to identify the man, although she said that it was the same man in each case. Mr. Farrell and Mr. Tull, H two of the other men, gave evidence, however, that it was the appellant who had hit both Mr. Harlow and Mr. Bourne. The appellant's defence was that in fact the man who had brushed against Mr. Harlow and who had hit Mr. Harlow and hit Mr. Bourne was none other than Mr. Tull himself. Pausing there, there was undoubtedly ample evidence to support the verdict against the appellant in regard to an assault on Mr. Harlow and nobody could complain of an impeccable summing-up and direction on the law in this case. What is said nevertheless is that I that verdict ought not to be allowed to stand because the jury in fact acquitted the appellant on two other counts in regard to the assault on Mr. Bourne. He had been charged with causing grievous bodily harm with intent, and in the alternative, inflicting grievous bodily harm on Mr. Bourne. When the jury came to

\* *R. v. Cooper and Compton*, [1947] 2 All E.R. 701; *R. v. Hopkins-Husson*, (1949), 34 Cr. App. Rep. 47; *R. v. Christ*, [1951] 2 All E.R. 254,n; *R. v. Sweetland*, (1958), 42 Cr. App. Rep. 62; *R. v. Mulroy*, (1958), unreported; *R. v. Lewis*, (1960), unreported; *R. v. Chalk*, (1961), unreported; *R. v. O'Brien*, (1961), unreported; and *R. v. Beach*, [1967] Crim. L.R. 687.

return their verdicts they did it in this form. Asked in regard to the first count, A  
“Do you find the accused guilty or not guilty of causing grievous bodily harm with  
intent?” the answer was, “We find on the first count insufficient evidence so  
that the [appellant] is not guilty”. Then the second count was put: “Do you  
find him guilty or not guilty of unlawfully inflicting grievous bodily harm?”  
The foreman answered, “On the second count exactly the same; not guilty.”

It is in those circumstances that counsel for the appellant argues that the sole B  
issue here was one of identity; that all the evidence was that it was the same man,  
whoever that man was; and that it follows that the jury, having rejected the  
evidence of Mr. Farrell and Mr. Tull in regard to the offences against Mr. Bourne  
should have rejected them in regard to the offences against Mr. Harlow. In the  
course of his argument the court has been referred to a great number of cases  
dealing with apparently inconsistent verdicts, in some of which the verdict has C  
been upheld and in others in which it has been quashed. They are, of course, by  
their very nature cases in which the two counts, being compared and which are  
said to be inconsistent, are closely linked either on the facts or by reason of motive  
or in regard to the nature of the defences, but the principle, as it seems to this  
court, in every case is whether the inconsistency is such that it would not be safe  
to allow the verdict, which *prima facie* is entirely a proper verdict, to stand. D  
There is a useful passage in regard to the approach that the court should make,  
which is in a judgment given by DEVLIN, J., in *R. v. Stone* (1) in this court in 1954.  
DEVLIN, J., there said:

“When an appellant seeks to persuade this court as his ground of appeal  
that the jury has returned a repugnant or inconsistent verdict, the burden  
is plainly on him. He must satisfy the court that the two verdicts cannot  
stand together, meaning thereby that no reasonable jury who had applied  
their mind properly to the facts in the case could have arrived at the con-  
clusion, and once one assumes that they were an unreasonable jury, or that  
they could not have reasonably come to the conclusion, then the convictions  
cannot stand. But the burden is on the defence to establish that.”

Applying that approach, this court is by no means satisfied that only an unreason- F  
able jury could have come to this conclusion or that it would be in any way unsafe  
to let the verdict stand. With all due respect to counsel for the appellant, the court  
very much doubts here whether the sole issue was identity because there was a  
real distinction between the charges made in respect of these two men. So far  
as Mr. Harlow was concerned, the appellant was only charged with assault  
occasioning actual bodily harm and the jury may well have thought that the  
proper charge in respect of Mr. Bourne would also have been assault occasioning  
actual bodily harm—something which was not left to them—and by their  
verdict were really saying that there was insufficient evidence for them to hold  
that there had been grievous bodily harm in respect of Mr. Bourne at all. They  
may further have been influenced by the fact that this appellant, as the result of  
an accident, had an injured right hand which it was suggested was incapable of  
hitting Mr. Bourne on the chin with the force necessary to fell him to the ground. H  
whereas in the case of Mr. Harlow the main blow struck was with the knee and  
only a glancing blow to the face had been inflicted by a fist. Be that as it may, this  
court is of the opinion that this verdict can be safely left and accordingly the  
appeal is dismissed. [His LORDSHIP, having heard argument on the appellant's  
behalf regarding sentence, stated that the appeal against sentence was dismissed.] I

*Appeal dismissed.*

Solicitors: *Registrar of Criminal Appeals* (for the appellant); *Leeds Smith,*  
*Bedford* (for the Crown).

[*Reported by N. P. METCALFE, Esq., Barrister-at-Law.*]

(1) (Dec. 13, 1954), unreported.



A

## COROCRAFT, LTD., AND ANOTHER v. PAN AMERICAN AIRWAYS, INC.

[QUEEN'S BENCH DIVISION (Donaldson, J.), April 4, 5, 8, 9, May 23, 28, 1968.]

B

*Carriage by Air—Carriage of goods—International carriage—Limitation of liability of carriers—Theft by carriers' servant—Air consignment note stating volume or dimension of goods—Proper law of contract United States law—Paramountcy of English Act in action in England—Clause in air consignment note for limitation of liability at same limit as statutory limit—Clause not subject to abrogation in events specified in art. 9 or art. 25 of Sch. 1 to Act of 1932—Whether clause avoided by art. 23—Carriage by Air Act, 1932 (22 & 23 Geo. 5 c. 36), Sch. 1, art. 8, art. 23.*

C

A parcel of jewellery was consigned from America to England via an American airline, but was stolen by one of the carriers' servants before delivery to the consignee. The air consignment note did not give particulars of the volume or dimensions of the goods, although it stated the other information required by art. 8\* of Sch. 1 to the Carriage by Air Act, 1932.

D

From this other information it could have been deduced that the volume or dimensions would be between 480 and 720 cubic inches, or ten to twelve inches in length, six inches in width, and eight to ten inches in depth. A clause in the air consignment note purported to limit liability to the value stated for carriage by the shippers on the face of the note, or in the absence of such statement to 250 gold francs or their equivalent per kilogram of goods destroyed, lost, damaged or delayed. The shippers had declared a value for customs but not one for carriage. It was admitted for the purpose of the action that by federal legislation of the United States of America an air waybill need state only one of the matters mentioned in para. (i) of art. 8 (namely, weight, quantity, volume or dimensions), so that the omission of particulars of volume and dimensions would not disentitle carriers to limit liability under United States legislation.

F

**Held:** (i) the liability of the carriers was not limited by the clause of the air consignment note purporting to limit liability because the limitation of liability was avoided by art. 23† of Sch. 1 to the Act of 1932 since, although the pecuniary limit fixed in the clause was the same as that laid down by art. 22 (2) of Sch. 1 to the Act of 1932, the limitation of liability by the clause was not subject to abrogation in the events specified in art. 9‡ and art. 25 of Sch. 1 to the Act of 1932, and was therefore a provision which tended to relieve the carriers of liability (see p. 1063, letter H, post).

G

(ii) the carriers were not entitled to limitation of liability by virtue of art. 22 (2) of Sch. 1 to the Act of 1932 for the following reasons—

H

(a) because the volume and dimensions of the parcel could not be taken as being impliedly stated, and thus sufficiently stated to satisfy art. 8 (i) of Sch. 1 to the Act of 1932, since, although some lack of ultimate precision might be permissible, the inferences to be drawn from the information in the air consignment note involved too wide a range of approximation (see p. 1065, letter E, post);

I

(b) because, as the air consignment note did not state either volume or dimensions, it failed to comply with para. (i) of art. 8 of Sch. 1 to the Act of 1932 with the consequence that art. 9 disentitled the carrier to the benefit of limitation of liability under art. 22 (2) (see p. 1072, letters B and G, post).

(c) because, for the purposes of litigation in the English court, the Act of 1932 provided law which was paramount to other rights and liabilities

\* Article 8, so far as material, is set out at p. 1061, letter I, post.

† Article 23 is set out at p. 1063, letter F, post.

‡ Article 9 is set out at p. 1062, letter D, post.

in respect of loss of goods, and thus the fact that the proper law of the contract was that of the United States did not render the terms of the Warsaw Convention, embodied in United States law, the relevant terms for the purposes of the present action (see p. 1065, letter H, and p. 1066, letters F and G, post).

[As to the requisite contents of an air consignment note, see 5 HALSBURY'S LAWS (3rd Edn.) 216, 217, para. 506, and for cases on carriage by air, see 8 DIGEST (Repl.) 642-644, 19-22.]

For the Carriage by Air Act, 1932, Sch. 1, see 2 HALSBURY'S STATUTES (2nd Edn.) 69.]

Cases referred to:

*American Smelting & Refinery Co. v. Phillipine Air Lines*, [1956] U.S. & Can. Av.R. 387.

*Brown & Co., Ltd. v. Harrison, Hourani v. Harrison*, [1927] All E.R. Rep. 195; 96 L.J.K.B. 1025; 137 L.T. 549; 44 Digest (Repl.) 268, 942.

*Flying Tiger Line Inc. v. United States*, [1959] U.S. Av.R. 112.

*Kraus v. K.L.M.*, [1949] U.S. Av.R. 306.

*Lockwood (decd.), Re, Atherton v. Brooke*, [1957] 3 All E.R. 520; [1958] Ch. 231; [1957] 3 W.L.R. 837; Digest (Cont. Vol. A) 568, 9744Aa.

*Montague (Samuel) & Co., Ltd. v. Swiss Air Transport Co., Ltd.*, [1966] 1 All E.R. 814; [1966] 2 Q.B. 306; [1966] 2 W.L.R. 854; Digest (Cont. Vol. B) 82, 32a.

*Rotterdamse Bank N.V. v. British Overseas Airways Corp.*, [1953] 1 All E.R. 675; [1953] 1 W.L.R. 493; 8 Digest (Repl.) 643, 21.

*Salomon v. Comrs. of Customs and Excise*, [1966] 3 All E.R. 871; [1967] 2 Q.B. 116; [1966] 3 W.L.R. 1223; Digest (Cont. Vol. B) 621, 77a.

*Seth v. British Overseas Airways Corp.*, [1964] 1 Lloyd's Rep. 268.

*Sullivan v. Behimer* (1960), 363 U.S. 335.

*Swan v. Pure Ice Co., Ltd.*, [1935] 2 K.B. 265; 104 L.J.K.B. 583; 152 L.T. 407.

### Preliminary Issue.

This was a preliminary issue in an action brought against the carriers, Pan American Airways, Inc., as carriers and/or bailees for reward for damages for failure to deliver to the plaintiffs goods consigned by air. Further, or alternatively, the plaintiffs claimed that the defendants, as bailees and/or carriers for reward, were in breach of their obligations to the plaintiffs in that they negligently failed to take any or any sufficient steps to preserve the said goods from theft, in consequence whereof the goods were stolen from the defendants' customs and clearance office. The carriers sought to limit their liability and the issue was

"Whether the right (if any) of the defendants to exclude or limit their liability as alleged in the amended points of defence and rejoinder is excluded by the alleged omission from the air waybill of particulars of (a) volume, and (b) the dimensions of the goods."

The facts are set out in the judgment.

*M. J. Mustill* and *D. W. Steel* for the plaintiffs.

*A. H. M. Evans* for the defendants.

*Cur. adv. vult.*

May 28. **DONALDSON, J.**, read the following judgment: In *Brown & Co., Ltd. v. Harrison, Hourani v. Harrison* (1), the Court of Appeal held in favour of cargo interests and against carriers by sea that the word "or" in art. IV, r. 2 (g), of the Carriage of Goods by Sea Act, 1924, must be read as "and". In this case I am asked to redress that balance in favour of cargo interests by holding that the word "and" in para. (i) of art. 8 of Sch. 1 to the Carriage by Air Act, 1932, must be read as "or", thus enabling carriers by air to limit their liability in certain circumstances.

(1) [1927] All E.R. Rep. 195; 137 L.T. 549.

A The matter has arisen in this way. On May 10, 1962, Verité Jewels, Ltd., a United States company, consigned a small parcel of Topaz jewellery by air to the second plaintiffs, Vendome Jewels, Ltd., who carry on business in England at Crawley in Sussex. I do not think that I was told what was the interest of the first plaintiffs, but it is immaterial for present purposes. The jewellery, which was worth £1,194 13s. 8d., was carried to England by Pan American Airways Inc., the defendants. It reached London Airport safely, but before the defendants could effect delivery to the consignees it was stolen by one of their employees. In these circumstances, the defendants do not now seek to contend that they are free of all liability. They do, however, contend that they are entitled to limit their liability to £19 2s. 10d. This is disputed by the plaintiffs on the ground that there has been a breach of the provisions of art. 8, with the consequences

C provided by art. 9, and further or alternatively that the loss was caused by the wilful misconduct of the defendants or their agents or by such default as is equivalent thereto, with the consequences provided by art. 25. In this preliminary issue I am concerned only with the alleged breach of the provisions of art. 8 by the omission from the air consignment note ("air waybill", in the language of the United States) of particulars of the volume or dimensions of

D the goods.

Counsel for the plaintiffs, submits that the purpose of the Act of 1932 was to provide a comprehensive code governing the rights and liabilities of carriers in relation to international carriage by air when sued in this country and that he is not concerned with the terms of the contract of carriage, at least if they are less favourable to the plaintiffs than the provisions of the Act of 1932, or with

E the terms or effect of compulsory legislation in other countries and, in particular, in the United States. No doubt if all the countries of the world not only adhered to the Warsaw Convention, but also took precisely the same view of its effect and incorporated it in their domestic law, all questions of conflict of laws would be eliminated whether one applied the domestic law of the forum or the proper law of the contract of carriage. However that may be, counsel for the plaintiffs

F submitted that the chosen method in the case of the United Kingdom was to make domestic law paramount in the case of all actions tried in the United Kingdom courts, and he referred me to the long title, the preamble and s. 1 of the Act of 1932 and to art. 32.

The general scheme of the convention in relation to the carriage of goods is as follows. Article 1 provides that the convention shall apply to all "international carriage" by air and defines "international carriage". It is agreed that the carriage with which I am concerned was "international carriage". Article 18 provides that the carrier is prima facie liable for loss of or damage to goods if the occurrence which gave rise to such loss or damage took place during the carriage by air. It is conceded that the goods with which I am concerned were lost during the carriage by air as that phrase is defined in art. 18 (2). This prima

H facie liability is displaced if the carrier proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures. It is conceded that the defendants cannot discharge this burden in this case. However, the defendants, although liable to the plaintiffs, are prima facie entitled to limit their liability to a sum of 250 gold francs per kilogram in accordance with the provisions of art. 22 (2), and

I it is agreed that the sterling equivalent of the sum so calculated is £19 2s. 10d.

It is at this point that art. 8 and art. 9 become relevant. Article 8 provides that "the air consignment shall contain the following particulars", and it then lists a large number of matters in sentences lettered (a) to (q), including:

"(g) the nature of the goods;

"(h) the number of the packages, the method of packing and the particular marks or numbers upon them;

"(i) the weight, the quantity and the volume or dimensions of the goods."



The defendants' form of air consignment note is laid out with columns for "No. of packages" (h), "Method of packing" (h), "Nature and quantity of goods" (g) and (i), "Marks and numbers" (h), "Dimensions or volume" (i), "Gross weight (specify in kilos or lbs)" (i). The letters which I have mentioned do not appear on the form and are cross-references to the relevant sentences of art. 8. This form of air consignment note is presumably in general use since it is prescribed by the International Air Transport Association ("I.A.T.A."). In the present case a form was completed as follows:—(No. of packages) "ONE (1)", (Method of packing) "CARTON", (Nature and quantity of goods) "TOPAZ JRLRY SET IN 14 KT GOLD", (Marks and numbers) "AS ADDR NO. 1", which, being interpreted, means that the carton bore the mark "Vendome Jewels, Fleming Way, Crawley, Sussex, England", and the number "No. 1", (Gross weight) "7 LBS 3.1 KGS". The column headed "Dimensions or volume" was left blank.

If, as is submitted by the plaintiffs, there has in these circumstances been a failure to comply with the provisions of sentence (i) of art. 8, the defendants are prevented from limiting their liability under art. 22, since art. 9 provides that

"If the carrier accepts goods without an air consignment note having been made out, or if the air consignment note does not contain all the particulars set out in art. 8 (a) to (i) inclusive and (g), the carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability."

Article 9 is a curious provision and no-one has been able to give me any rational explanation for the severe sanction which it imposes or for the selection of sentences (a) to (i) and (g) as being of paramount importance. The sentences can be grouped—for example, (a) to (c) and (g) relate to whether the carriage is international. However, (j), in respect of which no sanction applies, clearly falls in the same group as (g) to (i), to which the sanction does apply. I did at one time wonder whether the sanction was in part related to the need to ensure that carriers did not infringe minimum charging agreements, but I should have expected (k) to be included if this were the explanation. The matter becomes the more mysterious when it is appreciated that the obligation to complete an air consignment note rests on the consignor and not on the carrier. (See arts. 5-7.)

The plaintiffs' case has all the attractiveness of extreme simplicity and can be summarised in two sentences. Article 8 requires the consignment note to state, *inter alia*, three out of four matters, namely the weight, the quantity and either the volume or the dimensions of the goods. As neither the volume nor the dimensions was stated, art. 9 disentitles the defendants from availing themselves of the limitation of liability contained in art. 22 (2). The fact that "the quantity" was not stated is not relied on by the plaintiffs, possibly because no-one could suggest whether any and, if so, what quantity should be stated in relation to goods of this type or whether the proper notation was "None" or "Not applicable".

The defendants put forward a five part answer as follows:

1. The air consignment note complied with the Act of 1932, if that Act is properly construed, despite the presence of the word "and".

2. The air consignment note complied with the Act of 1932 since the word "and" must be rejected having regard to the French text of the convention and to the serious consequences flowing from the plaintiffs' construction.

3. The air consignment note complied with the equivalent United States legislation which applied to the exclusion of the Act of 1932, since the proper law of the contract of carriage was that of the United States of America.

4. The volume and dimensions of the goods were implicitly stated, and this is a sufficient compliance with both the United Kingdom and United States legislation.

- A 5. Even if the defendants cannot rely on the limitation provided by art. 22 (2), they are entitled to rely on cl. 4 in the conditions of contract endorsed on the air consignment note.

The first and second parts of the defendants' submissions are linked and are best considered together. The remaining parts are separate and can more conveniently be considered in the reverse order to that in which they are set out above.

- B *Clause 4 of the air consignment note.* This clause provides that:

- C "Except as the convention or other applicable law may otherwise require . . . (c) the charges for carriage having been based upon the value declared by the shipper, it is agreed that any liability shall in no event exceed the shipper's declared value for carriage stated on the face hereof, and in the absence of such declaration by shipper, liability of carrier shall not exceed 250 such French francs, [i.e. gold francs as specified in the Convention] or their equivalent per kilogram of goods destroyed, lost, damaged or delayed . . . ."

- D The air consignment note provides two boxes for completion by the inclusion of "Shipper's declared value", the first being headed "For customs" and the second "For carriage". In the present case the declared value for customs was \$ (U.S.) 2959.00 and that for carriage "NVD", which stands for "No value declared". Counsel for the defendants draws attention to the fact that by failing to declare a value for carriage purposes, the shippers or the plaintiffs obtained the advantage of a lower freight rate than would otherwise have been applicable and in fact paid only the minimum rate. The force of this comment is somewhat minimised by the fact that the true value, albeit for customs purposes, appears on the face of the air consignment note.

- E The plaintiffs' answer to this point is that this part of cl. 4 is avoided by art. 23 of Act of 1932, the convention and the United States legislation, which provides that:

- F "Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this convention shall be null and void, but the nullity of any such provision does not involve the nullity of the whole contract, which shall remain subject to the provisions of this convention."

- G The defendants reply that cl. 4 is unaffected by art. 23 because, as at the time when the contract was made, it did not tend to relieve the carrier of liability or to fix a lower limit than that which is laid down in the convention, but fixed the same limit. The same point was raised but not decided in *Samuel Montagu & Co., Ltd. v. Swiss Air Transport Co., Ltd.* (2).

- H I have no hesitation whatsoever in rejecting this contention. Clause 4 *does* tend to relieve the carrier of liability in that it fixes the same limit of liability as that fixed by art. 22 (2), but does not make it subject to abrogation in the events specified in art. 9 and art. 25.

*Implied statement of the volume and dimensions of the goods.* In this connexion the plaintiffs have made the following formal admissions:

- I 1. The first plaintiffs and Verité Jewels, Ltd., knew the volume and dimensions of the carton at all material times, and the defendants knew the same as soon as the carton was received for carriage.
2. The approximate volume and dimensions of the carton could be inferred from information contained in the air waybill. The approximate dimensions of the carton were ten to twelve inches long; six inches wide; eight to ten inches deep.
3. The omission from the air waybill of the volume and dimensions of the carton did not cause or contribute to the loss.

4. If the air waybill had stated the volume and dimensions (or either of them) of the goods, the defendants could not thereby have been caused to charge a different rate of freight for the goods, or to alter the mode of carriage or custody.

The defendants submit that inasmuch as the approximate dimensions and volume of the carton could be inferred or deduced from the information contained in the air consignment note and in particular from the description of the goods and the weight, the dimensions and volume are impliedly contained in the air consignment note and the requirements of art. 8 are satisfied.

This submission is based on reported English and United States decisions relating to sentences (c) and (q) in art. 8. Thus it has been held by the English Court of Appeal in *Samuel Montagu & Co., Ltd. v. Swiss Air Transport Co., Ltd.* (3), that the requirement at (q) that the air consignment note shall contain "a statement that the carriage is subject to the rules relating to liability established by this convention" is met if it states that carriage thereunder is subject to those rules "unless such carriage is not 'international carriage' as defined by the convention". The words "unless such carriage", etc., were treated as surplusage, since the air consignment note stated on its face that the carriage was from London to Zurich and such carriage is clearly international carriage within the meaning of the convention. A similar decision had previously been given by the United States Court of Appeals in *Seth v. British Overseas Airways Corp.* (4), and the Supreme Court refused an order of certiorari.

Acceptance of the defendants' submission would involve a very substantial extension of the scope of these decisions, since much more than a copy of the air consignment note and of the convention is required in order to establish the volume and dimensions. This is not seriously challenged and reliance is therefore placed on *Kraus v. K.L.M.* (5), *American Smelting & Refinery Co. v. Phillipine Air Lines* (6), both decisions of the Supreme Court of the State of New York, and on *Flying Tiger Line Inc. v. United States* (7), a decision of the Court of Claims. All these cases relate to sentence (c), which requires a statement of the agreed stopping places.

In *Kraus v. K.L.M.* (5) the court held that there was a sufficient compliance with this requirement if the airline timetable, which showed the agreed stopping places, was incorporated by reference. This was, if I may respectfully say so, a sensible decision and completely in line with the reasoning of the judgment in the *Seth* (4) and *Samuel Montagu* (3) cases, but it does not assist the defendants in the present case. The *American Smelting* case (6) serves their purpose rather better. The learned special referee held that it was a general principle of construction with respect to treaties that they be reasonably and liberally construed so as to carry out their obvious purposes, that the authorities were unanimous in showing that the purpose of (c) was to put the passenger or consignee on notice of the international character of the flight and of the applicability of the Warsaw Convention where the place of departure and destination did not themselves indicate such facts and that as the air consignment note showed on its face the international character of the flight, failure to specify the agreed stopping places did not constitute a failure to comply with art. 8. In the *Flying Tiger* case (7) Justice MADDEN said that he was inclined to agree with the plaintiffs' proposition that as the parties were well aware of the identity of the agreed stopping places, it would have been useless to have inserted them in the air consignment note and the omission should not affect the rights of the parties.

This is a field in which it is most regrettable that there should be any divergence between the approach of the courts of the United States and those of the United Kingdom, or, more accurately, of England and Wales. Nevertheless,

(3) [1966] 1 All E.R. 814; [1966] 2 Q.B. 306.

(4) [1964] 1 Lloyd's Rep. 268.

(5) [1949] U.S. Av.R. 306.

(6) [1956] U.S. & Can. Av.R. 387.

(7) [1959] U.S. Av.R. 112.



- A I am not wholly convinced of the correctness of this approach to requirement (c) which seems to me to involve the re-writing of art. 8 in a form which may well be more sensible, but is quite different. In any event, different considerations apply to requirement (i), which is not directed to the international character of the carriage. The United States and United Kingdom decisions (other than the *American Smelting* case (8)) fall into line if, while having reservations as to the dicta in some of these judgments, one accepts the proposition that there is compliance with art. 8 if (a) the particulars are stated expressly, or (b) the air consignment note expressly refers to documents which themselves contain the particulars, or (c) the particulars can be deduced from information appearing on the face of the air consignment note or from documents expressly referred to therein when considered in the light solely of the terms of the convention. This may in truth involve too robust an interpretation of the convention, but it does not suffice to make good the defendants' submission.

- Article 8 calls for particulars of the volume or dimensions of the goods and not for approximations, which are all that could be inferred. No doubt some lack of ultimate precision is quite permissible, but the inferences which could be drawn on the basis of the information contained in the air consignment note, namely the weight and contents, considered only in the light of the text of the convention must involve a very high degree of approximation. If the degree of error is to be narrowed, it would clearly be necessary to have knowledge of jewellery, of the way in which it is likely to be packed and the weight of the packing materials. Even the use of this knowledge is, I suggest, unlikely to produce the requisite degree of precision in the volume or dimensions which could be inferred.
- E The range of volume stated in the formal admission set out above extended from 480 to 720 cubic inches—a fifty per cent. variation—and a parcel ten inches by ten inches by six inches looks and is very different from one twelve inches by eight inches by six inches. In my judgment, this submission fails.

- The relevant legislation is that of the *United States of America*. The defendants submit that the proper law of the contract of carriage is that of the State of New York and the federal law of the United States applicable under that law. This submission is well founded, the contract having been made in New York between nationals of the United States, for performance beginning in the United States, and there being no indication that the contract has a closer or more real or, indeed, any connexion with any other system of law.
- F

- The defendants go on to submit that accordingly the Act of 1932 has no application, save to the extent that its provisions are impliedly accepted by the contract of the parties, such implied acceptance being determined in accordance with the proper law of the contract. This was referred to in argument as the "implied term" approach.
- G

- The plaintiffs adopt what was described as the "code" approach and submit that in proceedings before an English court the Act of 1932 and that alone determines the rights and liabilities of the parties.
- H

- In my judgment, the true view is that the contract of carriage and all claims based on that contract are to be determined in accordance with its proper law. This law would be relevant to claims based on non-performance or to defences based on frustration, and no doubt many other examples can be found.

- However, in respect of an action brought in the English courts, the legislature I has provided by s. 1 of the Act of 1932 that the provisions of the Warsaw Convention, as set out in Sch. 1 to that Act,

"... shall, so far as they relate to the rights and liabilities of carriers, passengers, consignors, consignees and other persons and subject to the provisions of this section, have the force of law in the United Kingdom..."

and that any liability imposed by art. 17 in respect of the death of a passenger shall be in substitution for any liability of the carrier in respect of such death

either under statute or at common law. It will be noticed that the convention, as set out in the schedule, is to have the force of law "*in the United Kingdom*" and not "*as part of the law of the United Kingdom*". The latter wording is consistent with an English court determining rights in accordance with foreign law, if that were the proper law of the contract, to the exclusion of the Act of 1932 but the former wording is not. The defendants' submission is also scarcely consistent with art. 28, which ignores the proper law of the contract of carriage and requires the plaintiff to bring his action in the territory of a nation which is a party to the convention and before a court having jurisdiction where the carrier is ordinarily resident, has his principal place of business or has an establishment by which the contract has been made or at the place of destination. This article has been held to override the provisions of R.S.C., Ord. 11, which governs the service of proceedings outside the jurisdiction (see *Rotterdamsche Bank N.V. v. British Overseas Airways Corpn.* (9). If that were not enough, the defendants' submission is, in my judgment, defeated by art. 32. The term "proper law of the contract" means the system of law by which the parties intended the contract to be governed, and it is only if that intention is not expressed and cannot be inferred that resort is had to the system of law with which the transaction has its closest and most real connexion (see DICEY'S CONFLICT OF LAWS, 8th Edn. r. 127), the latter approach being based on the presumed intention of the parties. Article 32 provides that any clause or special agreement

"... entered into before the damage occurred by which the parties purport to infringe the rules laid down by this convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and void ...".

If, therefore, the parties have, or are deemed to have, decided that the laws of the State of New York are applicable and if those laws are more favourable to the carrier than is the convention set out in the Act of 1932, their choice of law is rendered null and void and they are thrown back on the convention in the form in which it has the force of law in the United Kingdom.

In a sentence, the Act of 1932 provides a parcel of rights and liabilities which, in relation to actions tried in the English courts, exclude all other rights and liabilities in respect of the death of a passenger and are concurrent with, but paramount to, all other rights and liabilities in respect of loss of or damage to luggage and goods.

Accordingly, I hold that I am not directly concerned with the laws of the State of New York or the federal law of the United States, although these and other laws may require consideration in the context of the true construction of the schedule to the Act of 1932.

*The construction of sentence (i) in art. 8.* Not unnaturally the parties were not at one as to the matters to which I could properly refer in construing this sentence, but I thought it better, and in accord with the traditions of the commercial court, to admit all the evidence which either party sought to tender, and thereafter to consider the extent to which all or any of it can properly be taken into account. I will follow the same course in this judgment.

#### *The French Text.*

The convention was drawn up in French (see art. 36) and there was no official English text, although the language of Sch. 1 to the Act of 1932 accorded with the English translation of the convention which was registered with the League of Nations and printed in that organisation's Treaty Series, vol. 137, at p. 13. This accord is hardly surprising since vol. 137 relates to the year 1933, the year after the passing of the Act of 1932, and there is a footnote recording that the English text, with the exception of the preamble, was translated by His Britannic Majesty's Foreign Office. It is a matter for speculation whether the

A Foreign Office adopted the translation of Parliamentary counsel or vice versa or whether the English translation was a product of their co-operation. The volume sets out the French official text on the left hand pages and the English translation on the right.

B The accuracy of the English translation was impugned by the defendants and I had the advantage of hearing evidence from Maître (or Mr.) Picarda, an advocate of the Court of Appeal of Paris and a member of the English Bar, and from Maître Warat, also an advocate of the Court of Appeal of Paris. Unfortunately, these gentlemen were not agreed either as to the meaning of the French text or as to that of the schedule to the Act of 1932. Their views on the latter were plainly inadmissible, although interesting, and I disregard them for present purposes.

C Maître Picarda had no doubt in examination-in-chief that the French text, "le poids, la quantité, le volume ou les dimensions de la marchandise" produced what he described as a "choice" as opposed to an "accumulation". In other words, it was what was described in argument as "one out of four" as opposed to "three out of four". In cross-examination he was asked to consider, either in English or in French, the phrase "State name, address, date of birth or age" D and to say whether this was one out of four or three out of four. He replied that whereas grammatically it was one out of four, the context might well compel a different construction. He was also referred to sentence (h), which reads in French "Le nombre, le mode d'emballage, les marques particulières ou les numéros des colis". This appears in the schedule to the Act as "the number of the packages, the method of packing and the particular marks or numbers upon E them". Here again he had no doubt that in French this was grammatically one out of four, but he had some difficulty in deciding whether the true construction in its context might not be three out of four.

F Maître Warat had no doubt in examination-in-chief that "le poids, la quantité, le volume ou les dimensions" was an "enumeration", i.e. three out of four, and not an "alternative", i.e., one out of four. Had it been the latter, the sentence would have read "le poids, ou la quantité ou encore les dimensions de la marchandise". He expressed similar views concerning sentence (h). In cross-examination he expressed the view that in French a comma replaced the word "et" and could never replace the word "ou". A reference to other passages in the French text showed, however, that this must be an undue simplification.

G The conclusion which I have reached is that in French, as in English, it is possible to write with a precision which permits of only one possible construction, but that, in the absence of such precision, subject-matter and context carry great weight and, in particular, permit a comma to be construed conjunctively when the strict application of grammatical rules might dictate a disjunctive construction. Similar considerations apply to the word "ou". The interesting H problem of the true nature of an invitation by an airline operator to fly to "London, Brussels, Rome or Paris" and to partake en route of a meal consisting of "corn flakes, egg, tea or coffee"—to take an example explored in evidence—is not difficult of solution, even if it may involve some criticism both of the airline's use of English and of its catering.

#### *United States Law.*

I Before the action came on for hearing, the plaintiffs formally admitted (for the purpose of this action only) that:

"By the law of the State of New York (incorporating for this purpose the federal law of the United States of America) an air waybill need only state one of the following, viz. weight, quantity, volume or dimensions. A carrier is entitled to limit his liability notwithstanding the omission of volume and dimensions, if the weight is stated in air waybill and if the freight is calculated on the weight."



The practice of the commercial court has always been to encourage admissions of fact with a view to reducing the cost of litigation and increasing the speed of decision. In most cases the court will not be concerned to inquire whether the facts so admitted accord with reality, but this is not always so. In the present dispute I have to construe a statute expressed to be intended to give effect to a convention for the unification of certain rules relating to international carriage by air. In such circumstances I can see every reason why I might be influenced, and perhaps decisively influenced, by the construction of the convention adopted by the laws of the United States of America, if as is the fact, the point is devoid of authority in English law. On the other hand, what the parties choose to agree as being the law of the United States of America seems to me to be of no assistance whatsoever, unless it has a solid factual foundation.

In the light of these considerations, it was agreed that this admission should be withdrawn and that I should be supplied with an agreed statement of fact, supplemented, if the parties so wished, by evidence. It was eventually agreed that neither party could find any report of a decision by a court in the United States which was directly concerned with sentence (i) of art. 8 or any literature concerning the meaning of this sentence other than PROFESSOR DRON's book, to which I refer hereafter in relation to other systems of law. This negative agreement was supplemented by oral evidence from Mr. Robert Doran, a member of the American Bar who practises in New York and specialises in air law, and by written evidence from Mr. J. Edwin Carey, who is also a member of the American Bar.

Mr. Carey was of opinion that the courts of the United States would construe sentence (i) in the manner suggested by the plaintiffs, namely, as requiring the air waybill to state on its face the weight of the goods, the quantity of the goods and either the volume or dimensions of the goods. Mr. Doran said that he had never before heard it suggested that United States legislation required the statement of three out of four. There are, he said, only a very few lawyers specialising in aviation law and he did not include Mr. Carey amongst their number. He had taken steps to ascertain the consensus of professional opinion amongst these specialists and it was that on the true construction of sentence (i) it was only necessary to state such of the particulars mentioned as were essential or necessary in the circumstances of any particular case in order to identify the cargo and to assess the proper freight charge. Mr. Doran was of the same opinion. He was quite sure that the United States courts would adopt a liberal approach as displayed in the *American Smelting* case (10). This would involve stating both weight and volume or dimensions in a case in which freight was based on cubic measurements, but not in other cases. It would also, he said, involve taking account of commercial considerations such as the cost and difficulty involved in checking air waybills and returning them to consignors if they were not properly completed. These conditions would have varying weight in different times and circumstances and the courts might thus sometimes require the inclusion of particulars which at others they might hold could be omitted.

I find it impossible to know how the courts of the United States will resolve this problem, if and when it comes before them. I accept that they are unlikely to allow the language of the convention to become "a verbal prison" (per FRANKFURTER, J., in a dissenting judgment in *Sullivan v. Behimer* (11)). I also accept that they will not be unduly influenced by a liberal approach and will echo the words of JUDGE LEARNED HAND in his address to the Massachusetts Bar Association that:

"words are such temperamental beings that the surest way to lose their essence is to take them at their face."

(10) [1956] U.S. & Can. Av. R. 387.

(11) (1960), 363 U.S. 335 at p. 358.

A The approach of the English courts may appear superficially to be more verbally imprisoned than that of the American courts, but given a common view as to the true construction of any particular words, both courts can usually be relied upon to reach the same conclusion, although by somewhat different routes.

*Other systems of law.*

I am indebted to a work entitled LIMITATION OF LIABILITIES IN INTERNATIONAL AIR LAW, published in 1954 and written by an international expert in air law, the Dutch PROFESSOR H. DRION, for information on how other systems of law have treated sentence (i) of art. 8 (see para. 269). From this it seems that India (1934), Australia (1935), Eire (1936), Canada (1939), New Zealand (1940), Ceylon (1950) and the Union of South Africa (1946 but not in force in 1954) adopted the English text with the word "and" between "the quantity" and "the volume". The United States (1934) adopted literal translation of the French text of sentence (i), although it adopted the English text of sentence (h) with its added "and". Germany (1933) and Sweden (1937) in their respective languages adopted the same approach as the United States adding an "and" in sentence (h) and adopting a literal translation of the French text in the case of sentence (i). Italy in translating the French text of sentence (i) has substituted "and" for "or", thus apparently producing a "four out of four" situation. The research of counsel also suggested that Brazil, whilst adopting a literal translation of the French text of sentence (i), had adopted a novel approach to sentence (h) by substituting "and" for "or" in the French text, thus making this "four out of four". PROFESSOR DRION, in a footnote, records that the Belgian delegate to an organisation known as CITEJA took the view that sentence (i) is cumulative rather than alternative.

It seems, therefore, that most countries consider that sentence (h) of the French text is properly translated in a form which makes it clear that both the number of the packages and the method of packing must always be specified and that either the particular marks or the numbers on the packages must also be specified. In relation to sentence (i), which has a similar construction in the French text, the English speaking nations, other than the United States of America, have adopted a translation which makes it clear that this sentence is also to be construed as three out of four. The United States and the non-English speaking nations, other than Italy, have adopted a literal translation from the French, thus preserving such ambiguity as may exist. No nation has translated the French text in such a way as to give a clear indication that what is required is one out of four, although Italy has adopted a translation involving four out of four.

*Commercial Practice.*

Mr. Batson, who has for twenty years been the London manager of the defendants, gave evidence that in the case of ninety-five per cent. of goods carried by air the amount of the air freight depends on their actual weight, subject to minimum charges. In the remaining five per cent. freight is charged on cubic measurement. Whether actual weight or cubic measurement is the determining factor depends on whether the actual weight is or is not greater than a notional weight calculated in the United Kingdom on the basis that a cubic foot is equal to four kgs. In countries using the metric system the conversion factor is 7000 cu. cms. to the kg. Freight is payable on whichever weight is the greater. In Mr. Batson's experience there is no commercial point in recording the dimensions or volume of goods unless they have so large a volume/weight ratio as to be chargeable on a notional rather than an actual weight. Unusual dimensions which may create stowage problems are notified to the operating department specially.

I was also introduced to a formidable volume produced by the International Air Transport Association, entitled MANUAL OF TRAFFIC CONFERENCE RESOLUTIONS. Resolution 600 prescribes the form of air waybill to be used, as it was in this case, and the procedure to be adopted. This procedure seems to involve entering both the weight and either the dimensions or the volume of the goods.

*Text Books.*

McNAIR'S LAW OF THE AIR (3rd Edn.) lists certain differences between the Carriage by Air Act, 1932, and the equivalent United States legislation (see p. 226, n. 28), but most of these reflect the particular version of the English language in use in the respective countries rather than differences of meaning. The list contains no reference to sentence (i), and indeed the only current edition of a text book to notice and grapple with this point seems to be PROFESSOR DRION'S LIMITATION OF LIABILITIES IN INTERNATIONAL AIR LAW. PROFESSOR DRION expresses his views on sentences (h) and (i) in paras. 268 and 269 as follows:

"The number of the packages, the method of packing, the particular marks or the numbers on the packages. The text is not clear as to whether it is sufficient to have only one of these particulars mentioned, or whether the only choice is between the two last mentioned particulars. The latter solution seems preferable, as the other two items are so entirely different from each other and from the last two items that it would not make sense to say that the information as to the number of packages could be replaced, e.g., by the method of packing. The text of the English Carriage by Air Act and the American government translation have clarified the point by inserting the word 'and' after the words 'method of packing'."

"The same problem arises with respect to 'the weight, the quantity, the volume or the dimensions of the goods', but with this distinction that here all four particulars are of a similar nature, so that there is nothing illogical in providing that it will suffice to fill in only one of the four. Meanwhile, the English text has made the enumeration cumulative also here, by inserting the word 'and' before 'the volume and dimensions', so that at least in England and those countries which have adopted the same text for their legislation, the volume or dimensions of a shipment probably must be mentioned in addition to the number of packages and the quantity."

"The practical result of this interpretation is most unfortunate, as it compels shippers and carriers to much extra work which serves no practical purpose at all. Outside the British Commonwealth the accumulative interpretation does not appear to have been accepted. It is observed that it does not only make the 'volume or dimension' a mandatory requirement, but also the 'quantity' of the goods. Obviously, in a number of cases it is impossible to speak of the quantity of a shipment. What is the quantity of a suitcase containing personal belongings, shipped under an air waybill? And how to describe in any exact way the volume or dimensions of, e.g., a bicycle? Certainly, it should be sufficient if either the weight, or the quantity, or the volume, or the dimensions of the goods are mentioned on the air waybill."

*Conclusion.*

Counsel for the plaintiffs, submits that the words:

"The air consignment note shall contain the following particulars: ...  
(i) the weight, the quantity and the volume or dimensions of the goods"

permit of only one construction, and that it is not therefore permissible to look at the Warsaw Convention or to consider either the legislation of other countries or the practical results of that construction. He further submits that if a court is considering a statutory provision which contained no patent ambiguity, it should not look at other documents with a view to discovering a latent ambiguity and resolving it in the light of those documents. Furthermore, in this case Parliament has deliberately provided by s. 1 (1) not that the Warsaw Convention shall have the force of law in the United Kingdom, but that

"the provisions [of the convention] as set out in Sch. 1 to this Act shall ... have the force of law in the United Kingdom ..."



A If and in so far as there is any variance between the schedule and the convention, it was the intention of Parliament to give effect to the schedule.

Counsel for the defendants, submits that the words of s. 1 (1) and the form of the schedule indicate no more than that Parliament believed that the schedule represented a correct translation of the convention. The paramount object of the Act of 1932, as declared in the long title and the preamble, was to give effect to the convention and the schedule should receive a construction which will achieve this object. Furthermore, he submits, the literal meaning of the words of a statute must be rejected if that meaning leads to results which are absurd, confusing or inconsistent.

The duty of the courts is to ascertain and give effect to the will of Parliament as expressed in its enactments. In the performance of this duty the judges do not act as computers into which are fed the statute and the rules for the construction of statutes and from whom issues forth the mathematically correct answer. The interpretation of statutes is a craft as much as a science and the judges, as craftsmen, select and apply the appropriate rules as the tools of their trade. They are not legislators, but finishers, refiners and polishers of legislation which comes to them in a state requiring varying degrees of further processing.

D All this is familiar to English lawyers. I mention it because the problem with which I am concerned in this case is likely to be of interest to aviation lawyers on the other side of the Atlantic and I should be sorry if they thought, as I think that Mr. Doran thought, that the English judicial process was such that the judges inhabited FRANKFURTER, J.'s verbal prison, happily unaware of the risks involved in a literal interpretation of JUDGE LEARNED HAND's "temperamental beings". Not so. If the English courts might hesitate to adopt so robust an approach as did the learned special referee in the *American Smelting* case (12), it is not because these courts are less aware of the needs of the commercial community, but rather, perhaps, that there is a difference of opinion between the courts on the two sides of the Atlantic in their evaluation of the commercial advantages of certainty derived from close attention to the words of the statute.

F A relevant factor may also be differences in the legislative process. In the United Kingdom treaties do not become part of the domestic law by proclamation, but only by enactment after Parliamentary debate, and with the possibility of clarification and amendment. Less therefore may remain to be done by the courts of the United Kingdom by way of interpretation.

G In the English language the conjunctions "or" and "and" are almost inherently ambiguous, and the process of judicial clarification has been applied to statutes as old as Disabled Soldiers [Act.] 1601, and the Bankrupts [Act.] 1603-04 (see MAXWELL ON INTERPRETATION OF STATUTES (11th Edn.), p. 229). There is little difficulty, therefore, in appreciating the possibility of ambiguity in art. 8 (i) and looking further than the words themselves. There is ample authority for looking at the convention to which it is the expressed intention of Parliament to give effect (see, for example, *Salomon v. Comrs. of Customs and Excise* (13)). There is also authority for the proposition that

"... the judicial interpreter may deal with careless and inaccurate words and phrases in the same spirit as a critic deals with an obscure or corrupt text, when satisfied, on solid grounds, from the context or history of the enactment, or from the injustice, inconvenience or absurdity of the consequences to which it would lead, that the language thus treated does not really express the intention and that his amendment probably does"

(see *Swan v. Pure Ice Co., Ltd.* per ROMER, L.J. (14), and *Re Lockwood (decd.)*, *Atherton v. Brooke* (15), in which eight words were excised from a statute).

(12) [1956] U.S. & Can. Av.R. 387.

(13) [1966] 3 All E.R. 871; [1967] 2 Q.B. 116.

(14) [1935] 2 K.B. 265 at p. 276; ROMER, L.J., was quoting MAXWELL ON THE INTERPRETATION OF STATUTES (7th Edn.), p. 217.

(15) [1957] 3 All E.R. 520; [1958] Ch. 231.

How then shall I interpret sentence (i) of art. 8? The importance of international comity in the context of aviation legislation needs no emphasis, and, indeed, the whole purpose of the Warsaw Convention was the achievement of just this result. Unfortunately, it is clear that the French text of both sentences (h) and (i) contains an ambiguity. In the case of sentence (h) it has been resolved by almost universal agreement in favour of a conjunctive approach, although it may some time become necessary to consider whether, if goods are adorned with both marks and numbers, the word "or" is to be construed conjunctively. In the case of sentence (i) Parliament appears to have resolved the ambiguity in the same way. In this approach the United Kingdom Parliament has been followed by those of the Commonwealth countries.

The defendants' original contention was that art. 8 conferred an unfettered choice between the inclusion of particulars of the weight or the quantity or the volume or the dimensions of the goods. This is an unlikely construction because of the importance of weight in carriage by air. Furthermore, art. 8 is in part directed to informing the consignor and consignee of the applicability of the convention and of their rights thereunder, and weight is a critical factor in the determination of the limit of the carrier's liability when there has been no special declaration of value. If the defendants are right, particulars of weight could always be omitted. Quantity and either volume or dimensions are of importance in identification and volume or dimensions are also essential in the minority of cases in which freight is calculated on a cubic basis. Yet if the defendants were right, particulars of volume and dimensions could always be omitted.

These considerations no doubt explain the change of approach by the defendants in the course of the hearing, who ultimately contended that the sentence was to be construed as requiring particulars of weight, quantity and either volume or dimensions, so far as may be "relevant", meaning thereby "useful" or "necessary", in any particular case.

It may well be that the powers who joined in the execution of the Warsaw Convention would have been better advised to have made provision along the lines for which the defendants now contend, although consideration would have had to have been given to whether the inherent uncertainty in what was required in any particular case was commercially desirable, but they did not do so. In my judgment, it is not for a court, or indeed any single legislature, to vary the convention, and I am not prepared to do so under the guise of interpretation.

For these reasons which I have sought to express, I hold that the air consignment note did not comply with art. 8 (i), with the consequences provided by art. 9.

[HIS LORDSHIP stated that he would answer "Yes" to the question in the preliminary issue.]

*Answer accordingly.*

Solicitors: *Glyde & Co.* (for the plaintiff); *Slaughter & May* (for the defendants).

[Reported by MARY COLTON, *Barrister-at-Law.*]

A SELANGOR UNITED RUBBER ESTATES, LTD. v. CRADOCK  
(a bankrupt) AND OTHERS (No. 3).

[CHANCERY DIVISION (Ungoed-Thomas, J.), January 11, 12, 15, 16, 17, 18, 19, 22, 23, 24, 25, 26, 29, 30, 31, February 1, 2, 5, 6, 7, 8, 9, 12, 13, 14, 15, 16, 19, 20, 21, 22, 23, 26, 29, March 1, 4, 5, 6, 7, 8, 11, 12, 13, 14, 15, 18, 19, 20, 21, 22, 25, 26, 27, 28, 29, April 1, 2, 3, 4, May 29, 30, 1968.]

B *Bank—Duty of care Contractual duty to customer to exercise care and skill—Mandate from company to pay cheques signed by directors does not relieve bank from duty of care in respect of such cheques—Whether conviction that answer given to enquiry would be false excuses making enquiry—Take-over bids—Absence of instructions to branch officials regarding transactions connected with take-over bids—Knowledge attributable to bank of misapplication of company's funds in acquisition of its own shares in a take-over transaction.*

C *Company—Director—Trustee—Credit balance at bank—Misapplication of moneys of company standing to its credit in account with its bank—Liability of director acting in accordance with the instructions of a third person not being a director—Knowledge of third person attributable to director—Whether director entitled to be relieved from liability—Companies Act, 1948 (11 & 12 Geo. 6 c. 38), s. 448.*

D *Trust and Trustee—Constructive trustee—Participation in dishonest design—Elements requisite to establish liability as if participant were a trustee—Take-over transaction involving use of company's moneys for the acquisition of its shares on the take-over—Liability as constructive trustee based on reasonable inference from known facts and on alleged failure to make enquiry—Novation of debt created by loan of company's moneys—Whether extending to liability of borrower as constructive trustee.*

E The plaintiff company had liquid assets including a credit for some  
F £232,500 with a bank. C. Ltd., a banking company concerned in take-over bids, acting on behalf of an undisclosed principal who was C., bid for the share capital of the plaintiff company, and the offer was accepted by holders of seventy-nine per cent. of the plaintiff company's share capital. The cost of this acquisition was about £195,000. C. had an account with a branch of the D. bank which was in negligible credit. At C.'s instance  
G the D. bank branch accepted a transfer of the plaintiff company's account from N. bank, and pursuant to a resolution of the board of the plaintiff company (i.e., the newly constituted board after the take-over, who were C. Ltd.'s nominees) the plaintiff company gave a mandate to the D. bank authorising the account to be operated by cheques signed by two directors. On Apr. 25, 1958, a banker's draft for £195,000 on D. bank was given to  
H C. Ltd., the amount being debited by arrangement between C. and the D. bank to C.'s account. C.'s account was enabled to meet this by crediting a cheque for £232,500 drawn by the plaintiff company in favour of W. Ltd. (a private investment company) and endorsed on behalf of W. Ltd. to C. The £232,500 so paid by the plaintiff company represented a loan to W. Ltd. at interest, and the further transfer to C. represented a loan by W. Ltd. to C. at slightly greater interest. C. Ltd., out of the £195,000, paid the assenting shareholders of the plaintiff company whose shares\* were acquired  
I on the take-over. Thus the credit balance of the plaintiff company at the N. bank was ultimately applied as to some £195,000 in paying for the acquisition of some seventy-nine per cent. of the plaintiff company's shares, which were acquired on behalf of C. and became registered in the name of D. bank's nominee company as nominee for C. There was no evidence to

\* The plaintiff company's capital was in stock units, but is referred to as shares for convenience.



show that any properties or assets were transferred or were immediately to be transferred to the plaintiff company, and the application of the plaintiff company's credit balance in the manner previously indicated was, so the court found\*, a dishonest misapplication. The plaintiff company claimed (a) against two directors of the newly constituted board of the plaintiff company to account as trustees for misapplication of the £232,500; (b) against C. Ltd. as constructive trustee to replace £195,000 in the plaintiff company's funds; and (c) against the D. bank as constructive trustee to reimburse the plaintiff company the £232,500 paid to W. Ltd. on the ground that D. bank ought to have known (*not* ought to have made enquiry) that the payment of the £232,500 would be a misapplication, and alternatively against the D. bank for damages in contract for negligence in paying the cheque to W. Ltd. endorsed to C. The plaintiff company also claimed against W. Ltd. as constructive trustee in respect of the £232,500, but W. Ltd. did not dispute the equitable obligation, raising only defences on the basis of novation, satisfaction and illegality.

In regard to claim (a). The plaintiff company's cheque in favour of W. Ltd. for £232,500 was signed by two directors of the plaintiff company, the defendants B.-L. and J. Both these directors were nominees under C.'s control. Neither director made any enquiry about the purpose of the loan to W. Ltd., but voted for the board's resolutions to transfer the plaintiff company's account to D. bank and to lend W. Ltd. the £232,500, because C. wanted that. C. himself was not a director of the plaintiff company.

In regard to claim (b). No enquiry was made on C. Ltd.'s behalf whether or when assets were to be transferred to or "injected into" the plaintiff company at the times when C. paid C. Ltd. the £195,000 and C. Ltd. paid off the assenting shareholders of the plaintiff company. The board of the plaintiff company at that time consisted of C. Ltd.'s nominees, one of whom was B.-L. who became a nominee director for C., when C. took over the plaintiff company from C. Ltd. On this and other evidence the court found † that C. Ltd. knew that the plaintiff company's moneys were being used and misapplied to provide the £195,000 paid to C. Ltd.

In regard to claim (c). The plaintiff company's claim in equity against D. bank depended on the question whether D. bank should have known, from the facts apparent to its branch officials, that the plaintiff company's £232,500 was being used in part to cover the purchase by C. of shares in the plaintiff company. On receiving the cheque for £232,500 in favour of W. Ltd. and endorsed to C., the manager of the branch of D. bank had been much concerned about the validity of the endorsement (having regard to the bank's instructions concerning endorsed cheques). Considering all the material available to the branch officials by Apr. 25, 1958, the court found ‡ that a reasonable banker would have concluded that the payment was to finance purchase by C. of shares of the plaintiff company.

**Held:** (i) (in regard to the director defendants, claim (a) above) the director defendants, B.-L. and J., were liable in equity to account as trustees to the plaintiff company for the £232,500 for the following reasons—

(a) moneys standing to the credit of a company's bank account which directors had authority to operate were moneys of which the directors were trustees for the company in accordance with its purposes (see p. 1094, letter E, post).

*Re Lands Allotment Co., Ltd.* ([1891-94] All E.R. Rep. 1032) applied.

*Re City Equitable Fire Insurance Co., Ltd.* ([1924] All E.R. Rep. 485) considered.

\* See p. 1120, letter I, and p. 1121, letter A, post.

† See p. 1130, letters C to G, and p. 1126, letters F and I, post.

‡ See p. 1137, letter H, post.

- A (b) a director acting in a transaction on the direction of a stranger was fixed with the stranger's knowledge of the nature of the transaction (see p. 1095, letter C, post).
- Dictum of MELLISH, L.J., in *Gray v. Lewis* ((1873), 8 Ch. App. at p. 1056) applied.
- B *Land Credit Co. of Ireland v. Lord Fermoy* ((1870), 5 Ch. App. 763) distinguished.
- (c) B.-L. and J., being on the facts nominated as directors of the plaintiff company to do what they were told to do by C., exercising no discretion of their own and acting in disregard of their duties as directors, were fixed with the mind of C. and were liable in equity as trustees to make good to the plaintiff company such part of the £232,500 as was misapplied (see p. 1123, letter B, post); moreover they were not entitled to be relieved of liability under s. 448\* of the Companies Act, 1948 (see p. 1155, letter D, post).
- C (ii) (in regard to claim (b), p. 1074, letter B, ante) (a) to establish that a defendant was liable as if he were a trustee by reason of his participation in a transaction (as distinct from his intermeddling in the administration of trust) three of the elements which had to be proved were assistance by the stranger, with knowledge, in a dishonest and fraudulent design on the part of the trustees: of these the knowledge required was knowledge of circumstances which would indicate to an honest reasonable man that a dishonest and fraudulent (i.e., morally reprehensible) design was being carried out or would put him on enquiry whether such a design was being carried out (see p. 1096, letter G, p. 1104, letter G, and p. 1105, letter C, post).
- D *Barnes v. Addy*, ((1874), 9 Ch. App. 244) and *Thomson v. Clydesdale Bank, Ltd.* ([1891-94] All E.R. Rep. 1169) considered.
- E Dicta of SIR RICHARD KINDERSLEY, V.-C., quoted in *Shields v. Bank of Ireland* ([1901] 1 I.R. at p. 228) and of SIR RICHARD MALINS, V.-C., in *Gray v. Lewis* ((1869), L.R. 8 Eq. at pp. 542, 543) applied.
- F (b) the £195,000 received by C. Ltd. from C. represented moneys of the plaintiff company for the purposes of a claim by it in equity against C. Ltd. to account as constructive trustee of them, notwithstanding the incidental relationships between the plaintiff company and W. Ltd. and between W. Ltd. and C., whereby the sum of £232,500 passed out of the plaintiff company's account and reached C. and so provided the source from which C. paid C. Ltd. for the shares of the plaintiff company; and, as on the evidence
- G C. Ltd. knew that there was no contemporaneous or immediate transfer of assets by C. to the plaintiff company and that the plaintiff company's moneys were being used to provide the £195,000, C. Ltd.'s participation in that misapplication constituted it a constructive trustee liable to account to the plaintiff company for the £195,000 (see p. 1124, letter H, and p. 1130, letters G and H, post).
- H (iii) (in regard to claim (c), p. 1074, letter B, ante) (a) liability in equity was based as stated at (ii) (a) above (cf. p. 1076, letter D, post).
- (b) a paying bank had a duty to its customer in contract to exercise reasonable care and skill in carrying out its part of a transaction within the scope of its contract with its customers; and, if the duty was in the circumstances to make enquiry, failure to make enquiry was not excused by conviction that the answer would be false, for it was to be assumed that a true answer would be given (see p. 1118, letters A and G, post).
- I Dicta of ATKIN and BANKES, L.JJ., in *Hilton v. Westminster Bank, Ltd.* ((1926), 135 L.T. at pp. 362, 358) applied.
- A. L. Underwood, Ltd. v. Bank of Liverpool and Martins Bank* ([1924] All E.R. Rep. 230); *Pennmount Estates, Ltd. v. National Provincial Bank,*

\* Section 448 (1) is set out at p. 1154, letter I, to p. 1155, letter A, post.

*Ltd.* ([1945], 173 L.T. 344) and *Orbit Mining and Trading Co., Ltd. v. Westminster Bank, Ltd.* ([1962] 3 All E.R. 565) considered.

Dictum of DEVLIN, J., in *Baker v. Barclays Bank, Ltd.* ([1955] 2 All E.R. at p. 584) not followed.

(b) moreover the existence of a mandate from a company by which cheques were signed as so authorised were to be valid and binding on the company customer did not enable the bank to rely on the signatures as conclusive, so as to exclude the obligation of the bank to the company to exercise care and skill in relation to the cheque (see p. 1119, letter E, post).

*Midland Bank, Ltd. v. Reckitt* ([1932] All E.R. Rep. 90) applied.

(c) on the facts in the present case a reasonable banker would have concluded on Apr. 25, 1958, that the payment of £232,500 out of the plaintiff company's account was to finance the purchase by C. of shares of the plaintiff company, and, though the officials of the branch office of the D. bank had not realised this, the bank could not escape liability on that ground, particularly in view of the absence of instructions to its officials regarding take-over transactions (see p. 1137, letter I, and p. 1138, letter B, post); accordingly, by reason of the knowledge of the D. bank of relevant facts, the bank was liable as constructive trustee to replace so much of the £232,500 paid out of the plaintiff company's account as had been misapplied.

(d) the D. bank were also liable to the plaintiff company in contract for failure to exercise reasonable care and skill in paying the cheque for £232,500 without making enquiry of the directors of the plaintiff company as to the purpose for which the £232,500 was being applied (see p. 1138, letters F and I, post).

(iv) (in regard to the claim against W. Ltd.) (a) the loan of £232,500 by the plaintiff company to W. Ltd. was unlawful and was avoided by s. 54\* of the Companies Act, 1948, but this did not defeat the plaintiff company's claims (see p. 1154, letter H, post).

*Steen v. Law* ([1963] 3 All E.R. 770) applied.

DICTA of ROXBURGH, J., in *Victor Battery Co., Ltd. v. Curry's, Ltd.* ([1946] 1 All E.R. 519) not followed.

(b) there had not been satisfaction of the indebtedness of W. Ltd. to the plaintiff company (see holding (iii) at p. 1077, letter H, post).

(c) any novation of W. Ltd.'s indebtedness on the loan of £232,500 did not defeat the plaintiff company's claim against W. Ltd. as constructive trustee (see holding (iv) at p. 1077, letter I, post).

*Bank—Duty of care—Justifiable assumption of honesty of explanation given—Whether bank liable in equity as constructive trustee or at common law for not making further enquiry.*

*Company—Shares—Financial assistance for purchase of its own shares—Take-over—Payment from company's funds unlawful and avoided—Whether claim against directors as constructive trustees affected by illegality—Companies Act, 1948 (11 & 12 Geo. 6 c. 38), s. 54.*

A second transaction related to the acquisition of C.'s shares in the plaintiff company by B. At a board meeting of the directors of the plaintiff company on Jan. 26, 1960, it was resolved that indebtedness of W. Ltd. on the £232,500 loan from the plaintiff company, and certain indebtedness of other companies should be taken over as to £207,500 by C. and as to £42,000 by another company, but this latter arrangement was not completed and ultimately C. took over the £42,000 indebtedness. A cheque for £207,500 was drawn by C. on his account with the N.S. bank for crediting to the plaintiff company's account with that bank. The plaintiff company had in fact had an account with that bank since August, 1958, when it was transferred from

\* Section 54, so far as material, is set out at p. 1150, letter A, post.



A the D. bank. On Jan. 26, 1960, the defendant B. and the defendant S. were appointed directors in place of two who resigned. On the following day the plaintiff company opened an account with the N.S. bank (although the plaintiff company already had an account with that bank) and gave a mandate for its operation. B. and S. signed a cheque for £207,500 on the plaintiff company's account with N.S. bank; this was in favour of B., who  
B also had an account with the N.S. bank. B. signed a cheque for £207,500 on his account with that bank in favour of C. These three cheques were taken to the bank by a solicitor who represented to the bank's official that the transactions were for reasons of internal accounting; the N.S. bank official accepted the explanation and credited and debited the cheques accordingly. None of the circle of three cheques could have been met apart  
C from the others; but as a result of them B. obtained C.'s shares in the plaintiff company. On Feb. 25, 1960, a circle of three cheques for the £42,000 was similarly debited and credited. S. was throughout these transactions under the control of B., and as director of the plaintiff company, acted as B. told him. The plaintiff company claimed against B. and S. as directors, alleging liability to account as trustees, and against the N.S. bank on an alleged constructive trust for failure to make enquiry, alternatively  
D in contract for lack of reasonable care by failing to make enquiry.

**Held:** (i) in principle B. was liable in equity as trustee to account to the plaintiff company for the £207,500 and the £42,000, and, although the payment by the plaintiff company to B. was unlawful and avoided by s. 54\* of the Companies Act, 1948, yet that did not invalidate the plaintiff company's claim against B. as trustee (see p. 1140, letter I, post); S. was similarly liable, and neither B. nor S. was entitled to relief under s. 448† of the Companies Act (see p. 1141, letters F and I, and p. 1155, letter E, post): but, since no effective payment was made in the second transaction, the plaintiff company suffered no loss by its participation therein and this was fatal to its claim (see p. 1148, letter I, post).

F *Stein v. Law* ([1963] 3 All E.R. 770) applied, and dicta of ROXBURGH, J., in *Victor Battery Co., Ltd. v. Curry's Ltd.* ([1946] 1 All E.R. 519) not followed on the point that the plaintiff company's claims based on constructive trusteeship were not invalidated.

(ii) the explanation given by the solicitor to the official of the N.S. bank was justifiably assumed to be honest, and the N.S. bank was not, on the evidence, put on enquiry in respect of the cheques for £207,500 and £42,000; accordingly the N.S. bank were not liable in equity as constructive trustees nor were they liable in negligence for alleged failure to make enquiry (see  
G p. 1145, letter C, post; cf., p. 1104, letter G, and p. 1118, letter H, post).

(iii) the circular payments by each of the two sets of three cheques mentioned above did not result in satisfaction of the indebtedness of W. Ltd. on the loan of £232,500 to it by the plaintiff company, notwithstanding that the credit of each cheque may have amounted to payment of the sum credited, because each time what was received was paid out as part of the arrangement by which the payment in was made, leaving the plaintiff company with the satisfaction only of having played the part of a conduit pipe (see p. 1147, letter I, and p. 1148, letter G, post).

I (iv) in the second transaction (summarised at p. 1076, letter I, ante), the novation that occurred did not extend to any claim by the plaintiff company against W. Ltd. as constructive trustee (see p. 1147, letter A, post).

[As to directors as trustees of the company's property, see 6 HALSBURY'S LAWS (3rd Edn.) 299, 300, para. 604; and as to the accountability of directors,

\* Section 54, so far as material, is set out at p. 1150, letter A, post.

† Section 448, so far as material, is set out at p. 1154, letter I, to p. 1155, letter A, post.

see *ibid.*, p. 300, para. 605; for cases on the position of directors as agents or trustees, see 9 DIGEST (Repl.) 486-488, 3191-3212, 541, 542, 3561-3563.

As to a banker's position in regard to negligence in the payment of cheques and to cheques drawn in breach of trust, see 2 HALSBURY'S LAWS (3rd Edn.) 194-196, paras. 361, 364; as to protection to bankers paying cheques, see *ibid.*, pp. 197, 198, paras. 367, 368; and for cases on the liability of bankers for paying cheques, see 3 DIGEST (Repl.) 234-236, 601-610.

As to liability as a constructive trustee arising from the receipt of money, see 38 HALSBURY'S LAWS (3rd Edn.) 860, para. 1449; and for cases on the subject see 47 DIGEST (Repl.) 184-188, 1527-1565, 192, 1595-1609.

As to novation, see 8 HALSBURY'S LAWS (3rd Edn.) 262, para. 460; and as to satisfaction, see *ibid.*, p. 206, para. 349 text and notes (c), (d).

For the Companies Act, 1948, s. 54, s. 448, see 3 HALSBURY'S STATUTES (2nd Edn.) 507, 784.]

#### Cases referred to:

*Archbolds (Freightage), Ltd. v. S. Spanglett, Ltd. (Randall, Third Party)*, [1961] 1 All E.R. 417; [1961] 1 Q.B. 374; [1961] 2 W.L.R. 170; Digest (Cont. Vol. A) 284, 2333a.

*Backhouse v. Charlton*, (1878), 8 Ch.D. 444; 3 Digest (Repl.) 202, 420.

*Baker v. Barclays Bank, Ltd.*, [1955] 2 All E.R. 571; [1955] 1 W.L.R. 822; 3 Digest (Repl.) 265, 761.

*Bank of New South Wales v. Goulburn Valley Butter Co. Proprietary, Ltd.*, [1900-03] All E.R. Rep. 935; [1902] A.C. 543; 71 L.J.P.C. 112; 87 L.T. 88; 3 Digest (Repl.) 205, 434.

*Barnes v. Addy*, (1874), 9 Ch. App. 244; 43 L.J.Ch. 513; 30 L.T. 4; 47 Digest (Repl.) 191, 1593.

*Barney, Re, Barney v. Barney*, [1892] 2 Ch. 265; 61 L.J.Ch. 585; 67 L.T. 23; 47 Digest (Repl.) 192, 1598.

*Bellamy v. Marjoribanks*, (1852), 7 Exch. 389; 21 L.J.Ex. 70; 18 L.T.O.S. 277; 155 E.R. 999; 3 Digest (Repl.) 266, 762.

*Berwick-upon-Tweed Corpn. v. Murray*, (1856), 7 De G.M. & G. 497; 19 L.J.Ch. 281; 44 E.R. 194; 22 Digest (Repl.) 457, 5015.

*Blundell, Re, Blundell v. Blundell*, [1886-90] All E.R. Rep. 837; (1888), 40 Ch.D. 370; 57 L.J.Ch. 730; 58 L.T. 933; 47 Digest (Repl.) 187, 1561.

*Bodenham v. Hoskins (Hoskyns)*, [1843-60] All E.R. Rep. 692; (1852), 21 L.J.Ch. 864; 19 L.T.O.S. 294; *affd.*, 2 De G.M. & G. 903; 1 Digest (Repl.) 655, 2280.

*Boisserain v. Weil*, [1950] 1 All E.R. 728; [1950] A.C. 327; 17 Digest (Repl.) 457, 182.

*Burdick v. Garrick*, (1870), 5 Ch. App. 233; 39 L.J.Ch. 369; 47 Digest (Repl.) 485, 4365.

*Carpenters Co. v. British Mutual Banking Co. Ltd.*, [1937] 3 All E.R. 811; [1938] 1 K.B. 511; 107 L.J.K.B. 11; 157 L.T. 329; 3 Digest (Repl.) 264, 760.

*Chettiar v. Chettiar*, [1962] 1 All E.R. 494; [1962] A.C. 294; [1962] 2 W.L.R. 548; Digest (Cont. Vol. A) 286, 2401a.

*City Equitable Fire Insurance Co., Ltd., Re*, [1924] All E.R. Rep. 485; [1925] Ch. 407; 94 L.J.Ch. 445; 133 L.T. 520; 9 Digest (Repl.) 489, 3217.

*Coleman v. Bucks & Oxon Union Bank*, [1897] 2 Ch. 243; 66 L.J.Ch. 564; 76 L.T. 684; 3 Digest (Repl.) 196, 386.

*Curtice v. London City and Midland Bank, Ltd.*, [1908] 1 K.B. 293; 77 L.J.K.B. 341; 98 L.T. 190; 3 Digest (Repl.) 246, 657.

*Dey E. H., Pty., Ltd. (In liquidation) v. Dey*, [1966] V.R. 464.

*Dressy Frocks Pty., Ltd. v. Bock*, (1951), 51 S.R. (N.S.W.) 390.

*Edgar v. Fowler*, (1803), 3 East. 222; 102 E.R. 582; 1 Digest (Repl.) 802, 3279.

*Essex Aero, Ltd. v. Cross*, (November, 1961), unreported.

- A *Foley v. Hill*, [1843-60] All E.R. Rep. 16; (1848), 2 H.L. Cas. 28; 9 E.R. 1002; 3 Digest (Repl.) 177, 289.  
*Forest of Dean Coal Mining Co., Re*, (1878), 10 Ch.D. 450; 40 L.T. 287; 10 Digest (Repl.) 946, 6500.  
*Gray v. Johnston*, (1868), L.R. 3 H.L. 1; 3 Digest (Repl.) 201, 411.  
*Gray v. Lewis*, (1869), L.R. 8 Eq. 526; 20 L.T. 282; *reversd.*, (1873), 8 Ch. App. 1035; 43 L.J.Ch. 281; 29 L.T. 12, 199; 9 Digest (Repl.) 651, 4331.
- B *Holman v. Johnson*, [1775-1802] All E.R. Rep. 98; (1775), 1 Cowp. 341; 98 E.R. 1120; 11 Digest (Repl.) 325, 16.  
*Ireland v. Livingston*, [1861-73] All E.R. Rep. 585; (1872), L.R. 5 H.L. 395; 41 L.J.Q.B. 201; 27 L.T. 79; 1 Digest (Repl.) 485, 1275.  
*Jarvis v. Moy, Davies, Smith, Vandervell & Co.*, [1936] 1 K.B. 399; 105 L.J.K.B. 309; 154 L.T. 365; 44 Digest (Repl.) 394, 32.
- C *Joachimson (N.) (a firm name) v. Swiss Bank Corpn.*, [1921] All E.R. Rep. 92; [1921] 3 K.B. 110; 90 L.J.K.B. 973; 125 L.T. 338; 3 Digest (Repl.) 193, 376.  
*Jones v. Williams*, (1857), 24 Beav. 47; 30 L.T.O.S. 110; 53 E.R. 274; 20 Digest (Repl.) 340, 692.
- D *Keane v. Roberts*, (1819), 4 Madd. 332; 56 E.R. 728; 47 Digest (Repl.) 471, 4220.  
*Lands Allotment Co., Re*, [1891-94] All E.R. Rep. 1032; [1894] 1 Ch. 616; 63 L.J.Ch. 291; 70 L.T. 286; 9 Digest (Repl.) 550, 3630.  
*Land Credit Co. of Ireland v. Lord Fermoy*, (1870), 5 Ch. App. 763; 23 L.T. 439; 9 Digest (Repl.) 528, 3480.
- E *Liggitt (B.) (Liverpool), Ltd. v. Barclays Bank, Ltd.*, [1927] All E.R. Rep. 451; [1928] 1 K.B. 48; 97 L.J.K.B. 1; 137 L.T. 443; 3 Digest (Repl.) 235, 609.  
*Lloyd v. Banks*, (1868), 3 Ch. App. 488; 37 L.J.Ch. 881; 8 Digest (Repl.) 597, 416.  
*Lloyds Bank, Ltd. v. E. B. Savory & Co.*, [1932] 2 K.B. 122; *affd.*, H.L., [1932] All E.R. Rep. 106; [1933] A.C. 201; 102 L.J.K.B. 224; 148 L.T. 291; 3 Digest (Repl.) 270, 785.
- F *Macbryde v. Eykyn*, (1871), 24 L.T. 461; *on appeal*, 25 L.T. 192; 20 Digest (Repl.) 341, 700.  
*Mara v. Browne*, [1896] 1 Ch. 199; 65 L.J.Ch. 225; 73 L.T. 638; 47 Digest (Repl.) 191, 1589.
- G *Marreco v. Richardson*, [1908-10] All E.R. Rep. 655; [1908] 2 K.B. 584; 77 L.J.K.B. 859; 99 L.T. 486; 32 Digest (Repl.) 448, 693.  
*Midland Bank, Ltd. v. Reckitt*, [1932] All E.R. Rep. 90; [1933] A.C. 1; 102 L.J.K.B. 297; 148 L.T. 374; 3 Digest (Repl.) 268, 770.  
*Morison v. London County and Westminster Bank, Ltd.*, [1914-15] All E.R. 853; [1914] 3 K.B. 356; 83 L.J.K.B. 1202; 111 L.T. 114; 3 Digest (Repl.) 268, 773.
- H *Orbit Mining & Trading Co., Ltd. v. Westminster Bank, Ltd.*, [1962] 3 All E.R. 565; [1963] 1 Q.B. 794; [1962] 3 W.L.R. 1256; Digest (Cont. Vol. A) 49, 788a.  
*Overseas Tankship (U.K.), Ltd. v. Morts Dock & Engineering Co., Ltd., The Wagon Mound*, [1961] 1 All E.R. 404; [1961] A.C. 388; [1961] 2 W.L.R. 126; Digest (Cont. Vol. A) 1148, 185a.
- I *Penmount Estates, Ltd. v. National Provincial Bank, Ltd.*, (1945), 173 L.T. 344; 3 Digest (Repl.) 270, 780.  
*Quistclose Investments, Ltd. v. Rolls Razor, Ltd. (In voluntary liquidation)*, [1968] 1 All E.R. 613; [1968] 2 W.L.R. 478.  
*Reckitt v. Barnett, Pembroke and Slater, Ltd.*, [1928] All E.R. Rep. 1; [1929] A.C. 176; 98 L.J.K.B. 136; 140 L.T. 208; 1 Digest (Repl.) 361, 353.  
*Royal British Bank v. Turquand*, [1843-60] All E.R. Rep. 435; (1856), 6 E. & B. 327; 25 L.J.Q.B. 317; 119 E.R. 886; 9 Digest (Repl.) 660, 4374.



- Russell v. Wakefield Waterworks Co.* (1875), L.R. 20 Eq. 474; 44 L.J.Ch. 496; 32 L.T. 685; 10 Digest (Repl.) 1268, 8963.
- Sajan Singh v. Sardara Ali*, [1960] 1 All E.R. 269; [1960] A.C. 167; [1960] 2 W.L.R. 180; Digest (Cont. Vol. A) 287, 2460b.
- Shields v. Bank of Ireland (Governor & Co.)*, [1901] 1 I.R. 222; 3 Digest (Repl.) 201, \*335.
- Soar v. Ashwell*, [1891-94] All E.R. Rep. 991; [1893] 2 Q.B. 390; 69 L.T. 585; 47 Digest (Repl.) 185, 1545.
- Steen v. Law*, [1963] 3 All E.R. 770; [1964] A.C. 287; [1963] 3 W.L.R. 802; Digest (Cont. Vol. A) 169, \*1353b.
- Taylor v. Chester*, [1861-73] All E.R. Rep. 154; (1869), L.R. 4 Q.B. 309; 38 L.J.Q.B. 225; 21 L.T. 359; 10 B. & S. 237; 12 Digest (Repl.) 311, 2401.
- Taylor v. Davies*, [1920] A.C. 636; 89 L.J.P.C. 65; 123 L.T. 121; 32 Digest (Repl.) 587, \*1066.
- Thomson v. Clydesdale Bank, Ltd.*, [1891-94] All E.R. Rep. 1169; [1893] A.C. 282; 62 L.J.P.C. 91; 69 L.T. 156; 3 Digest (Repl.) 203, 425.
- Underwood (A. L.), Ltd. v. Bank of Liverpool and Martins Bank*, [1924] All E.R. Rep. 230; [1924] 1 K.B. 775; 93 L.J.K.B. 690; 131 L.T. 271; 3 Digest (Repl.) 205, 435.
- Victor Battery Co., Ltd. v. Curry's Ltd.*, [1946] 1 All E.R. 519; [1946] Ch. 242; 115 L.J.Ch. 148; 174 L.T. 326; 9 Digest (Repl.) 651, 4330.
- Westminster Bank, Ltd. v. Hilton*, (1926), 136 L.T. 315; *reversg.* sub nom. *Hilton v. Westminster Bank, Ltd.*, (1926), 135 L.T. 358; 3 Digest (Repl.) 246, 658.
- Williams-Ashman v. Price & Williams*, [1942] 1 All E.R. 310; [1942] Ch. 219; 111 L.J.Ch. 157; 166 L.T. 359; 47 Digest (Repl.) 393, 3524.

### Action.

This was an action commenced by writ issued on Apr. 21, 1964, and amended on Jan. 15, 1965, and re-amended on Jan. 16, 1968, by the plaintiff company, the Selangor United Rubber Estates, Ltd., a company in compulsory liquidation by order of the court dated June 5, 1961. The action was brought in the name of the company by the Board of Trade pursuant to s. 169 (4) of the Companies Act, 1948, by and with the authority of the official receiver as the liquidator. By the re-amended statement of claim, the plaintiff company claimed as follows: (i) A declaration that the first nine defendants were jointly and severally liable to replace moneys of the plaintiff company misapplied as alleged in the statement of claim, and (a) as to the first, seventh, eighth and ninth defendants to the extent of the sum of £249,500; (b) as to the second defendant to the extent of the sum of £195,322 5s. 2d.; (c) as to the third, fourth, fifth and sixth defendants to the extent of the sum of £232,500 — which said sums of £195,322 5s. 2d. and £232,500 were included in the said sum of £249,500. (ii) An order on the first nine defendants and each of them to pay to the official receiver in companies' liquidation as liquidator of the plaintiff company such sum or sums as the defendants or any one or more of them should be declared liable to replace as aforesaid with interest thereon at the rate of five per cent. per annum. (iii) Against each of the first nine defendants damages for breach of duty. (iv) Further or in the alternative, against the third and seventh defendants damages for negligence. (v) An order on the first nine defendants jointly and severally to pay to the Board of Trade, or alternatively to the official receiver as aforesaid the amount of the expenses of and incidental to an investigation of the affairs of the plaintiff company defrayed by the board.

The defendants were first, Francis Richard Cradock (a bankrupt), second, Contanglo Banking & Trading Co., Ltd., third, District Bank, Ltd., fourth, Woodstock Trust, Ltd., fifth, Francis Evelyn Barlow-Lawson, sixth, Francis Arthur Jacob, seventh, the Bank of Nova Scotia, eighth, John Leonard Burden,

A ninth, William Vernor Squire Sinclair, and tenth, the trustee of the property of Francis Richard Cradock (a bankrupt). Previous proceedings are reported at [1967] 2 All E.R. 1255 and [1968] 1 All E.R. 567.

The cases noted below\* were cited during the argument.

B Arthur Bagnall, Q.C., J. P. Warner, Richard Sykes and R. A. Morrill for the plaintiff company.

A. J. Balcombe for the second defendant.

R. H. W. Dunn, Q.C., and K. B. Suenson-Taylor for the third defendants.

G. B. H. Dillon, Q.C., and D. J. Nicholls for the fourth defendants.

John L. Arnold, Q.C., and R. B. S. Instone for the seventh defendants.

The fifth, sixth, eighth and ninth defendants appeared in person.

C The first and tenth defendants did not appear and were not represented.

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*Cur. adv. vult.*

May 29, 30. **UNGOED-THOMAS, J.**, read the following judgment: I have divided this judgment into the headings set out above so as to make it more easily identifiable.

## INTRODUCTION

This action arises from the collapse of a group of companies, including the plaintiff company, and the investigation of the plaintiff company's affairs by inspectors of the Board of Trade. The Board of Trade has brought the action in the name of the plaintiff company under its statutory power conferred by s. 169 (4) of the Companies Act, 1948, now replaced by s. 37 of the Companies Act 1967. In addition, the action is brought with the authority of the liquidator of the plaintiff company, who would be the proper person to bring these proceedings apart from the statutory authority.

*The claim and the defendants.*

The claims are in respect of substantial funds of the plaintiff company used for purchasing stock in the plaintiff company and in respect of a lesser amount used otherwise than for the purposes of the plaintiff company. All these sums have been lost to the plaintiff company. The claims are in respect of two separate transactions: the first transaction in 1958 and the second transaction in 1960. The first transaction is the basis of a claim in respect of £232,500 transferred from the plaintiff company to the first defendant Mr. Cradock for the purchase of the stock in the plaintiff company. The second transaction is the basis of a claim in respect of first, £207,500 transferred to the eighth defendant, Mr. Burden, for the purchase of the stock in the plaintiff company, and, secondly, a claim in respect of £42,000 transferred to the eighth defendant, Mr. Burden, otherwise than for the purposes of the plaintiff company. The claim in respect of these three sums is not cumulative but is in respect of an overall amount of £249,500 (namely, the £207,500 plus the £42,000) including (that is, in the £249,500) the £232,500.

The first defendant, Mr. Cradock, is at the centre of both transactions and the claim against him is in respect of both the £232,500 and the £249,500. The claims against the rest of the first nine defendants are in respect of the £232,500 or the £249,500 but not both, except that the claim against the second defendant, Contanglo Banking and Trading Co., Ltd. ("Contanglo") is limited to £195,000 which is that part of the £232,500 which came into its hands. The claims in respect of the £232,500, based on the first transaction, are made against the third, to sixth defendants, District Bank, Ltd. ("District"), Woodstock Trust, Ltd. ("Woodstock"), Mr. Barlow-Lawson and Mr. Jacob and, as I have said, in respect of £195,000, part of the £232,500, against the second defendant, Contanglo. The claims in respect of the £249,500 are made against the seventh to ninth defendants, the Bank of Nova Scotia, Mr. Burden and Mr. Sinclair.

Mr. Cradock was a dealer in some kinds of surplus war stores and in properties, and he operated through companies, private and public, which he controlled. In the first transaction he purchased approximately seventy-nine per cent. of stock in the plaintiff company and in the second transaction he disposed of it to Mr. Burden. He was adjudicated bankrupt on Jan. 16, 1967, and the official receiver is his trustee in bankruptcy. Mr. Cradock is out of the country; he entered an appearance but there is before me a motion for judgment against him



A in default of defence. Mr. Cradock's trustee in bankruptcy was added by amendment as tenth defendant with a view to his being bound by any order that may be made. Of the rest of the first nine defendants the personal defendants have appeared in person and the others have been represented by counsel.

B Contanglo carried on business as a banker and was concerned in take-over bids and acted for Mr. Cradock in the first transaction. District were bankers to the plaintiff company for a time during the first transaction and the Bank of Nova Scotia were bankers to the plaintiff company for a time during the second transaction. Woodstock was a private investment company which received a cheque for the £232,500 from the plaintiff company, which it claims was as loan at interest; and it endorsed the cheque over to Mr. Cradock which it claims was as a loan at one per cent. higher rate of interest.

C The individual defendants, Mr. Barlow-Lawson, Mr. Jacob, Mr. Burden and Mr. Sinclair were directors of the plaintiff company: Mr. Barlow-Lawson as chairman from Apr. 24, 1958, to Oct. 7, 1959 (a date in respect of which there was some doubt but to which all parties agreed); Mr. Jacob from Apr. 25, 1958, to Jan. 26, 1960; Mr. Burden and Mr. Sinclair from Jan. 26, 1960, to June 1, 1960, at the earliest, Mr. Sinclair being also chairman. Mr. Barlow-Lawson had D a small engineering business and was introduced by Mr. Scott, a director of Contanglo, into these affairs. Mr. Jacob was an employee of Mr. Cradock, Mr. Burden was developing and expanding a group of engineering businesses and in the second transaction, as I have said, acquired Mr. Cradock's holding of seventy-nine per cent. of stock in the plaintiff company. Mr. Sinclair was in concert with Mr. Burden.

E The legal formulation of the claim against the defendants is against the directors to account as trustees, and against the rest of the first nine defendants to account as constructive trustees, in respect of the misapplication of the plaintiff company's moneys; and, in addition, against the defendant banks for negligence. The claim is against the directors, Mr. Barlow-Lawson and Mr. Jacob (in respect of the £232,500), Mr. Burden and Mr. Sinclair (in respect of F the £249,500), that they are liable to account as trustees for misapplying the plaintiff company's moneys as I have already indicated; against Mr. Cradock (in respect of the £232,500 and £249,500), Contanglo (in respect of the £195,000), District and Woodstock (in respect of £232,500) and the Bank of Nova Scotia (in respect of the £249,500) that they are liable to account as constructive trustees; against Mr. Cradock and Contanglo and Woodstock on the ground that they G knowingly participated in misapplication of the plaintiff company's moneys in breach of trust and received, in the case of Mr. Cradock and Woodstock, £232,500, and, in the case of Contanglo, £195,000 of such moneys; against District on the ground that it likewise knowingly participated in misapplication of £232,500 of the plaintiff company's moneys in breach of trust, or alternatively that it paid away £232,500 of such moneys, knowing them to be trust moneys and when it H knew or ought to have known that such payment was a misapplication; and against the Bank of Nova Scotia on the ground that it paid away £249,500 of the plaintiff company's moneys knowing them to be trust moneys when it ought to have known (though not when it knew) that such payment was a misapplication; and in addition against the banks in negligence in breach of their duty to the plaintiff company as their customer in making such payments out of the I plaintiff company's account with them.

It was submitted that the only misapplication relied on in the statement of claim was the use of the plaintiff company's money to buy its own shares. The statement of claim, however, alleges misapplication of the plaintiff company's money not for the purposes or benefit of the plaintiff company but for the purposes and benefit of named recipients and alternatively, in providing financial assistance for the purchase of shares in the plaintiff company by reason of which the plaintiff company lost £249,500. Thus the pleadings are not, in my view, so limited. The plaintiff company in opening limited the misapplication

relied on in respect of the £232,500 and £207,500 to financial assistance for the purchase of shares in the plaintiff company; but this left standing the allegations that such misapplication was not for the purposes or benefit of the plaintiff company but of the recipients by reason of which the plaintiff company lost the money.

These claims are disputed on facts and on law and the questions that thus arise on law are of considerable general importance, particularly for banks.

*The Scheme of the Judgment.*

It would be convenient first to describe the first and second transactions so far as they are not substantially in dispute or there is no difficulty in deciding that the facts are as described. I will then specify the various legal issues which arise and deal with those of them which it will be convenient to deal with at that stage. I will then consider the claim against and the defence of each defendant separately; and in doing so examine the disputes of fact and state the results from my findings of fact, taken in conjunction with my conclusions on the points of law already considered but subject to consideration of outstanding questions of law, which will be more conveniently dealt with afterwards. I will then deal with those outstanding questions of law. Finally, I will state the overall result but leave for consideration later the form of order, costs and a claim for expenses of the investigation by the Board of Trade.

THE FIRST TRANSACTION

I will first indicate the gist of the first transaction and then trace it in some detail.

*The gist of the first transaction.*

The plaintiff company in 1957-58 was a company without a business but with substantial liquid assets of about £235,800. Contanglo, acting for an undisclosed principal, who was Mr. Cradock, made an offer for the stock in the plaintiff company and the offer was accepted by about seventy-nine per cent. of the stockholders. The total amount payable for the stock and expenses was about £195,000. Mr. Cradock had a bank account at District's Oxford Street branch in negligible credit and it was arranged that the plaintiff company's £232,500 credit in its bank account with National Bank, Ltd. ("National") should be transferred to a new account in the plaintiff company's name at the same branch of District. At a meeting on Apr. 25, 1958, a banker's draft for the £195,000 on District in favour of Contanglo was transferred to Contanglo. In accordance with an arrangement between Mr. Cradock and District, it was to be debited to his account with District, such payment to be covered by a National draft for £232,500 to be paid into Mr. Cradock's account. What happened at the meeting, however, was that, instead of a draft for £232,500 by National for payment into Mr. Cradock's account, National transferred to District's representative two drafts for a total of £232,764 drawn by it in favour of District to be paid into the plaintiff company's new account with District. In accordance with a resolution of the plaintiff company's board to lend £232,500 to Woodstock at eight per cent. interest, a cheque for £232,500 was drawn on the plaintiff company's new account with District in favour of Woodstock; and in accordance with an arrangement that Woodstock should lend that amount at nine per cent. interest to Mr. Cradock, the cheque was endorsed by Woodstock in favour of Mr. Cradock, handed to District's representative and paid into Mr. Cradock's account with District. The £232,500 thus covered the payment of the £195,000 to Contanglo and the seventy-nine per cent. of the stock in the plaintiff company, brought by Contanglo for Mr. Cradock, was in due course registered in one of District Bank's nominee companies as nominee for Mr. Cradock. Thus, Mr. Cradock obtained the stock, Contanglo the £195,000 paid for the stock and expenses and its own fee, Woodstock a liability for £232,500 from Mr. Cradock at one per cent. higher rate of interest than its liability for that amount to the plaintiff company; and the plaintiff company, instead of £232,500 cash, obtained an unsecured liability on the part of Woodstock for that amount at eight per cent. interest.

A *The first transaction in detail.*

The plaintiff company was incorporated as long ago as 1911 and carried on business as a rubber company in the Malay States. In 1957, like other rubber companies there, it sold its rubber estates with the result that it had over £½ million in cash and investments. There was demand for such companies at this time, companies known as shell companies which had lost all their assets, or preferably which had assets which were all liquid and also had a quotation on the Stock Exchange. Such a company provides a cheap method of obtaining a public company, without need for a prospectus, or for the consent of the Capital Issues Committee under the Control of Borrowing Order, as required for the issue of new shares. Though its Stock Exchange quotation would be suspended on a take-over, it would be regranted when the company acquired business assets and provided the Stock Exchange with particulars of them. Control of such a company had the advantage, for a property dealer, of enabling him to obtain free of tax a profit on a property deal, by selling his properties at substantially less than their market value to the company and then ensuring their resale by the company at market value and taking profits on the re-sale in the form of appreciation in the shares which he then sold. Owing to these advantages, the price for the shares in a shell company exceeded the net asset value of the company's assets and this was represented, in the purchase by Mr. Cradock of stock in the plaintiff company, by a premium of £9,250 in excess of the net asset value. In order to keep the Stock Exchange quotation, however, it was necessary for there to be a substantial minority holding in the company, as happened in the acquisition of the majority shareholding by Mr. Cradock in the plaintiff company. Shareholders who did not accept the take-over offer also shared the advantage of any appreciation in the value of the shares as the result of any re-sale of properties thus sold to (or, to use the jargon, "injected into") the company. Thus the property dealer and shareholders, whether they accepted or rejected the take-over offer, would obtain advantages; and the Revenue would not obtain any tax which, apart from the operation, the property dealer would, in the ordinary course, like others, have to pay on the profits of his business.

Although, in order to obtain the tax advantage, it was of the very essence and purpose of such an operation that the price for the injected properties on sale to the company should be substantially less than the price obtainable on the market, this was apparently treated generally as free from objection. I am not concerned in this case with any objection on such a ground.

If, however, the shell company's liquid assets were used not to pay for properties sold to the company, but to pay for the controlling shareholding, which the taker-over bought, this would clearly be a blatant and fraudulent misapplication of the moneys of such a company as the plaintiff company. That is what the plaintiff company says the first transaction was. The danger, in general, of such a misapplication was clearly recognised by those who were versed in such operations. I shall deal with this in detail, together with the suggested refinements of the shaded area between clear honesty and black dishonesty, when I consider the first case which calls for such a detailed consideration namely, the case against Contanglo.

Mr. Scott of Contanglo proposed to Mr. Cradock that he should acquire the stock in the plaintiff company. On Oct. 16, 1957, acting on behalf of Mr. Cradock a principal whose identity was not disclosed, Contanglo approached the plaintiff company, with the result that on Mar. 31, 1958, Contanglo wrote to the plaintiff company's directors offering, on behalf of unidentified clients (in fact Mr. Cradock), to purchase the whole of the issued stock of the plaintiff, namely, £90,000 of stock at 5s.1½d. per 2s. unit of stock, conditional on acceptance in respect of not less than seventy-five per cent. of the issue capital, the offer to remain open for acceptance by stockholders until Apr. 21 or such extended period as Contanglo might approve, being not later than Apr. 28. There was provision for payment



of a total of £550 to the directors of the plaintiff company, Mr. Roberts and Mr. Fenton, as compensation for loss of office, and for the replacement of such directors by Contanglo's nominees on the offer becoming unconditional. The offer of 5s. 1½d. per 2s. stock unit represented the premium of £9,250 in addition to the value of the plaintiff company's assets; and the £235,000 was to cover the purchase of possibly the whole of the stock. Contanglo gave, as references for their readiness and ability to implement the offer, their solicitors, Messrs. D. B. Levinson & Co., and the National Bank.

On the same date as Contanglo thus wrote to the plaintiff company, namely, Mar. 31, Mr. Cradock wrote to Contanglo confirming that their offer to the plaintiff company was made for him as undisclosed principal; that if the offer became effective Contanglo would pay for all acceptances; that the shares would be transferred into the names of Contanglo or their nominees; that all such payments, together with expenses, would be provided as loan from Contanglo to Mr. Cradock at eight per cent. interest; that Mr. Cradock would repay the loan at the expiration of seven days after the closing date of the offer; that Mr. Cradock would pay Contanglo £7,500 if the offer became effective and £500 if not effective; that Mr. Cradock charged, by way of first charge, as security for such payments to Contanglo, the shares of all assenting shareholders; and that he would confer with Contanglo as to the constitution of the new board of the plaintiff company but, in the event, from the resignation of the old board until Mr. Cradock had paid all moneys payable to Contanglo under their agreement, the plaintiff company board was constituted of Contanglo's nominees.

The consensus of opinion about Mr. Levinson, of Contanglo's solicitors D. B. Levinson & Co., is that he was a man of very considerable ability and force of character. He, with Mr. Scott and one Essex, had acquired a fifty per cent. shareholding in Contanglo, though both Mr. Scott and Mr. Levinson preferred not to be on the board. Mr. Scott said that he was in control of the operation and in charge of policy matters for Contanglo in the first transaction and that Mr. Levinson was responsible for implementing that policy.

Contanglo arranged with the Whitehall branch of the National Bank to grant it an overdraft for the £235,000 on Mr. Levinson's guarantee, supported by securities which he had deposited with the bank. However, Contanglo also had a first charge on the stock units in the plaintiff company, purchased for Mr. Cradock, for moneys payable by Mr. Cradock under his agreement with Contanglo, and these were to be in the name of National Bank Nominees. Mr. Snell, the branch manager of National, wrote, also on Mar. 31, to Guthrie & Co., Ltd., the plaintiff company's secretaries, that Contanglo was in a position to provide £235,000 for the purchase of the holdings in the plaintiff company and added that it had been agreed that the "shares" so purchased should be transferred into a National nominee company and indicated that the transfers should be worded accordingly. Again, however, the event differed from the arrangement, for, as we shall see, Contanglo was paid District's draft for the £195,000 covering payments to accepting shareholders (as well as Contanglo's fee and expenses) before any cheques went to accepting shareholders were or, indeed, could be presented for payment.

On Apr. 1 the plaintiff company's board resolved to recommend acceptance of Contanglo's offer and by a circular of Apr. 3 it did so. On Apr. 17 Contanglo declared the offer unconditional, and on Apr. 18 requested the plaintiff company's board to transfer the whole of the plaintiff company's cash and funds to the Whitehall branch of the National. On Apr. 21 the plaintiff company's board passed a resolution for such transfer from Barclays Bank to the branch of National. On Apr. 22 Contanglo, on Mr. Cradock's instructions, requested the plaintiff company to sell its gilt-edged securities and tax reserve certificates and pay the proceeds to the plaintiff company's account at the National Bank, Whitehall branch. On Apr. 23 Contanglo wrote to Mr. Cradock that it had arranged to complete the purchase of the shares at the plaintiff company's board

- A meeting on Apr. 24 and that Mr. Meaden and Mr. Barlow-Lawson would then be appointed directors and would resign as soon as Mr. Cradock made the payments for which he was liable to Contanglo; and that Mr. Cradock intended to make such payments at a board meeting of the plaintiff company summoned for Apr. 25. Also on Apr. 23 Mr. Sarsfield, one of three directors of Woodstock, wrote to Mr. Cradock as follows: "Dear Mr. Cradock", and the heading is "The Selangor United Rubber Estates, Ltd.",

- "Further to our telephone conversation this afternoon, I confirm the arrangements whereby you will complete the transaction to purchase 719,579 2s. ordinary shares in the above company on Friday, Apr. 25. It is understood that Contanglo Banking & Trading Co., Ltd. will produce a bankers draft in favour of Woodstock Trust, Ltd. for £235,799 representing the balance in the account of Selangor United. We shall then make a loan to you of a similar amount and you in your turn will produce a bankers draft for £195,322 5s. 2d. in favour of Contanglo representing the purchase consideration for the shares. It is further agreed that Woodstock Trust will pay interest at the rate of eight per cent. per annum on the loan from Selangor United and that we shall charge you a rate of ten per cent per annum on the same amount, making a net fee to us of two per cent., for the period in which the money is outstanding. I also confirm that I shall be present at 11 o'clock on Friday at the National Bank Ltd., 15, Whitehall."

- The fee of two per cent. was in fact reduced to one per cent., and the figure of £235,799 was erroneous, being more than the balance in the plaintiff company's account.

- On Apr. 23 Mr. Cradock telephoned Mr. McMinn, the manager of the Oxford Street branch of the District Bank, and said that he might influence the transfer of the plaintiff company's bank account to District. He requested Mr. McMinn to prepare a banker's draft in favour of Contanglo for £195,322 and asked for District's representative to attend at the National Whitehall branch to collect a banker's draft in favour of Mr. Cradock for £235,000 odd. This was confirmed by a letter of Apr. 24 from Mr. Cradock to Mr. McMinn. Mr. McMinn, reporting on May 20 to his general manager, said:

- "I understand that the second draft would cover the issue of the first and the arrangement was agreed on this basis."

- I am completely satisfied that it was on this basis that the arrangement was in fact agreed. This £235,000 odd corresponded with the erroneous figure of £235,799 appearing in Mr. Sarsfield's letter of Apr. 23 to Mr. Cradock (which I have already referred to) as representing the balance of the plaintiff company's account.

- On Apr. 24 the manager of the National Bank, Whitehall branch, wrote to the plaintiff company's secretaries that cheques for the accepting shareholders were being sent on that day. On the same day, at a meeting of the plaintiff company's board which Mr. Levinson attended, the bank's letter was tabled and then Mr. Barlow-Lawson and Mr. Meaden were appointed as additional directors, the secretaries were instructed to leave the plaintiff company's fund on current account and Mr. Roberts and Mr. Fenton resigned from the board. On the same day, a letter from the plaintiff company signed at any rate by Mr. Barlow-Lawson, if not also by Mr. Meaden, asked Mr. Snell to arrange for a banker's draft for £236,964 to be made out to the order of the District Bank. This sum represented the balance of the plaintiff company's account at National which did not include the proceeds of sale of the plaintiff company's stock reserve certificate for which payment had not then been received.

On the morning of Apr. 25, a board meeting of the plaintiff company was held in Mr. Snell's office at the Whitehall branch of the National. There were

present Mr. Barlow-Lawson, Mr. Meaden, Mr. Jacob and, in attendance, Mr. Ringshall for the secretaries, Mr. Levinson and Mr. Scott for Contanglo, Mr. Reynolds for District, Mr. Cradock, and for Woodstock Mr. Sarsfield. Mr. Snell welcomed those who came to the meeting and then left. The room was a small room some fifteen feet by sixteen feet, but in this room two groups formed, one at the desk in the room and consisting of Mr. Levinson, Mr. Barlow-Lawson, Mr. Meaden, Mr. Jacob and Mr. Ringshall, and another outer group of Mr. Scott, Mr. Cradock, Mr. Sarsfield and Mr. Reynolds, probably nearer the door and probably to some extent standing and to some extent sitting. The meeting fell into three stages, first preliminary chat, then the board phase dealing with resolutions, and then documentation to carry out what had been arranged.

In the first phase (i) Mr. Cradock told Mr. Reynolds in particular that a board meeting of the plaintiff company was to take place and that the plaintiff company's account would be transferred from National to District, Oxford Street branch; (ii) Mr. Sarsfield told Mr. Reynolds in particular that the plaintiff company would draw a cheque on its new account with District in favour of Woodstock which would endorse it in favour of Mr. Cradock, and he asked if this re-arrangement would be all right and Mr. Reynolds agreed to it; (iii) Mr. Reynolds thereupon handed over the draft which he had brought with him, drawn by and on District for £195,000 in favour of Contanglo. He either handed it to Mr. Cradock who handed it to Mr. Levinson or he handed it direct to Mr. Levinson, but the difference is immaterial.

In the board meeting stage, although Mr. Barlow-Lawson was in the chair formally or, more accurately, nominally in the minutes, Mr. Levinson was in complete and exclusive control of the meeting. At this stage, resolutions were passed appointing Mr. Jacob as additional director and that Mr. Meaden's resignation as director be accepted, that a bank account be opened at the Oxford Street branch of District; that £232,764 odd (which included the proceeds of sale of the tax reserve certificates) on current account with National be transferred to that branch of District; and that £232,500 be deposited with Woodstock at eight per cent. per annum interest subject to withdrawal on demand. It was also recorded that Mr. Meaden, Mr. Scott and Mr. Levinson withdrew from the meeting. I mention these resolutions and the withdrawal of the Contanglo representatives without regard to the order in which they occurred. There was considerable dispute about the order and, in particular, whether the Contanglo representatives withdrew before or after the resolution to deposit the plaintiff company's moneys with Woodstock, since it became a crucial part of Contanglo's case that they had no knowledge whatsoever about any loan to Woodstock. The plaintiff company, however, was content not to rely on this withdrawal having taken place at any particular point.

In the course of the third phase of the meeting, documentation, though without regard to the precise order in which the events occurred, Mr. Reynolds received (i), for payment into the plaintiff company's new account with District, two drafts totalling £232,764 6s. 9d. from National to District, one draft for £226,964 6s. 9d. representing the balance of the plaintiff company's credit at National apart from the proceeds of sale of tax reserve certificates, and the other draft for £5,800 representing those proceeds of sale; (ii) a mandate form made out by Mr. Barlow-Lawson and signed by Mr. Barlow-Lawson, Mr. Jacob and Mr. Ringshall for the purpose of operating the plaintiff company's account with District; (iii) a cheque for £232,500 signed by Mr. Barlow-Lawson and Mr. Jacob in favour of Woodstock and endorsed specially to Mr. Cradock by Mr. Sarsfield for Woodstock; (iv) probably paying-in slips in respect of the drafts from National to District and a paying-in slip in respect of the cheque endorsed to Mr. Cradock; and (v) an undertaking signed by Mr. Snell, addressed to the manager of the District Oxford Street branch, to deliver to him 713,579 2s. stock units in the plaintiff company with a complete transfer deed in favour of District Bank (London) Nominees, Ltd. as soon as formalities of stamping the registration had



A been completed. This undertaking was handed to Mr. Reynolds when he was on the point of leaving and he assumed that it was handed by a representative of the National Bank.

Mr. Reynolds returned with these documents and reported to Mr. McMinn, the manager of the District Oxford Street branch. Mr. McMinn was "horrified". Mr. Reynolds had parted with the draft for £195,322 and although he had drafts B for £232,764, payable into the plaintiff company's new account, what he had for transfer into Mr. Cradock's account to cover the £195,322 draft was not a draft but a cheque drawn on the plaintiff company's account. In view of the draft payable into the plaintiff company's account, the plaintiff company's cheque would have been as effectual as a draft if it were properly payable to Mr. Cradock. The horrifying difficulty was that it was only payable to Mr. Cradock by reason C of an endorsement for a limited company. Mr. McMinn was therefore concerned to make certain that the endorsement was valid. So he set about getting the endorsement confirmed by Woodstock and eventually he obtained the necessary confirmation from the other two directors of Woodstock on May 30 and ultimately in 1959 of a board meeting of Woodstock. On Apr. 25, however, he paid the £232,754 6s. 9d. drafts into the plaintiff company's account, debited the amount D of the cheque for £232,500 to the plaintiff company's account, and credited it to Mr. Cradock's account. Thus he covered the payment of £195,000 draft. It would appear from Mr. Cradock's account with District, and is stated in a letter of June 16, 1958, from Mr. McMinn to his general manager, that the difference between £195,000 and the £232,500 was used by Cradock for his own purposes and the purposes of his companies.

E On Apr. 25 Contango paid into its own account with National the £195,322 5s. 2d. and paid out of that account into an account with National opened for itself with itself £188,809 18s. 1d. Out of that account with National the accepting stockholders were paid, together with certain fees, leaving nil in the account.

Eventually, as I have said, and in accordance with the undertaking handed to Mr. Reynolds at the meeting of Apr. 25, the stock was transferred to and F registered in the District nominee company as nominee for Mr. Cradock.

#### THE SECOND TRANSACTION

In between the first and second transactions a Mr. Adrian Jacobs was appointed chairman of the plaintiff company. Mr. Barlow-Lawson resigned from the board, as I have said, and Mr. Cradock's stock in the plaintiff company was G transferred first on Sept. 25, 1958, to Mr. Cradock and on Jan. 5, 1959, to G. & C. Finance, Ltd. as nominee for Mr. Cradock. On Feb. 24, 1959, G. & C. Finance, Ltd. was registered as holder of the stock and was issued the stock certificate. On Aug. 26, 1958, the plaintiff company's account at District was transferred to the Nova Scotia Bank where it opened with a credit of some £700 and the usual documents authorising the directors to sign for the plaintiff company's H cheques drawn on the account were sent to the Nova Scotia Bank, Waterloo Place branch.

Some little time before Jan. 26, 1960, Mr. Burden agreed to buy from Mr. Cradock his stockholding in the plaintiff company and two persons Mr. Stekel and Mr. Kraft acted as intermediaries between them and as agents for both of them. There were, I find, two meetings of the plaintiff company's I board on Jan. 26, although it is just possible that the second meeting took place on Jan. 27; the difference is however immaterial. At the first meeting, held at Mr. Cradock's head office, there were present Mr. Jacobs and Mr. Jacob and in attendance a Mr. Mitchell, and a Mr. Sterling representing the secretaries, Weavers, and a Mr. Curtis and a Mr. Short representing Henry Briggs, Son & Co. (Trust), Ltd., a Cradock company. Mr. Cradock, Mr. Stekel and Mr. Kraft were on the premises and there was a good deal of going to and fro between the room where the meeting was held and other parts of Mr. Cradock's premises. Mr. Burden and Mr. Sinclair were not on the premises at all. It was resolved

that the indebtedness of Woodstock to the plaintiff company, consequent on the first transaction, and the indebtedness of the two Cradock companies, F.R.C. Properties and General Investment, Ltd. and M. D. R. Motors, Ltd. (for a total of £6,400) should be taken over, as to £207,500 by Mr. Cradock, and as to £42,000 or the balance of the indebtedness by Henry Briggs Son & Co. (Trust), Ltd.: that a cheque for £207,500 in settlement of Cradock's liability be handed to Mr. Burden's representative for payment into the plaintiff company's account; and that bills for a total of £42,000 payable on future specified dates be drawn on Briggs' settlement of Briggs' liability. Mr. Jacob and Mr. A. Jacobs resigned as directors and Mr. Burden and Mr. Sinclair were appointed directors.

No representative of Woodstock was present when the resolution about taking over Woodstock's liability was passed. On Jan. 27 there was an exchange of cheques for £245,761 12s. each between Mr. Cradock and Woodstock and they passed through Martins Bank where Woodstock and apparently Mr. Cradock had accounts. This sum, it is said, represented the £232,500, plus outstanding interest, and Woodstock wrote to Mr. Cradock on Jan. 27, 1960, that they had that day "repaid you £242,671 12s. being a principal and part interest on a sum of £232,500". The position about this is by no means clear but it looks as though Woodstock and Mr. Cradock were intending to eliminate Mr. Cradock's liability to Woodstock and that he should be liable, in Woodstock's place, to the plaintiff company. In due course Mr. Burden obtained a blank transfer of Mr. Cradock's stock in the plaintiff company, duly executed by G. & C. Finance, Ltd.

At the second meeting Mr. Sinclair was appointed chairman and Mr. Burden secretary and it was resolved that the plaintiff company should open an account with the Bank of Nova Scotia, although in fact, as I have said, the plaintiff company already had an account with that bank. The usual banking resolution was passed. A mandate appropriate for the opening of such an account was signed by Mr. Burden and Mr. Sinclair, authorising, inter alia, cheques drawn on the account to be signed by the chairman and secretary or any two directors. It is not disputed that it was a valid mandate. This is the authority relied on by the Bank of Nova Scotia for making the payment in respect of which the claim is made against it on the ground of constructive trusteeship and negligence. Mr. Stekel or Mr. Kraft, or both, came with Mr. Cradock's cheque for £207,500 in favour of the plaintiff company and handed it to Mr. Burden. A cheque for the same amount was drawn in accordance with the mandate by Mr. Sinclair and Mr. Burden for the plaintiff company: and Mr. Burden drew a cheque for the same amount on his own account in favour of Mr. Cradock. All three cheques for £207,500 each were handed to a solicitor, a Mr. Bieber, "as a stakeholder".

On Feb. 10, 1960, Mr. Bieber took the three cheques to the Nova Scotia Bank Waterloo Place branch, where he had an interview with a Mr. Evans who, in the manager's absence, was in charge of the branch. He explained that the cheques were being exchanged for "internal accounting reasons" or "internal book-keeping reasons". On that day all three cheques were debited and credited as they directed.

The Westminster Bank refused to discount the bills for £42,000 and on Feb. 19 Mr. Cradock sent the plaintiff company a cheque for £42,000 in place of the bills, which were later handed to Mr. Cradock. This cheque, however, was part of a further series of three cheques, drawn like the three cheques for £207,500, but for an amount of £42,000 each. On Feb. 25, 1960, they were likewise debited and credited to the three accounts at the Nova Scotia Waterloo Place branch. The evidence about these three cheques is thin. On Feb. 9, 1960, the date which the three cheques bore, Mr. Burden entered into an agreement with Mr. Cradock to purchase all the shares in H. C. Hopper (Norwich), Ltd. for £78,000, payable as to £42,000 in cash and the balance of £36,000 in bills drawn by Mr. Cradock and accepted by Mr. Burden. Mr. Burden was expressed to make the agreement "as agent for and on behalf of" without indicating the

- A principal in any way. Mr. Burden said he intended the plaintiff company to have "Hopper". There are unsigned minutes of a board meeting of the plaintiff company on Mar. 30, 1960, purporting to record a resolution for investment of the plaintiff company's money in short term loans "pending the result of an investigation into an engineering business which it was suggested the company should purchase". Mr. Sinclair said that nothing mentioned in this unsigned minute of a resolution was ever considered. In a memorandum of Apr. 5, 1960, to Mr. Burden, Mr. Sinclair said "particulars as to paying in of requisite assets are awaited". Whatever any particular person may, however, have intended with regard to H. C. Hopper (Norwich), Ltd., on May 31, 1960, Mr. Burden and Mr. Cradock cancelled their agreement for its sale to Mr. Burden on Mr. Cradock accepting bills drawn by Mr. Burden or his nominee for a total of £10,000. No "Hopper" asset and no part of the £10,000 ever reached the plaintiff company.

#### QUESTIONS OF LAW

The following questions of law arise:

1. How far are directors trustees of their companies' funds?
- D 2. How far is a director who acts on the direction of a third party to be ascribed the relevant knowledge or state of mind of the third party?
3. How far can a stranger to a trust be liable as constructive trustee in respect of a breach of the trust?
4. What is the liability to its customer in negligence of a bank which pays out of its customers' account?
- E As each of these questions affect more than one defendant and as they are conveniently considered apart from the facts, I will deal with them before considering the cases against the individual defendants. Five further questions involving considerations of law, however, arise. They are:
5. How far did any novation replace the liability of Woodstock to the plaintiff company by liability of Mr. Cradock and Mr. Briggs to the plaintiff company and preclude the plaintiff company from succeeding in its claim against Woodstock?
- F 6. How far was the payment to the plaintiff company of the £249,000 satisfaction of its claim in respect of the first transaction?
7. Was there any loss to the plaintiff company by reason of the second transaction?

8. Whether the payments by the plaintiff company of the £232,500 and £207,500, in respect of which it claims, are irrecoverable because made illegal by s. 54 of the Companies Act 1948 (1)?
- G

9. Should the individual defendants Mr. Barlow-Lawson, Mr. Jacob, Mr. Burden and Mr. Sinclair be relieved under s. 448 of the Companies Act, 1948 (2)?

- H These questions involve considerations of law and fact together. Questions 6-9 affect more than one defendant. Questions 5-8 involve the inter-relationship of the first and second transactions. It will in the circumstances be convenient to deal with them after I have considered (subject to these questions) the cases against each of the defendants separately; and in the order in which I have numbered the questions.

#### 1. *Directors as trustees of their companies' funds.*

- I The first question of law that arises is how far directors are trustees of their companies' funds. It is clear and not disputed that they owe a fiduciary duty to the company to apply its assets only for the purpose of the company and are therefore liable for breach of that duty; but the question how far they are trustees bears on the question how other defendants can be made liable as constructive trustees as claimed.

On occasion directors have been said to be trustees and on occasion not to be trustees. Like so many interminable arguments in philosophy, economics and

(1) For s. 54 see 3 HALSBURY'S STATUTES (2nd Edn.) 507.

(2) For s. 448, see 3 HALSBURY'S STATUTES (2nd Edn.) 784.



everyday life, its resolution depends largely on definition of terms in this case of "trustees" and then on the ambit of its proper application to directors. A

Directors are clearly not trustees identically with trustees of a will or marriage settlement. In particular, so far as at present relevant, they have business to conduct and business functions to perform in a business manner, which are not normally at any rate associated with trustees of a will or marriage settlement. All their duties, powers and functions qua directors are fiduciary for and on behalf of the company. So property in their hands or under their control is theirs for the company, i.e., for the company's purposes in accordance with their duties, powers and functions. However much the company's purposes and the directors' duties, powers and functions may differ from the purposes of a strict settlement and the duties powers and functions of its trustees, the directors and such trustees have this indisputably in common—that the property in their lands or under their control must be applied for the specified purposes of the company or the settlement; and to apply it otherwise is to mis-apply it in breach of the obligation to apply it to those purposed for the company or the settlement beneficiaries. So, even though the scope and operation of such obligation differs in the case of directors and strict settlement trustees, the nature of the obligation with regard to property in their hands or under their control is identical, namely to apply it to specified purposes for others beneficially. This is to hold it on trust for the company or the settlement beneficiaries as the case may be. That is what holding it on trust means. That is why a misapplication of it is equally in each case a breach of trust. This is just not treating as a breach of trust something which is not a breach of trust. No ground has been suggested for treating it as a breach of trust except that it is a breach of trust. It would be topsy turvy, as seems sometimes to have been suggested, to make the mis-application of property that is held a breach of trust (and not just treat it as a breach of trust, though not a breach of trust) without the property having been held on trust and thus convert into a trust what was not a trust before the misapplication. B C D E

It has been said that the director is not in all respects in the position of a trustee in respect of an unpaid debt and that a bank account credit, like that of the plaintiff company with its banks in this case, is an unpaid debt from the bank to the customer. Normally a trustee of a strict settlement has to get in unpaid debts, whereas a director has to treat unpaid debts with due regard to the commercial purposes which he is serving and perhaps therefore not press for their payment. A bank credit differs, however, from such unpaid debts which a trustee has to get in—to get in, be it observed, perhaps by having it paid into the trust bank account—and it differs from the ordinary commercial debts owing to a company. In general, the bank's debt to its customer for the credit in his account, though legally a debt, is, in substance and every day experience and conduct of our affairs, moneys within the control of the customer—the customer's moneys at the bank, cash at the bank. In the present case there is no dispute about the fact of payments of the plaintiff company's moneys out of the plaintiff company's bank accounts but only of their nature and significance and whether they amounted to a misapplication. The very application of the plaintiff company's moneys of which complaint is made by the plaintiff company would have been impossible if the defendant directors did not have and exercise effective control of these moneys. Those directors were the only directors of the company and the directors who were authorised to operate the company's bank account. Indeed, a crucial part of the defence (namely that which relies on the conclusiveness of the mandate) is that they had that control. F G H I

I will now refer to passages in the authorities.

In *Re City Equitable Fire Insurance Co., Ltd.* (3), ROMER, J., said (4):

(3) [1924] All E.R. Rep. 485; [1925] Ch. 407.

(4) [1925] Ch. at p. 426.

- A "It has sometimes been said that directors are trustees. If this means no more than that directors in the performance of their duties stand in a fiduciary relationship to the company, the statement is true enough. But if the statement is meant to be an indication by way of analogy of what those duties are, it appears to me to be wholly misleading. I can see but little resemblance between the duties of a director and the duties of a trustee of a will or of a marriage settlement. It is indeed impossible to describe the duty of directors in general terms, whether by way of analogy or otherwise. The position of a director of a company carrying on a small retail business is very different from that of a director of a railway company."

Later he said (5):

- C "The manner in which the work of the company is to be distributed between the board of directors and the staff is in truth a business matter to be decided on business lines . . . It has been laid down that so long as a director acts honestly he cannot be made responsible in damages unless guilty of gross or culpable negligence in a business sense."

- D In *Russell v. Wakefield Waterworks Co.* (6) SIR GEORGE JESSEL, M.R., in a passage explaining that the appropriate person to apply to the court for repayment of misapplied funds of a company was, not the shareholders, but the company, said:

- E "The answer was that, where the owner of the trust fund is an incorporated company, the corporation is the only party to sue; the stranger has nothing whatever to do with the individual corporators; and although in a sense it is their property, because individual corporators make up the corporation, yet in law it is not their property, but the property of the corporation, and therefore the right person to sue is the corporation, who is the cestui que trust or equitable owner of the fund. That I take to be the general rule of this court. In this court the money of the company is a trust fund, because it is applicable only to the special purposes of the company in the hands of the agents of the company, and it is in that sense a trust fund applicable by them to those special purposes; and a person taking it from them with notice that it is being applied to other purposes cannot in this court say that he is not a constructive trustee."

In *Re Lands Allotment Co.* (7) LINDLEY, L.J., said:

- G "Although directors are not properly speaking trustees, yet they have always been considered and treated as trustees of money which comes to their hands or which is actually under their control; and ever since joint stock companies were invented directors have been held liable to make good moneys which they have misapplied upon the same footing as if they were trustees . . ."

- H KAY, L.J., said (8):

"I conceive that the directors of every company, being the managing agents of a trading concern, have considerable authority and power in dealing with outstanding debts due to the concern . . ."

He added a little later (9):

- I "... but if they deal with the funds of a company, although those funds are not absolutely vested in them, but funds which are under their control, in a manner which is beyond their powers, then, as to that dealing, they are treated as having committed a breach of trust."

(5) [1925] Ch. at p. 427.

(6) (1875), L.R. 20 Eq. 474 at p. 479.

(7) [1894] 1 Ch. 616 at p. 631, cf., [1891-94] All E.R. Rep. 1032 at p. 1034.

(8) [1891-94] All E.R. Rep. at p. 1037; [1894] 1 Ch. at p. 637.

(9) [1891-94] All E.R. Rep. at p. 1038; 1894] 1 Ch. at p. 638.

Then he said (10):

"... directors are not always trustees. As directors they are not trustees at all. They are only trustees qua the particular property which is in their hands or under their control, and which they have applied in a manner which is beyond the powers of the company. I conceive that qua such fund they are constructive trustees, or trustees by implication of law..."

In *Re Forest of Dean Coal Mining Co.* (11) SIR GEORGE JESSEL, M.R., in dealing with the responsibility of directors in respect of debts due to a company, said (12):

"Traders have a discretion as to whether they shall sue their customers, a discretion which is not vested in the trustees of a debt under a settlement."

He added (13):

"Again, directors are called trustees. They are no doubt trustees of assets which have come into their hands, or which are under their control, but they are not trustees of a debt due to the company... A director is the managing partner of the concern, and although a debt is due to the concern I do not think it is right to call him a trustee of that debt which remains unpaid, though his liability in respect of it may in certain cases and in some respects be analogous to the liability of a trustee. So much for the question of unpaid debts."

So, in my view, in general as in this case a credit in a company's bank account which the directors are authorised to operate are moneys of the company under the control of those directors and are held by them on trust for the company in accordance with its purposes.

2. *How far is a director who acts on the direction of a third party bound by the state of mind of that third party?*

How far, as put in argument, the director who acts, without exercising any discretion, at the direction of a stranger to the company is, in respect of his liability for funds under his control (for which he is, as I have concluded, a trustee) to have ascribed to him the purpose of that stranger, or, as I prefer to put it and which comes to much the same thing in our case and is sufficient for present purposes, how far is he bound by the stranger's knowledge of the nature of the transaction.

In *Gray v. Lewis*, (14) MELLISH, L.J., said:

"If a person allows himself to be the mere nominee of, and acts for another person, he must be bound by the notice which that other person for whom he acts has of the nature of the transaction."

Moreover, that was said with reference to a fraudulent and illegal transaction. The nominees in that case were not directors but purchasers of shares.

In *Land Credit Co. of Ireland v. Lord Fermoy* (15) a company's funds were used by a duly appointed directors' sub-committee to buy the company's shares in order to raise the price and keep up a fictitious appearance of credit. This operation was carried out and cloaked by the sub-committee in the guise of loans, which were then used to buy the shares. The sub-committee disclosed the loans to the full board but not their purpose and use. The loans were not of unusual amount and there was nothing about them to put the board on enquiry. So a director who was not involved in the transaction, otherwise than as a member of the board, and presumed to have just the knowledge disclosed to the board, was held not liable to repay to the company the amount of the loan. The sub-committee was duly appointed and acted within the ambit of its authority in

(10) [1891-94] All E.R. Rep. at p. 1038; [1894] 1 Ch. at p. 639.

(11) (1878), 10 Ch.D. 450.

(12) (1878), 10 Ch.D. at p. 452.

(13) (1878), 10 Ch.D. at p. 453.

(14) (1873), 8 Ch. App. 1035 at p. 1056.

(15) (1870), 5 Ch. App. 763.



- A making the loans, its only report was of the loans and the loans qua loans were unexceptionable. The director therefore acted perfectly properly within the ambit of his responsibility, having regard to the proper delegation of responsibility to the sub-committee in accordance with the company's constitution. The objectionable part was concealed by the sub-committee, namely that the loans were but means of purchasing the company's shares with the company's money.
- B In these circumstances it was said "a director cannot be held liable for being defrauded".

That does not touch, however, on the case of a nominee director putting himself blindly at the disposal of a stranger without status in the company, except the irrelevant status for present purposes of shareholder. The *Land Credit Co.* case (16) does not impinge in any way on the observations of MELLISH, L.J.,

- C which I have quoted (17).

In my view, a director acting in a transaction on the direction of a stranger is fixed with that stranger's knowledge of the nature of that transaction.

### 3. *Stranger's liability as constructive trustee.*

- I come now to the question how far a stranger to the trust can become liable
- D as constructive trustee in respect of a breach of the trust.

It is essential at the outset to distinguish two very different kinds of so-called constructive trustees. (i) Those who, though not appointed trustees, take on themselves to act as such and to possess and administer trust property for the beneficiaries, such as trustees de son tort. Distinguishing features for present purposes are (a) they do not claim to act in their own right but for the beneficiaries,

- E and (b) their assumption to act is not of itself a ground of liability (save in the sense of course of liability to account and for any failure in the duty so assumed), and so their status as trustees preceeds the occurrence which may be the subject of claim against them. (ii) Those whom a court of equity will treat as trustees by reason of their action, of which complaint is made. Distinguishing features are (a) that such trustees claim to act in their own right and not for beneficiaries,
- F and (b) no trusteeship arises before, but only by reason of, the action complained of.

Until the limitation provisions of the Trustee Act, 1925, the first category of constructive trustees could not rely, in defence of claims against them, on statutory limitation or the analogous rules enforced by courts of equity. This was because they acted as trustees for others, and therefore held in right of those

- G others and therefore time was held not to run in their favour against those others; but as the second category of trustees claimed in their own right, time ran in their favour from their obtaining possession. It is largely by reason of this distinction that the first category of constructive trustee is sometimes referred to or included in the authorities under the term "express trustee" (see *Taylor v. Davies* (18); *Soar v. Ashwell* (19), especially the judgments of LORD ESHER, M.R., (20) and
- H BOWEN, L.J. (21)).

It has long been well established that a bank is not a trustee for its customer of the amount to his credit in his bank account (see, for example, *Foley v. Hill* (22) and *Burdick v. Garrick* (23), per LORD HATHERLEY, L.C.). In view of this, and the circumstances in which the constructive trusteeship relied on by the plaintiff company against the defendants is said to arise, the plaintiff company does not

I rely at all in this case on the establishment of the first category of constructive trusteeship, but exclusively on the second category. The first category is irrelevant

(16) (1870), 5 Ch. App. 763.

(17) (1873), 8 Ch. App. at p. 1056.

(18) [1920] A.C. 636 at pp. 650-653.

(19) [1891-94] All E.R. Rep. 991; [1893] 2 Q.B. 390.

(20) [1891-94] All E.R. Rep. at pp. 992-994; [1893] 2 Q.B. at pp. 392-395.

(21) [1891-94] All E.R. Rep. at pp. 994-996; [1893] 2 Q.B. at pp. 395-399.

(22) [1843-60] All E.R. Rep. 16; (1848), 2 H.L. Cas. 28.

(23) (1870), 5 Ch. App. 233 at p. 240.

to the plaintiff company's case. The cases of *Soar v. Ashwell* (24), *Burdick v. Garrick* (25), *Re Barney, Barney v. Barney* (26), *Mara v. Browne* (27) and *Williams-Ashman v. Price & Williams* (28) to which I was referred, fall within that first category.

*Barnes v. Addy* (29) contains a formulation of the second category of constructive trusteeship, on which the plaintiff relies. In that case Barnes was husband of the life tenant of the trust, was appointed sole trustee by Addy, the sole surviving trustee, and subsequently misappropriated the trust fund. The question before the Court of Appeal was whether the solicitors engaged in respect of the appointment were liable to make good the amount misappropriated. LORD SELBORNE, L.C., referred to both categories of constructive trustees. He said (30):

"That responsibility [that is the responsibility of express trustees] may no doubt be extended in equity to others who are not properly trustees, if they are found either making themselves trustees de son tort, or actually participating in any fraudulent conduct of the trustee to the injury of the cestui que trust. But, on the other hand, strangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers, transactions, perhaps of which a court of equity may disapprove, unless those agents receive and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees."

In that passage he refers to the first category as "trustees de son tort" and as persons who "receive and become chargeable with some part of the trust property", and he refers to the second category as "actually participating in any fraudulent conduct of the trustee to the injury of the cestui que trust" and as those who "assist with knowledge in a dishonest and fraudulent design on the part of the trustees". This is virtually repeated by LORD ESHER, M.R., in *Soar v. Ashwell* (31) where he refers to *Barnes v. Addy* (29):

"There is another recognised state of circumstances in which a person not nominated a trustee may be bound to liability as if he were a nominated trustee, namely, where he has knowingly assisted a nominated trustee in a fraudulent and dishonest disposition of the trust property."

It is this formulation in *Barnes v. Addy* (32) "... assist with knowledge in a dishonest and fraudulent design on the part of the trustees", that is the basis of the plaintiff company's claim that the defendants are liable as constructive trustees. There are thus three elements: (1) assistance by the stranger, (2) with knowledge, (3) in a dishonest and fraudulent design on the part of the trustees. As appears from the passage quoted, an agent acting for a trustee is a stranger within its meaning in that passage, so that he is not liable as a constructive trustee within the second category, unless he too assists "with knowledge in a dishonest and fraudulent design on the part of the trustees".

What knowledge is required to satisfy the second element? LORD SELBORNE, L.C., in *Barnes v. Addy* (32), referred to one of the solicitors, a potential constructive trustee, as having no "knowledge or suspicion . . . of an improper or dishonest design", and says that "there was nothing to lead him to suppose" that there was any intention to misappropriate; and he says of the other solicitor

(24) [1891-94] All E.R. Rep. 991; [1893] 2 Q.B. 390.

(25) (1870), 5 Ch. App. 233.

(26) [1892] 2 Ch. 265.

(27) [1896] 1 Ch. 199.

(28) [1942] 1 All E.R. 310; [1942] Ch. 219.

(29) (1874), 9 Ch. App. 244.

(30) (1874), 9 Ch. App. at pp. 251, 252.

(31) [1891-94] All E.R. Rep. at p. 994; [1893] 2 Q.B. at pp. 394-395.

(32) (1874), 9 Ch. App. at p. 252.

A that (33) "he never knew nor suspected any dishonest purpose". These references leave wide open the question what knowledge is required.

SIR RICHARD KINDERSLEY, V.C., in *Bodenham v. Hoskins* (34) quoted in *Shields v. Bank of Ireland (Governor & Co.)* (35) indicated that the knowledge required was of circumstances which made it a dishonest and fraudulent breach of trust, though without dishonest intention on the part of the person with that knowledge. The quotation from SIR RICHARD KINDERSLEY, V.C., in *Shields v. Bank of Ireland* (36):

"I am constrained to arrive at the conclusion that the bankers, although I must exonerate them from any deliberate intention to commit a robbery or commit a fraud, still were not only parties to the simple fact of the transfer, but were parties to the fraud in question, in this sense, that they were aware of the circumstances which made it a fraud in Parkes, to make the transfer to his private account, and being cognisant of that, and having been cognisant of it before the time when the account was opened under the name of 'The Rotherwas Account', and being cognisant of it throughout, they concur in a transaction, the effect of which is, that for their own pecuniary benefit an act is done by Parkes which is a fraud upon the plaintiff. Now, according to the plain principles of a court of equity such an act can never be sustained . . ."

The plaintiff company accepts and relies on this view. PORTER, M.R., referring to the quotation which I have just read from SIR RICHARD KINDERSLEY, V.C., said (37):

" . . . he very charitably refrains from arriving at the inference, which he might well have drawn, that the bankers deliberately intended themselves to commit a robbery or a fraud."

In these circumstances he may well, and very understandably so it seems to me, have had little use for the distinction between knowledge of the circumstances which constitute a fraud and knowledge of fraudulent intent. At any rate, whilst not dissenting from what SIR RICHARD KINDERSLEY, V.C., said, he added (38):

"you must . . . show that the bankers knew of and concurred in the intention to misapply, a knowledge which will easily be presumed if the banker derives a personal benefit from the transaction designed or stipulated for."

He preferred a more vigorous approach and to rely on a finding of fact rather than a refinement of law. In that case both courses led to the same result. But there may well be cases, of which the present case may be one, in which a finding of fact cannot properly dispense with SIR RICHARD KINDERSLEY, V.C.'s formulation.

In the last sentence of the passage quoted from SIR RICHARD KINDERSLEY, V.C. (39), it is made plain that the act in respect of which relief is given is an act to be judged according to "the plain principles of a court of equity". It seems to me imperative to grasp and keep constantly in mind that the second category of constructive trusteeship (which is the only category with which we are concerned) is nothing more than a formula for equitable relief. The court of equity says that the defendant shall be liable in equity, as though he were a trustee. He is made liable in equity as trustee by the imposition or construction of the court of equity. This is done because in accordance with equitable principles applied by the court of equity it is equitable that he should be held liable as though he were a trustee. Trusteeship and constructive trusteeship are equitable conceptions.

(33) [1874], 9 Ch. App. at p. 254.

(34) [1843-60] All E.R. Rep. 692; (1852), 21 L.J.Ch. 864.

(35) [1901] 1 I.R. 222, at p. 228.

(36) [1901] 1 I.R. at p. 228 (quoting from *Bodenham v. Hoskins*, (1852), 21 L.J.Ch. at p. 873; [1843-60] All E.R. Rep. at p. 697).

(37) [1901] 1 I.R. at p. 229.

(38) [1901] 1 I.R. at p. 232.

(39) [1901] 1 I.R. at p. 229 (quoting from *Bodenham v. Hoskins*, (1852), 21 L.J.Ch. at p. 873; [1843-60] All E.R. Rep. at p. 697).



The court of equity is not administering criminal law but equity. It is equity and not criminal law or even tort or contract that governs whether a person shall be liable in equity as constructive trustee. So, whether a mis-application of a company's funds for the purchase of its shares occasions the imposition of liability as constructive trustees, depends not on the statutory provision making it a criminal offence, or on statute or criminal law, or common law conceptions, but on equity and its principles. As mentioned in argument, there are criminal offences nowadays which are not morally reprehensible and are not even blameworthy. Indeed, it appears that nowadays, by Act of Parliament, a person is made criminal although he can unquestionably and conclusively prove that he did not even know the facts that establish the crime. If, indeed, this is so, this is crime without guilt. It is to brand such proven innocents as convicted criminals. It may be convenient policing. It is not justice, and it certainly is not equity. On the other hand, there may be actions, dishonest and fraudulent in the eyes of equity, yet not punishable under the criminal law. Equity is not crime and this court is not the Old Bailey; and it is according to "the plain principles of a court of equity" which this court is, in its administration of equitable relief, that what is "dishonest and fraudulent" has to be judged. Moreover, the language used by the courts of equity, in the authorities referred to, must be similarly understood in accordance with their equitable principles and conceptions. This may all seem over emphatic emphasis of the obvious; but it is an emphasis that I have found essential if confusion is to be avoided.

Equity is concerned to give effect to equitable interests, though bereft of legal ownership. Thus it will trace trust property into the hands of a volunteer, where it is not inequitable to do so, and will hold a purchaser for value liable as constructive trustee if he had actual or constructive notice that the transfer to him was of trust property in breach of trust (see the statement in SNELL'S PRINCIPLES OF EQUITY (26th Edn.) pp. 202, 203, which was relied on by the plaintiff company and the defendants). Moreover, in conveyancing (apart from the intrusion of statute) actual or constructive notice of equitable right is enough to fasten a grantee with knowledge of those rights. The governing consideration is to give effect to equitable rights, where it is not inequitable to do so, and when knowledge of the existence of those rights is material to granting equitable relief. In general, at any rate, it is equitable that a person with actual notice or constructive notice of those rights should be fixed with knowledge of them. This is in a context of producing equitable results in a civil action and not in the context of criminal liability. The sort of question to which it is directed is which of two persons should in equity bear the loss; and not whether one of them should be sent to prison. So this seems to me to be the very understandable, and indeed equitable, approach of equity.

In *Lloyd v. Banks* (40) LORD CAIRNS, L.C., brings out clearly that equity is concerned with knowledge of equitable interests, because it is concerned with fastening on the conscience of the person with that knowledge. In that case a trustee of a fund saw, in a newspaper, notice of a petition to the insolvent debtors' court presented by his cestui que trust and acted on it. The question was whether a subsequent assignee of the cestui que trust, who gave the trustee formal notice of the assignment, acquired priority over the assignee in insolvency. The case thus did not turn on constructive notice but on the source of actual knowledge which the trustee had.

LORD CAIRNS said (41):

"... but I am quite prepared to say that I think the court would expect to find that those who alleged that the trustee had knowledge of the incumbrance had made it out, not by any evidence of casual conversations, much less by any proof of what would only be constructive notice—but by proof

(40) (1868), 3 Ch. App. 488.

(41) (1868), 3 Ch. App. at pp. 490, 491.

A that the mind of the trustee has in some way been brought to an intelligent apprehension of the nature of the incumbrance which has come upon the property, so that a reasonable man, or an ordinary man of business, would act upon the information and would regulate his conduct by it in the execution of the trust. If it can be shown that in any way the trustee has got knowledge of that kind—knowledge which would operate upon the mind of  
 B any rational man, or man of business, and make him act with reference to the knowledge he has so acquired—then I think the end is attained, and that there has been fixed upon the conscience of the trustee, and through that upon the trust fund, a security against its being parted with in any way that would be inconsistent with the incumbrance which has been created.”

C It was unsuccessfully submitted that casual notice obtained by a trustee (who had no concern with the notice except to receive it and observe it) was not enough to decide priorities as between equally innocent holders of equitable interests. In that case the trustee had subjective knowledge, which passed the objective test of “knowledge which would operate on the mind of any rational man or man of business”. Would that objective test be sufficient without the subjective knowledge?

D In *Berwick-upon-Tweed Corpn. v. Murray* (42) William Murray, bound as a surety to the extent of £2,000 to the plaintiff for the due accounting of the office of treasurer by David Murray, received notice that David Murray was a defaulter. He then took from David Murray a deposit note of a bank for £2,300, placed in the bank by David Murray one month previously in the name of his daughter aged twenty-three. It was held that, in the circumstances in which William  
 E Murray received the £2,300, William Murray should have made enquiries and, not having done so, that he was bound to restore the £2,300 with five per cent. interest.

LORD CRANWORTH, L.C., said (43):

F “But were not the circumstances such as must have forced an honest man to make inquiry? He had just received formal notice that David Murray, for whom he had become surety, had refused to account, or to pay the balance due from him. Nothing could be more reasonable than that he should immediately apply to David Murray for indemnity. But when, by way of indemnity, he was offered a deposit note made a month previously by David Murray, in the name of his daughter a young woman of twenty-three  
 G years of age, it is impossible that suspicion should not have been excited. [I observe that this was in 1856 not in 1960.] He was bound to ask why such a deposit was made not in David Murray’s own name, but in that of his daughter. It is not alleged that he was ever led to suppose the daughter had any beneficial interest in the money; for what purpose then was her name used? In fact, her name was evidently used as a means of disguising the truth. Perhaps inquiry might not have brought out the truth; but it does not  
 H lie in the mouth of William Murray to say this. He made no inquiry although the circumstances were such as ought to have induced him to do so.”

Then later on he said (44):

I “It is impossible to permit a man who received, by way of security from a defaulting agent, a deposit of money which had been withdrawn from the funds of his principal, to insist in circumstances like these on his ignorance of the truth. I am clearly of opinion, that William Murray must be treated as a person who had notice of the truth.”

In a separate short judgment (45), dealing with interest chargeable on the £2,300, LORD CRANWORTH referred to that sum as “received from David by William under

(42) (1856), 7 De G.M. & G. 497.

(43) (1856), 7 De G.M. & G. at pp. 512, 513.

(44) (1856), 7 De G.M. & G. at p. 513.

(45) (1857), 7 De G.M. & G. at p. 520.

circumstances which have satisfied me that the latter knew it was the money of the corporation". Clearly what he meant by "knew" in that passage was treated by equity as "having notice of the truth", or knowing because of his failure to make enquiry in circumstances in which "an honest man" would have done so. "An honest man" is obviously the ordinary reasonable or honest person. There the test is an objective test. A

In *Keane v. Roberts* (46) beneficiaries under a will claimed that a defendant bank should account for estate moneys alleged to have been applied by them to liquidate the executors' private account with the bank. It was stated (47) that there was no evidence to that effect. The executors were overdrawn on their private account about £8,000. They authorised the bank to sell assets of the testator and credit the proceeds to their account. There were delays in realising the assets and, in the meantime, they drew bills on the bank by which moneys were remitted to them in Ireland and when assets were realised and paid into the account the overdraft was slightly more than before. As was said (48): B

"In this particular case, however, the remittance of the assets to Ireland was not necessarily a breach of trust in the executors."

The case is thus summarised (49): C

"The present case is not one of purchase or pledge from the executors: it is the case of agents of the executors receiving moneys by the authority of the executors, and remitting it to them in the course of their duty as agents, and in the proper forms of business, leaving the application of it to the purposes of the will wholly in the power of the executors." D

In the course of his judgment SIR JOHN LEACH, V.-C., said (50): E

"With a view to this cause, I have carefully examined every authority upon this subject, and I think the result may be thus stated: Every person who acquires personal assets by a breach of trust, or devastavit in the executor, is responsible to those who are entitled under the will, if he is a party to the breach of trust. Generally speaking, he does not become a party to the breach of trust, by buying or receiving as a pledge for money advanced to the executor at the time any part of the personal assets, whether specifically given by the will or otherwise, because this sale or pledge is held to be prima facie consistent with the duty of an executor. Generally speaking, he does become a party to the breach of trust, by buying or receiving in pledge any part of the personal assets, not for money advanced at the time, but in satisfaction of his private debt, because this sale or pledge is prima facie inconsistent with the duty of an executor. I preface both these propositions with the term 'generally speaking', because they both seem to admit of exceptions." F

It is with these observations in mind that a passage relied on by the defendants has to be understood. It reads (51): G

"If Roberts and De Lord had reason to believe that Thomas and Fennell were so misapplying the assets, it would be difficult to find a ground which would make them responsible for paying to their principals the moneys which had been placed in their hands for the purpose of being remitted to them; that would be to make every trustee accountable for his conduct in the trust to every agent whom he happened to employ, and would carry the principle of constructive trust to an inconvenient and, indeed, to an impracticable length." H

This is a guarded obiter statement. It indicates that it might not be enough to I

(46) (1819), 4 Madd. 332.

(47) (1819), 4 Madd. at p. 355.

(48) (1819), 4 Madd. at p. 357.

(49) (1819), 4 Madd. at p. 359.

(50) (1819), 4 Madd. at pp. 357, 358.

(51) (1819), 4 Madd. at p. 356.



A make an agent liable for breach of trust that he pays trust moneys to the trustee his principal, the legal owner to whom they are payable, when he has reason to believe that he was misapplying the trust assets, when—and this is vital, as appears from the judgment itself in the passage quoted (52)—the payment itself did not constitute a breach of trust. That is far removed from our case, where the payments were to strangers and the payments themselves are alleged to constitute, or be part of, the breach of the trust complained of. Moreover, “reason to believe” here may have been intended to mean no more than that circumstances were consistent with misapplication or proper application of the trust fund.

B In *Gray v. Johnston* (53) a bank paid a cheque for about £800 drawn by an executrix on the estate bank account in favour of a partnership, which she entered into in place of her husband on her husband, the testator’s, death. The cheque was paid into the partnership account in the same bank and it went against the partnership overdraft. No balance was struck and the account continued to be operated as before. It was held that the will beneficiaries were not entitled to have the money replaced by the bank. The relevant nub of the decision for present purposes appears to me to be that, in the circumstances, the payment of the cheque was perfectly consistent with there being no breach of trust, with the result that the bank had no knowledge or notice of breach at all. LORD CAIRNS, L.C., summarised the authorities (54):

C “I say that the result of those authorities is clearly this: in order to hold a banker justified in refusing to pay a demand of his customer, the customer being an executor, and drawing a cheque as an executor, there must, in the first place, be some misapplication, some breach of trust, intended by the executor, and there must in the second place, as was said by SIR JOHN LEACH in the well-known case of *Keane v. Roberts* (55), be proof that the bankers are privy to the intent to make this misapplication of the trust funds. And to that I think I may safely add, that if it be shown that any personal benefit to the bankers themselves is designed or stipulated for, that circumstance, above all others, will most readily establish the fact that the bankers are in privy with the breach of trust which is about to be committed.”

E This passage again leaves open the question what is to be taken as “proof” of the misapplication and what establishes privy to the intent to make the misapplication. A benefit designed or stipulated for “most readily” establishes it—apparently as evidence of it. How far is shutting one’s eyes to circumstances which indicate misapplication to be taken as establishing or constituting such privy? Nor does LORD WESTBURY (56) deal with this problem.

G In *Re Blundell, Blundell v. Blundell* (57), a case of a solicitor’s liability as constructive trustee, STIRLING, J., in considering what was required to make a stranger to a trust liable as constructive trustee, said (58):

H “... a stranger to the trust receiving money from the trustee which he knows to be part of the trust estate is not liable as a constructive trustee unless there are facts brought home to him which show that to his knowledge the money is being applied in a manner which is inconsistent with the trust.”

He said (59) that a solicitor having then “no notice” of any breach of trust was not liable. He also said (60):

I “The real difficulty in each case is to determine what is sufficient to fix the solicitors with the liability of constructive trustees. As I have said, they must have been parties to either a breach of trust or fraud, on the part of the

(52) (1819), 4 Madd. at p. 359.

(54) (1868), L.R. 3 H.L. at p. 11.

(56) (1868), L.R. 3 H.L. at p. 14.

(57) [1886-90] All E.R. Rep. 837; (1888), 40 Ch.D. 370.

(58) (1888), 40 Ch.D. at p. 381; [1886-90] All E.R. Rep. at pp. 841, 842.

(59) (1888), 40 Ch.D. at p. 383; [1886-90] All E.R. Rep. at p. 842.

(60) (1888), 40 Ch.D. at p. 382; [1886-90] All E.R. Rep. at p. 842.

(53) (1868), L.R. 3 H.L. 1.

(55) (1819), 4 Madd. at p. 357.

trustee, or they must have brought home to them facts which show that the fund was being applied in a manner inconsistent with the trust . . . a mere suspicion or intimation that something is wrong in the administration of the trust will not, to my mind, be sufficient to deprive the solicitor of his right to accept payment out of the trust estate of costs, charges, and expenses properly incurred."

So in the same judgment we have as the test "knowledge the money is being" misapplied, "notice" and having "brought home to him facts which show" misapplication. Such use of terms in the same judgment shows how dangerous it is to pick on "knowledge" in a passage and treat it per se as necessarily meaning actual knowledge. The last of these passages quoted appears to be in line with a passage quoted earlier from *Shields v. Bank of Ireland* (61) suggesting that the requisite knowledge is of the circumstances which make it a fraudulent breach of trust.

*Gray v. Lewis* (62), a decision of SIR RICHARD MALINS, V.-C., appears to have been based, as an alternative, on the ratio decidendi that circumstances sufficiently unusual will put a bank on enquiry and may thus fix it with notice of a fraudulent breach of trust. The first two paragraphs of the headnote read (62):

"The Laffitte Company was formed to purchase the business of the Paris Bank of Laffitte. The Paris bank objected to complete the contract until forty thousand shares should have been subscribed for. To effect this object, the International Contract Company guaranteed a subscription of the requisite number of shares. The latter company then applied to the National Bank to discount their bills for £230,000, which they agreed to do upon the guarantee of the Laffitte Company that they would leave in their hands whatever money should be paid in for shares to the amount of the advance. The money was thereupon transferred to the credit of the Contract Company, who provided shareholders, and paid the deposits out of the advances by the bank. In order to procure a settling-day on the Stock Exchange the bank certified that the £230,000 had been deposited with them in payment of shares. The Laffitte Company, by their articles of association, were prohibited from purchasing their own shares . . ."

SIR RICHARD MALINS, V.-C., said (63):

"Upon the whole case I must pronounce these proceedings to have been false, fictitious, and fraudulent; and I am bound, I conceive, by the principles of this court to declare that the National Bank could derive no right under the letters or guarantees of Dec. 8, 1865, and Feb. 6, 1866, which were wholly beyond the powers of the company, and were acted upon for a fraudulent and illegal purpose . . ."

He referred (64) to the transaction as "illegal and fraudulent". He dealt with knowledge and notice and he said (65):

"This company was expressly prohibited, by the 90th clause of its articles of association, from purchasing its own shares, a provision strictly proper in itself, and introduced for the protection of the public, and also to satisfy the committee of the Stock Exchange, which never grants a settling-day to a company unless it is prohibited from such a course of dealing . . . But it is contended by the learned counsel for the National Bank that they did not know of the rule. But I am of opinion that the circumstances show, and there cannot be a doubt, that it was perfectly known to Sir Joseph McKenna and the other officers of the bank, as it undoubtedly was to the directors, Mr. Harvey Lewis and Mr. Henshaw, who were parties to the transaction, and it was impossible that they could be ignorant of it, for it

(61) [1901] 1 I.R. at p. 228.

(63) (1869), L.R. 8 Eq. at p. 544.

(62) (1869), L.R. 8 Eq. 526.

(64) (1869), L.R. 8 Eq. at p. 542.

(65) (1869), L.R. 8 Eq. at pp. 542, 543.

A would be a scandal upon them, as bankers, to suppose that they were ignorant of such a primary rule in commercial transactions; and, even if they did not know of the rule, I am of opinion that the transaction was one of so unusual and extraordinary a character that it became their duty to inquire and investigate as to the rights of this company to enter into such a transaction in the very first hour of its existence, and I must therefore treat the bank as having had express notice that what was being done was a gross breach of trust, in which they consequently became participators. The rules of this court are perfectly well settled, and so are the rules of honesty and fair dealing, that no party to an illegal or fraudulent contract can derive any benefit from it, and that all persons who obtain possession of trust funds with a knowledge that their title is derived from a breach of trust will be compelled to restore such trust funds."

B In *Thomson v. Clydesdale Bank, Ltd.* (66), a broker paid a cheque representing proceeds of sale of a client's shares into his own account at the defendant bank, where he was overdrawn. The broker absconded and was found insolvent and the owners of the shares claimed the proceeds of the cheque from the bank. As LORD SHAND said (67), a broker, according to ordinary practice, pays the proceeds of shares which he sells into the credit of his own bank account. Such payment, therefore, does not even suggest misapplication or put the bank on enquiry. LORD HERSCHELL, L.C. (68), LORD WATSON (69), and LORD SHAND (70) said that to recover against the bank, knowledge by the bank of misapplication by payment into the broker's account would have to be established. LORD SHAND (71), referred, however, to such knowledge as capable of being established by "inference from " or "reasonable inference from " "the facts proved"; and he referred to there being (72)

"... no evidence whatever here of facts which could have put the bankers on inquiry or can be founded on as showing that they must have believed or known that this was a misapplication of funds."

F LORD HERSCHELL, L.C. (73), referred to the bank as being disentitled to retain money which it receives when it

"... has reason to believe that the payment is being made in fraud of a third person, and that the person making the payment is handing over in discharge of his debt money which he has no right to hand over..."

G So here again "knowledge", apparently, is not treated as being exclusive of "reason to believe" or being put on enquiry.

As in *Thomson v. Clydesdale Bank* (66) so in *Shields v. Bank of Ireland* (74), the payment of estate money into an executor's private account did not suggest misapplication. So they "were not bound to enquire".

H In *Coleman v. Bucks & Oxon Union Bank* (75) payment by the bank of trust moneys into a trustee's personal account was not a breach of trust. It was without any knowledge that a breach of trust by the trustee was intended and without any intention to benefit themselves. So it does not help on the question of notice of breach.

In *Backhouse v. Charlton* (76) there was nothing to put the bank on enquiry or

- I (66) [1891-94] All E.R. Rep. 1169; [1893] A.C. 282.  
 (67) [1891-94] All E.R. Rep. at p. 1172; [1893] A.C. at p. 291.  
 (68) [1891-94] All E.R. Rep. at p. 1171; [1893] A.C. at p. 289.  
 (69) [1891-94] All E.R. Rep. at p. 1172; [1893] A.C. at p. 290.  
 (70) [1891-94] All E.R. Rep. at pp. 1172-1174; [1893] A.C. at pp. 291-293.  
 (71) [1891-94] All E.R. Rep. at pp. 1172, 1173; [1893] A.C. at pp. 291, 292.  
 (72) [1891-94] All E.R. Rep. at p. 1174; [1893] A.C. at p. 293.  
 (73) [1891-94] All E.R. Rep. at p. 1171; [1893] A.C. at p. 287.  
 (74) [1901] 1 I.R. at p. 238.  
 (75) [1897] 2 Ch. 243.  
 (76) (1878), 8 Ch.D. 444.



suggest constructive notice. It was in those circumstances that SIR RICHARD MALINS, V.-C., said that the bank was justified in honouring a cheque signed by a surviving partner out of a partnership account for payment into his own account (as had in fact happened before the death of the other partner) (77) "unless they had express notice that some breach of duty was taking place". I do not read his observation as meaning that the only notice that could in law affect the bank would be express notice. Such an interpretation would be inconsistent with the passages referred to in SIR RICHARD MALINS, V.-C.'s judgment in *Gray v. Lewis* (78).

In *Bank of New South Wales v. Goulburn Valley Butter Co. Proprietary, Ltd.* (79), the bank was held not liable to repay to the company moneys which had been standing to the credit of its account with the bank and transferred by cheques of its managing director to his own overdrawn private account. The private account was, like the company's account, operated in connexion with the company's business, with cross-payments for adjustment between them being made by cheque, in the ordinary course of business.

Counsel for the company submitted (80) that the bank knew, or ought to have known, that the managing director was acting wrongfully in transferring funds from the company's account to his account. It was admitted in argument, however, that, if the company was indebted to the managing director when the cheques were paid, then there could be no objection to their payment; and, as there was no evidence that the bank knew that the company was not indebted to the managing director, the case turned on whether there was a duty on the bank to enquire into the state of account between the bank and the managing director. It was held that in the circumstances it was not obliged to do so.

It was a strong committee (81), but they did not state that absence of actual knowledge was conclusive. It seems to me that the decision went on the basis that the absence of actual knowledge was not conclusive and that circumstances might give rise to a duty to enquire; but that, in fact, the circumstances did not impose such a duty in that case. The judgment also seems to me to indicate that what occurs in the normal course of properly conducted business consistent with its unobjectionable operation does not put on enquiry. It is not enough that such normal occurrence is compatible with improper operation too.

The knowledge required to hold a stranger liable as constructive trustee in a dishonest and fraudulent design, is knowledge of circumstances which would indicate to an honest, reasonable man that such a design was being committed or would put him on enquiry, which the stranger failed to make, whether it was being committed. Acts in the circumstances normal in the honest conduct of affairs do not indicate such a misapplication, though compatible with it; and answers to enquiries are *prima facie* to be presumed to be honest, an aspect of the law which I shall deal with more fully later when considering negligence.

I come to the third element (82), "dishonest and fraudulent design on the part of the trustees". I have already indicated my view, for reasons already given, that this must be understood in accordance with equitable principles for equitable relief.

I therefore cannot accept the suggestion that, because an action is not of such a dishonest and fraudulent nature as to amount to some crime, that it is not fraudulent and dishonest in the eyes of equity—or that an intention eventually to restore or give value for property—which it was suggested might provide a good defence to a criminal charge—would of itself make its appropriation and use in the meantime, with its attendant risks and deprivation of the true owner,

(77) (1878), 8 Ch.D. at p. 449.

(78) (1869), L.R. 8 Eq. at pp. 542-544.

(79) [1900-03] All E.R. Rep. 935; [1902] A.C. 543.

(80) [1902] A.C. at p. 545.

(81) Present: LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, LORD LINDLEY, SIR FORD NORTH and SIR ARTHUR WILSON. Judgment was delivered by LORD DAVEY.

(82) See p. 1096, letter G, ante, for the three elements.

A unobjectionable in equity, and thus make what would otherwise be dishonest and fraudulent free from such objection.

It was suggested for the plaintiff company that "fraudulent" imports the element of loss into what is dishonest, so that the phrase means dishonest resulting in loss to the claimant. It seems to me unnecessary and, indeed, undesirable to attempt to define "dishonest and fraudulent design", since a definition in vacuo, without the advantage of all the circumstances that might occur in cases that might come before the court, might be to restrict their scope by definition without regard to, and in ignorance of, circumstances which should patently come within them. The words themselves are not terms of art and are not taken from a statute or other document demanding construction. They are used in a judgment as the expression and indication of an equitable principle and not in a document as constituting or demanding verbal application and, therefore, definition. They are to be understood "according to the plain principles of a court of equity" to which SIR RICHARD KINDERSLEY, V.-C., referred (83), and these principles, in this context at any rate, are just plain, ordinary commonsense. I accept that "dishonest and fraudulent", so understood, is certainly conduct which is morally reprehensible; but what is morally reprehensible is best left open to identification and not to be confined by definition.

#### 4. *Paying bank's liability to its customer in negligence.*

A further and alternative claim is made against the defendant banks for negligence. This is a claim for damages at common law, as contrasted with a claim for equitable relief against the banks, as well as against other defendants, to replace moneys misapplied as trustees or constructive trustees. Both these equitable and common law claims, as against both defendant banks, involve the allegations that they ought to have made enquiry. Such allegations, though differing in the case of each bank, are identical under both the equitable and the common law claim, and it is common ground that any standard of care which puts on enquiry or notice is the same under both claims. Whereas the claim in equity against the banks is made against them as constructive trustees, the claim against them in common law is based, as stated in para. 27 of the statement of claim, on "the duty which as bankers they respectively owed to the [plaintiff company] as their customer".

The relationship of banker to customer with regard to the customer's current account in credit at the bank is not that of trustee or fiduciary to a beneficiary but sounds in contract (see *Foley v. Hill* (84), and *N. Joachimson (a firm name) v. Swiss Bank Corpn.* (85), per ATKIN, L.J.). In *Jarvis v. Moy, Davies, Smith, Vandervell & Co.* (86), GREEK, L.J., stated:

"... where the breach of duty alleged arises out of a liability independently of the personal obligation undertaken by contract, it is tort, and it may be tort even though there may happen to be a contract between the parties, if the duty in fact arises independently of that contract. Breach of contract occurs where that which is complained of is a breach of duty arising out of the obligations undertaken by the contract."

Although it was suggested that, in this case, para. 27 of the statement of claim alleging negligence is wide enough to cover negligence both in tort and contract, the negligence with which we are concerned, being negligence in the duty owed to the plaintiff company as the bank's customer, is negligence "arising out of the obligations undertaken by the contract" between the bank and its customer and is, in my view, clearly negligence in contract. The claim by the plaintiff company in equity is as a beneficiary in a fund of which it is alleged the director

(83) In *Bodenham v. Hoskins*, (1852), 21 L.J.Ch. at p. 873; [1843-60] All E.R. Rep. at p. 697.

(84) [1843-60] All E.R. Rep. 16; (1848), 2 H.L. Cas. 28.

(85) [1921] All E.R. Rep. 92 at p. 100; [1921] 3 K.B. 110 at pp. 126, 127.

(86) [1936] 1 K.B. 399 at p. 405.

defendants are trustees, and against other defendants treated in equity as constructive trustees; but the claim in common law against the banks is by the plaintiff company as itself a customer of the banks. It contrasts with any claim which a beneficiary under a settlement trust might make, where the customer is the trustee and not the beneficiary and the account is not in the name of the beneficiary at all but of the trustee. The allegations against the defendant banks are exclusively as paying banks and not as collecting banks—for negligence in paying out the plaintiff company's money from its bank account. The question, therefore, is: is there any and, if so what, liability of a bank in negligence in contract between a paying bank and its customer? Nevertheless as the authorities referred to deal with both paying and collecting banks, I will deal first with a bank's obligations in general, both with regard to paying and collecting, so far as they are relevant to this case and the authorities.

It might be convenient to indicate first certain matters which are elementary. A cheque (as a bill of exchange drawn on the banker payable on demand) is transferred by delivery or endorsement and delivery. Delivery means transfer of possession. When a cheque is delivered to the payee he becomes the holder of it and may negotiate it by presenting it for payment or endorsing it over to a third party, who may similarly endorse it, and so on. If the endorsee gives value for the cheque, he becomes holder for value and if, in addition, he takes it bona fide without notice of any defect of title, he becomes holder in due course and his title is unassailable despite prior defect. The person for the time being entitled to the property in and possession of a cheque, as against all other claimants, is its true owner. Anyone entitled to immediate possession of a cheque may sue for conversion and the measure of damages is the face value of the cheque. Alternatively, a plaintiff may waive the tort and claim the proceeds of the cheque as money had and received to his use. (See BYLES ON LAW OF BILLS OF EXCHANGE (22nd Edn.) pp. 267, 295, 296.)

Section 60 of the Bills of Exchange Act, 1882. (87), provides protection for a paying bank and s. 82 for a collecting bank (88). The protection given by s. 60 is to a paying banker who pays "in good faith and in the ordinary course of business", though negligent. The protection to a collecting banker is to a banker who collects not just "in the ordinary course of business" but "in good faith and without negligence". Section 60 reads as follows:

"When a bill payable to order on demand is drawn on a banker, and the banker on whom it is drawn pays the bill in good faith and in the ordinary course of business, it is not incumbent on the banker to show that the indorsement of the payee or any subsequent indorsement was made by or under the authority of the person whose indorsement it purports to be, and the banker is deemed to have paid the bill in due course, although such indorsement has been forged or made without authority."

On this the text book (BYLES ON LAWS OF BILLS OF EXCHANGE (22nd Edn.)) comments at pp. 268, 269:

"This provision protects only the banker on whom the bill or cheque is drawn: it does not protect a collecting banker. Its object is to protect the paying banker against forged or unauthorised indorsements. Hence it applies to an indorsement by an agent in fraud of his principal. Where, however, the paying banker fails to exact a proper indorsement and pays upon an indorsement which is irregular, he is not protected by this section: nor is he protected where the bill or cheque is materially altered, since the instrument has been avoided by the alteration and he is under no duty to pay it. . . . Negligence is clearly not incompatible with good faith, and an act which is done negligently may yet be done in the ordinary course of business."

(87) for s. 60, see 2 HALSBURY'S STATUTES (2nd Edn.) 538.

(88) For s. 82, see 2 HALSBURY'S STATUTES (2nd Edn.) 547.



A Section 82 reads as follows:

“Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment.”

B Section 80 provides (89) further protection to a paying bank on whom a crossed cheque is drawn and who pays to a banker. This is not limited to protection in respect of endorsements like s. 60, but it does require a more stringent standard from the banker than s. 60, namely, payment “in good faith and without negligence” and not just “in good faith and in the ordinary course of business”.

C Section 80 reads:

“Where the banker, on whom a crossed cheque is drawn, in good faith and without negligence pays it, if crossed generally, to a banker, and if crossed specially, to the banker to whom it is crossed, or his agent for collection being a banker, the banker paying the cheque, and, if the cheque has come into the hands of the payee, the drawer, shall respectively be entitled to the same rights and be placed in the same position as if payment of the cheque had been made to the true owner thereof.”

D The relationship between customer and banker is contractual and founded on one contract, which normally includes the relationship of creditor and debtor with regard to the balance in the customer's bank account and the relationship of principal and agent in respect of the payment of the customer's cheques drawn on the customer's bank account. This appears clearly from LORD ATKINSON's speech in *Westminster Bank, Ltd. v. Hilton* (90) and ATKIN, L.J.'s famous judgment in *N. Joachimson (a firm name) v. Swiss Bank Corpn.* (91). LORD ATKINSON said, in *Westminster Bank, Ltd. v. Hilton* (92):

E “It is well established that the normal relation between a banker and his customer is that of debtor and creditor, but it is equally well established that quoad the drawing and payment of the customer's cheques as against money of the customer's in the banker's hands the relation is that of principal and agent. The cheque is an order of the principal's addressed to the agent to pay out of the principal's money in the agent's hands the amount of the cheque to the payee thereof.”

F G ATKIN, L.J., in *Joachimson's* case (93), said:

“The question seems to turn upon the terms of the contract made between banker and customer in ordinary course of business when a current account is opened by the bank. It is said on the one hand, that it is a simple contract of loan; it is admitted that there is added, or superadded, an obligation of the bank to honour the customer's drafts to any amount not exceeding the credit balance at any material time, but it is contended that this added obligation does not affect the main contract. The bank has borrowed the money and is under the ordinary obligation of a borrower to repay. The lender can sue for his debt whenever he pleases. I am unable to accept this contention. I think that there is only one contract made between the bank and its customer. The terms of that contract involve obligations on both sides and require careful statement. They appear upon consideration to include the following provisions. The bank undertakes to receive money and to collect bills for its customer's account. The proceeds so received are not to be held in trust for the customer, but the bank borrows the proceeds and

(89) For s. 80, see 2 HALSBURY'S STATUTES (2nd Edn.) 546.

(90) (1926), 136 L.T. 315 at p. 317.

(91) [1921] All E.R. Rep. at p. 100; [1921] 3 K.B. at pp. 126, 127.

(92) (1926), 136 L.T. at p. 317.

(93) [1921] All E.R. Rep. at p. 100; [1921] 3 K.B. at pp. 126, 127.

undertakes to repay them. The promise to repay is to repay at the branch of the bank where the account is kept, and during banking hours. It includes a promise to repay any part of the amount due against the written order of the customer addressed to the bank at the branch, and as such written orders may be outstanding in the ordinary course of business for two or three days, it is a term of the contract that the bank will not cease to do business with the customer except upon reasonable notice. The customer on his part undertakes to exercise reasonable care in executing his written orders so as not to mislead the bank or to facilitate forgery. I think it is necessarily a term of such contract that the bank is not liable to pay the customer the full amount of his balance until he demands payment from the bank at the branch at which the current account is kept. Whether he must demand it in writing it is not necessary now to determine."

The *Joachimson* case (94) turned, in the special circumstances of that case, on whether the customers had a cause of action against the bank on Aug. 1, 1914. As no demand was made by the customers for payment by the bank of the amount standing to the credit of their account with the bank, that depended on whether demand by a customer was necessary to a cause of action by a customer against a bank for money lent.

Although the case was concerned with this limited point, it was suggested that the passage quoted from ATKIN, L.J., was intended as a comprehensive statement of the law on the contract between customer and banker and that, therefore, as it did not mention a duty of care by banker to customer there is no such duty of care, the more so as it mentions a duty of care by customer to banker. It would, indeed, seem to me rash, in the absence of compelling considerations, to ascribe, particularly to such a judge as ATKIN, L.J., such a very risky and cramping intention. BANKES, L.J., in a judgment preceding ATKIN, L.J., had (95), rejected a somewhat similar submission that *Foley v. Hill* (96) should be treated as making an exhaustive definition of the obligations arising out of the relations of banker and customer. True, ATKIN, L.J., in his judgment said (97), "The terms of that contract involve obligations on both sides and require careful statement." It was therefore suggested that he was making a careful statement of all the terms; but he did not say "comprehensive" statement, and his "careful statement" was that "they appear upon consideration to include the following provisions". The defendants say that, in the careful statement, the word "includes" means "consist of". This, however, would rob the statement of the carefulness relied on to make it comprehensive. It seems to me that ATKIN, L.J., is dealing with the mutual obligations of banker and customer, from receipt of moneys into the customer's account until payment out of the account, so far as they throw light on the question to be decided, namely, whether demand was required before payment. That is why he concludes the relevant passage by saying: "I think it is necessarily a term of such contract that the bank is not liable to pay the customer . . . until he demands payment." What is "such contract" is shown by what he had mentioned earlier, including the obligation of the bank not to cease to do business with the customer, except on reasonable notice; and the obligation of the customer to take reasonable care in executing his written orders. That is why he mentioned what he did mention earlier.

Five years later, the same court was dealing with the duty of care of a paying bank in the case of *Hilton v. Westminster Bank, Ltd.* (98). ATKIN, L.J., said (99), with reference to the plaintiff's instructions to the defendant:

"I think it is the duty of the bank, arising out of the contract to exercise

(94) [1921] All E.R. Rep. 92; [1921] 3 K.B. 110.

(95) [1921] All E.R. Rep. at pp. 95, 96; [1921] 3 K.B. at pp. 118, 119.

(96) [1843-60] All E.R. Rep. 16; (1848), 2 H.L. Cas. 28.

(97) [1921] All E.R. Rep. at p. 100; [1921] 3 K.B. at p. 127.

(98) (1926), 135 L.T. 358.

(99) (1926), 135 L.T. at p. 362.

A reasonable care and skill in dealing with the communications which the customer sends to them in relation to his banking business."

BANKES, L.J., in referring to the relationship between banker and customer, said (100) that it is

"to a large extent regulated by statute, but . . . in essence it is a contractual relationship which involves, I think, the duty on the bank to take reasonable care in the carrying out for its customer of its customer's business."

In the House of Lords (101), the Court of Appeal was reversed, but on inference of fact and not on these statements of law. On the contrary, the speeches of the House of Lords were on the footing that there was a duty to take care. To avoid a possible source of confusion which threatened before me, it may be convenient to mention here that ATKIN, L.J., makes it perfectly clear (102) that this is not contrary to, but in addition to, the rule in *Ireland v. Livingston* (103) that an agent, acting honestly on a possible interpretation of ambiguous instructions, cannot be held responsible for so acting.

The *Hilton* case (101) turned on the stopping of a cheque. The drawing of a cheque and the stopping of a cheque are both instructions to a banker. The banker's obligations with regard to his customer's instructions are the same whether they be to pay or to stop (though subject, of course, to the difference in the substance of the instructions given). There seems no ground for saying that the duty of care applies to instructions to stop but not to instructions to pay, or vice versa. Certainly no such ground has been suggested. Thus LORD SHAW OF DUNFERMLINE (104) referred to the duty of a bank to honour a cheque drawn on a customer's account up to the amount of the customer's credit, and said:

"This duty is ended, and on the contrary when the cheque is stopped another duty arises, namely, to refuse payment."

LORD DUNEDIN said (105):

"It must always be remembered that a bank can be sued just as much for failing to honour a cheque as for cashing a cheque that had been stopped,"

and, of course, vice versa. The facts in that case, so far as we need be concerned with them, were as follows (106). On Aug. 1 the bank received a telegram purporting to be signed by a customer directing "Stop payment of cheque 117283 amount of £8 ls. 6d. to Poate". On Aug. 2 the customer telephoned the bank branch cashier and the conversation included the following: "Did you get my wire to stop cheque to Poate for £8 ls. 6d.?" "Yes, it has not been presented yet, Mr. Hilton", to which Hilton, the customer, replied: "It is not due to be presented till today", or perhaps, "It is not presentable until today". This telephone conversation authenticated the telegram and so disposed of any question that might have arisen whether the telegram came from the plaintiff. The telegram, taken on its own and thus authenticated, provided perfectly clear instructions.

The telephone conversation, however, went beyond authentication and referred to the cheques being presented or presentable "until today" Aug. 2. The Court of Appeal (107) concluded that the inference from the reference to Aug. 2 was that the cheque was post-dated Aug. 2. From this conclusion it followed that, when on Aug. 6 a cheque arrived at the bank, drawn by the same customer for the same amount to the same payee and also dated Aug. 2, but numbered 117285, instead of 117283, reasonable care on the part of the bank would have required

(100) (1926), 135 L.T. at p. 358.

(101) (1926), 136 L.T. 315.

(102) (1926), 135 L.T. at p. 362.

(103) [1861-73] All E.R. Rep. 585; (1872), L.R. 5 H.L. 395.

(104) (1926), 136 L.T. at p. 320.

(105) (1926), 136 L.T. at p. 316.

(106) See (1926), 136 L.T. at p. 315.

(107) (1926), 135 L.T. 358.



that the bank should check whether number 117283 had been paid. If they had exercised that care they would have found that it was the number of another cheque that had already been paid on July 29; and that therefore the telegram could not have been intended to refer to 117283 but must have been intended to refer to 117285, with the result that the bank should not have paid cheque 117285. In fact, the bank did pay it, and the Court of Appeal held that, in accordance with their inference about Aug. 2, the bank was liable to the customer for damages for negligence. A

The House of Lords (108), however, on the other hand, concluded that the telephone conversation did not indicate that the cheque was post-dated, and that therefore the cheque 117285, being later in numerical order of the cheque than 117283 and being dated Aug. 2 after the cancellation on Aug. 1 of a cheque already drawn (and which on the House of Lord's view, the bank was not told was post-dated), the supposition was that it was a later duplicate cheque. So, in the view of the House of Lords, there was no breach of the bank's duty to take care, not because there was no such duty to take care but because there had not been a breach of it. On the existence of the duty, the House of Lords did not gainsay what was said by the Court of Appeal. They proceeded on the Court of Appeal view of the law, even though HORRIDGE, J., at first instance had, as LORD DUNEDIN said (109), "exonerated the bank on the simple ground that 117283 was stopped and 117285 was cashed". If the instructions were conclusive and there was no duty of care, then it seems to me that HORRIDGE, J., was necessarily right. B

Further, LORD DUNEDIN indicated that the duty of care that arose was not limited to checking the accuracy of instructions, when a doubt arose about their expression or meaning, but went beyond that to exercising care that the apparent instructions were in reality the instructions of the customer. LORD DUNEDIN said (109): C

"I was at one time inclined to think that, inasmuch as both the cashier and the manager knew that there was a stop on a cheque they ought, on Aug. 6, to have made certain investigations, but I find that they did do so. They followed the ordinary practice. They looked at the ledger and the ledger showed that no cheque in favour of Poate had come in. I think, therefore, that the view of the officials was correct that the cheque presented being subsequent to the date of the stop instructions might be a duplicate cheque and that they were bound to cash it." D

Here it was the mere existence of a stop on a cheque, without regard to any ambiguity in expression, that imposed the obligation to take care by investigation that there was no duplication of payment. This was in keeping with the bank's duty of care, as stated by BANKES, L.J., and ATKIN, L.J., in the passages quoted (110). E

*Curtice v. London, City and Midland Bank, Ltd.* (111), referred to in judgments of BANKES and WARRINGTON, L.J.J., in the *Hilton* case (112), was also a case of stopping a cheque. The issues in the *Curtice* (111) case were, whether a cheque could be countermanded by telegram and whether it had in fact been so countermanded. The telegram was placed in the bank's letter box which, by oversight, was not cleared until after the cheque had been paid. It was held that the cheque was not countermanded within the meaning of s. 75 of the Act of 1882 (113) which provides that F

"The duty and authority of a banker to pay a cheque drawn on him by his customer are determined by (1) countermand of payment . . ." G

(108) (1926), 136 L.T. 315.

(109) (1926), 136 L.T. at p. 316.

(110) (1926), 135 L.T. at pp. 358, 362.

(111) [1908] 1 K.B. 293.

(112) (1926), 135 L.T. at pp. 360, 361.

(113) For s. 75, see 2 HALSBURY'S STATUTES (2nd Edn.) 544. H

- A The placing of the telegram in the letter box did not, by constructive notice, constitute a countermand, when in fact there was none. SIR HERBERT COZENS-HARDY, M.R., said (114): "There is no such thing as a constructive countermand in a commercial transaction of this kind", and FLETCHER MOULTON and FARWELL, L.J.J., agreed; but all the members of the court made it perfectly clear that these observations, so far from being related to a claim in negligence, were supplemented by statements that the appropriate course was to claim in damages for negligence, instead of for money had and received, on the ground that the cheque was constructively countermanded. FARWELL, L.J., said (115):

"On the evidence here it is clear that the banker is simply put on inquiry by the receipt of a telegram, and his duty is not to pay at once, but to make inquiries . . ."

- C FLETCHER MOULTON, L.J., said (116):

"It must be a question in each case as to whether the agent has behaved reasonably in acting or not acting upon that telegram."

Moreover COZENS-HARDY, M.R., said (117):

- D "A telegram may, reasonably and in the ordinary course of business, be acted upon by the bank, at least to the extent of postponing the honouring of the cheque until further inquiry can be made. But I am not satisfied that the bank is bound as a matter of law to accept an unauthenticated telegram as sufficient authority for the serious step of refusing to pay a cheque."

- E So this case likewise, in my view, goes to indicate that the bank has a duty of care to its customer in respect of the conduct of its customer's business as BANKES, L.J., said and not merely in interpreting its customer's instructions; that that duty may in the circumstances require that the bank should make enquiries before acting and for that purpose to postpone honouring the customer's cheque; and that the test of care required in the performance of the bank's duty is an objective test of reasonableness.

- F *Bellamy v. Marjoribanks* (120), a case before the Bills of Exchange Act, 1882, gave the banks statutory protection, also dealt with the duty of care of a paying bank. The plaintiff drew a cheque on Coutts & Co., payable to one Geary or bearer, and crossed it "Bank of England for the account of the Accountant General". Geary crossed out the crossing to the Bank of England and wrote instead the name of his own bankers "Gosling & Co.". The amount of the cheque was paid by Coutts & Co. to Gosling & Co. and Geary was thus enabled to mis-apply the cheque. The plaintiff sued his bankers in negligence for paying the cheque to Gosling and not to the Bank of England. It was decided that the crossing was not part of the drawer's instructions so as to make the cheque payable to the Bank of England only, but that it was, by bankers' usage, a protection for the plaintiff, a design to secure payment through a bank so that "in the event of a banker paying a crossed cheque otherwise than through a banker (121) the circumstance of his so paying would be strong evidence of negligence in an action against him". This case was not decided on the ground that the customer's instructions were the bank's only concern and, once ascertained, were conclusive, or on the ground that the care required of the bank was limited to care in interpreting the customer's instructions. Payment, despite the crossing and the usage, was "strong evidence", but not more than evidence, of negligence. It was not treated as disobedience of instructions. The relevance of the decision is its ratio decidendi; and the decision was based on a duty of care on the part of the

(114) [1908] 1 K.B. at p. 298.

(115) [1908] 1 K.B. at p. 301.

(116) [1908] 1 K.B. at p. 300.

(117) [1908] 1 K.B. at pp. 298, 299.

(120) (1852), 7 Exch. 389.

(121) (1852), 7 Exch. at pp. 403, 404.

paying bank to protect the plaintiff, its customer. There was, it seems to me, a clear recognition of such a duty of care, even though it may be arguable that the decision might have been founded, as it was not, and perhaps even better founded, on observance by the bank of an instruction of the customer by crossing, which, truly interpreted, required payment through any bank.

In *Carpenters' Co. v. British Mutual Banking Co., Ltd.* (122) MAC KINNON, L.J. (who dissented, but only because he, unlike his brethren, considered that the court was bound by previous decision) said (123):

"... the banker does owe a duty of care to his customer; they are in a contractual relation."

Then he comments (123) that s. 60 of the Bills of Exchange Act, 1882, in relief of a paying bank, merely requires that the bank should have paid "in the ordinary course of business", and not, as in s. 82 in relief of a collecting bank, "without negligence". He adds (123) that, if in s. 60 "without negligence" had been intended,

"... seeing that the paying banker already owes a duty of carefulness to his customer, it would have been the more obvious to express it."

For the banks it was suggested that this merely referred to a duty to take care not to pay otherwise than in accordance with the instructions. I do not read MAC KINNON, L.J.'s observations in the limited way for which the banks contend. SLESSER, L.J. (124), treated circumstances which put on inquiry, coupled with the absence of inquiry, as establishing negligence within s. 82.

*B. Liggett (Liverpool), Ltd. v. Barclays Bank, Ltd.* (125) was referred to. As the law turned on the *Royal British Bank v. Turquand* (126) case, with which we are not concerned, and the circumstances of negligence were far removed from the circumstances in our transactions, it does not seem to be of material assistance.

The cases on the duty of care of paying banks are very few. For the defendant banks, it was suggested that this indicated that there was no duty of care on paying banks. Not only is such a negative indication dangerous, but it seems to me that, to conclude that there is no duty of care on paying banks, is contrary to the quotations which I have made from paying bank cases. For the plaintiff company, it was suggested with considerable force that there were good practical reasons why customers should not choose to sue the paying banks, including in particular that it was less onerous to sue the collecting bank. The customer could sue the collecting bank in conversion, in which the burden in a defence under s. 82 of establishing absence of negligence would lie on the bank; whereas if the customer sued the paying bank in negligence, the burden of establishing negligence would lie on the customer. The paying bank might be able to rely on s. 60, which exonerates a bank acting in good faith and in the ordinary course of business, although negligent.

The collecting bank cases referred to were relied on by the plaintiff company, as I have mentioned, merely as providing an indication of circumstances constituting carelessness and of the standard of care required.

In *Midland Bank, Ltd. v. Reckitt* (127), Lord Terrington was authorised by power of attorney to draw cheques on the account of a client at Barclays Bank for his client's purposes, signed such cheques as his client's attorney, and paid them into his own account at the Midland Bank in reduction of his overdraft. The headnote states the decision (128):

(122) [1937] 3 All E.R. 811; [1938] 1 K.B. 511.

(123) [1937] 3 All E.R. at p. 821; [1938] 1 K.B. at p. 537.

(124) [1937] 3 All E.R. at p. 820; [1938] 1 K.B. at p. 535.

(125) [1927] All E.R. Rep. 451; [1928] 1 K.B. 48.

(126) [1843-60] All E.R. Rep. 435; (1856), 6 E. & B. 327.

(127) [1932] All E.R. Rep. 90; [1933] A.C. 1.

(128) [1933] A.C. at p. 2.



- A "HELD, as to all the cheques except two, which depended on special circumstances, affirming the decision of the Court of Appeal, that the defendants, in presenting and receiving payment for the cheques, had converted them, and that, as the defendants had from the form of the cheques notice as to the money not being T.'s money, they were negligent in making no inquiry as to T.'s authority to make these payments into his own account, and therefore failed to bring themselves within s. 82 of the Bills of Exchange Act, 1882."
- B

LORD ATKIN (129) quoted LORD CARSON in a similar case involving Lord Terrington, which is the case of *Reckitt v. Barnett, Pembroke and Slater, Ltd.* (130), and LORD ATKIN said:

- C "LORD CARSON shortly states the conclusion of all the members of the House when he says [and he quotes LORD CARSON (131)] 'It is clear (i) that the cheque was used to liquidate the private debt of Lord Terrington, (ii) that the defendants knew it was so used, and (iii) that the form of the cheque gave them notice that the money was not the money of Lord Terrington. In that state of circumstances there is no evidence or any possible inference which can be drawn that the agent was applying his principal's money in discharge of any possible liability of his principal'."
- D

Then LORD ATKIN added (129): "Precisely the same state of things exists here." Then LORD ATKIN added (132):

- E "It seems to me clear that in an omission of an ordinary business precaution, in breach of a plain duty imposed upon a creditor to take reasonable care to see that a known agent paying his own debt to his creditor out of his principal's money is acting within his authority, the bank were negligent in making no inquiry as to their customer's authority to make these payments; . . ."

Later LORD ATKIN said (133):

- F "... the notice found to exist defeats reliance on ostensible equally with with actual authority. Neither in the one case nor in the other can the agent be assumed to have authority to pay his own debts with his principal's money."

In *Permanent Estates, Ltd. v. National Provincial Bank, Ltd.* (134), the first paragraph of the headnote reads (134):

- G "The plaintiffs were the payees of a cheque, crossed 'and Co. Not negotiable', received by a firm of surveyors on their behalf from the War Damage Commission. An employee of that firm, having forged the plaintiffs' endorsement, asked B. to cash the cheque. B. took the cheque to A., a solicitor, who had a clients' account with the defendant bank. A. paid the cheque into the clients' account, having met the bank's objections by stating that he had arranged for cheques from the War Damage Commission to be paid into his clients' account, whereupon he sent his clients his cheque for the amount less his fees. Having discovered the employee's fraudulent conduct, a partner of the firm sent the plaintiffs his cheque for the amount of the commission's cheque."
- H

- I The action against the bank was in conversion by it as collecting bank and the bank relied on s. 82 of the Bills of Exchange Act, 1882. The only question was, whether the bank had established that it had acted without negligence within that section, that is, without carelessness towards the plaintiff, the payee, who was

(129) [1932] All E.R. Rep. at p. 94; [1933] A.C. at p. 15.

(130) [1928] All E.R. Rep. 1; [1929] A.C. 176.

(131) [1929] A.C. at p. 191.

(132) [1932] All E.R. Rep. at p. 95; [1933] A.C. at p. 15.

(133) [1932] All E.R. Rep. at p. 96; [1933] A.C. at p. 17.

(134) (1945), 173 L.T. 344.

the true owner of the cheque. With regard to the plaintiff, the bank owed no contractual duty, but to succeed under s. 82 it had to establish that it acted "without negligence" with regard to the plaintiff. MACKINNON, L.J., sitting in the King's Bench Division, said (135):

"It is difficult to enunciate any principle which is applicable to the infinite variety of circumstances in which such a question might arise. There are obviously various considerations: the name of the payee; the form of the endorsement; the circumstances of the customer himself. In this case the customer was a solicitor. True, there is reason to believe that he was not a very reputable solicitor; but he was a solicitor, and he was keeping, under statutory conditions, a clients' account, and it would be natural that he should be paying into such an account the money of people other than himself. He himself presented the cheque, so that there was no question, as there has been in other cases, of negotiating a cheque for a person known to be a servant of the true owner of the cheque. It is true that, in the light of after events, the explanations given by Addis may sound improbable to anyone in a suspicious frame of mind; but in my opinion the officials of the bank, doing their duty under s. 82, have not to be abnormally suspicious. Moneys must be paid out, among a multiplicity of other transactions, with reasonable despatch. As it turns out, there were a good many questions on which a lawyer, who is trained very differently from a bank clerk, would probably have had it in mind to cross-examine Addis."

So there are an "infinite variety of circumstances" that may be relevant to negligence. "Reasonable despatch" in this passage must, of course, mean reasonable in all the circumstances. It is accepted that, in the ordinary course of business, the decision what course to take with regard to a cheque presented for payment must be taken on the day of its receipt by the bank branch responsible for the decision. It seems to me, however, that a banker is not compelled at his risk to honour or dishonour his customer's cheque, in the ordinary course, by the end of the day of its receipt, if there are circumstances requiring investigation. The need for despatch and the knowledge of the banker are alike elements which enter into a decision what despatch and what investigation are reasonable in the circumstances.

In *A. L. Underwood, Ltd. v. Bank of Liverpool and Martins Bank* (136), so far as material, cheques were drawn in favour of a company, endorsed by a sole director duly authorised to endorse the company's cheques, and paid by him wrongly into his private account in the defendant bank. The company sued the defendant as collecting bank for conversion, and the bank relied on s. 82. The issue was whether the bank had established under that section that it acted "without negligence", that is, without carelessness in relation to the company, the true owner of the cheque. It was decided that the bank had not so acted without negligence and was therefore liable in conversion to the plaintiff. BANKES, L.J., said (137):

"They [that is, the cheques] were indorsed by Underwood as sole director, a fact which, instead of absolving the cashiers from inquiry, appears to me to demand the exercise of greater caution on their part, having regard to the fact that the cheques were being paid into Underwood's private account."

So, although as stated (137), Underwood clearly had authority, as sole director, to endorse cheques, this certainly did not conclude the matter in the bank's favour.

ATKIN, L.J., quoted the cross-examination of the bank manager. He said (138):

"Later the witness was asked this: 'It would be negligence on the part of the bank to collect for a customer's private account cheques made

(135) [1945], 173 L.T. at p. 346.

(136) [1924] All E.R. Rep. 230; [1924] 1 K.B. 775.

(137) [1924] All E.R. Rep. at p. 235; [1924] 1 K.B. at p. 788.

(138) [1924] All E.R. Rep. at p. 239.; [1924] 1 K.B. at p. 797

A payable to his principal. Do you agree with that? A.—Yes: without asking the principal first—without referring to the principal’.”

SCRUTTON, L.J.’s judgment (139) contains observations to the same effect. Later, the cross-examination continued (140):

B “Q.—I put it that there is a risk that he is, or may be doing wrong? [that is, the payer-in]. A.—Yes. Q.—I think you will agree with me that at all events such a transaction, that is to say, the payment to the private account of the official of the company of a cheque which, on the face of it, is made payable to the company, is out of the ordinary course of business? A.—Yes.”

Then ATKIN, L.J., continued his own observations (140):

C “These admissions, fortified by the whole facts of the case, appear to demonstrate that in disposing of the cheques as he did Underwood was not acting within the ordinary scope of his authority, but was doing something unusual which ought to have attracted the attention of the bank’s servants.”

D This passage suggests that where a transaction is “out of the ordinary course of business”, “doing something unusual which ought to have attracted the attention of the bank’s servants”, and where there is “a risk” that wrong is being done (to someone with regard to whom the bank seeks to maintain that it is acting without negligence), then the bank is negligent unless it makes enquiry.

E It is irrelevant to the passages which I have quoted, that the negligence of the bank to the true owner of the cheque was imposed by statute and did not arise out of contract, or that such negligence is not a ground of claim but a defence in which, under s. 82, the burden of proof lay on the bank, instead of on the plaintiff as in contract. Nor is it relevant that the negligence being considered is that of a collecting and not of a paying bank. The passages are not directed to or affected by the considerations which are irrelevant to them. They are directed to what constitutes carelessness within the legal context of negligence, what kind of behaviour amounts to negligence. They show, to my mind, that the standard of care being considered is not some mystery peculiar to banking law, still less that it is limited to collecting banks. That case does not appear to me to be a pronouncement for banks, and still less for collecting banks, of some peculiar standard of care; but the application to a bank of the approach, tests, and standard of care prevailing generally in the law of contract.

G *Morison v. London County and Westminster Bank, Ltd.* (141), was a case relied on by the defendants. In that case, one Abbott had authority to draw on the plaintiff’s account at the National Provincial Bank and sign cheques “per pro”, for the purposes of the plaintiff’s business. Over the years, he paid in cheques, so signed, into his own account with the defendant bank. The plaintiff sued the defendant, as collecting bank, for damages for conversion, or alternatively for money had and received. It appears (particularly from the observations of PHILLIMORE, L.J. (142)) that, in reply to the claim in conversion, the defendant relied on s. 82 (including its collection being without negligence) and, in reply to the claim for money had and received, on the cheques being forgeries and therefore nullities.

H The forgery relied on was what was called “statutory forgery” under s. 25 of the Bills of Exchange Act, 1882 (143). That section provides:

I “A signature by procuration operates as notice that the agent has but a limited authority to sign, and the principal is only bound by such signature if the agent in so signing was acting within the actual limits of his authority.”

It was held that the misuse of his authority by a person authorised to sign “per

(139) [1924] All E.R. Rep. at p. 237; [1924] 1 K.B. at p. 793.

(140) [1924] All E.R. Rep. at p. 239; [1924] 1 K.B. at p. 797.

(141) [1914-15] All E.R. Rep. 853; [1914] 3 K.B. 356.

(142) [1914-15] All E.R. Rep. at p. 866; [1914] 3 K.B. at p. 382.

(143) For s. 25, see 2 HALSBURY’S STATUTES (2nd Edn.) 518.



pro" and who so signed, was not a forgery; that with regard to cheques collected in later years, there was no negligence because the bank had collected similar cheques in earlier years without protest from the plaintiff; and that, with regard to cheques in the earlier years, the plaintiff had in the circumstances ratified Abbott's acts. A

Two series of observations in the course of the case, it was suggested, bear on our problem, one series on the position of the paying bank, and the other on negligence. As no claim was made against the paying bank, the observations with regard to it were, at the highest, obiter. Even so, it seems to me that they were not made with any reference to the paying bank's liability in negligence at all, since no suggestion of negligence was made against the paying bank. LORD READING, C.J., said with reference to the forgery issue (144): B

"If, as is admitted, the National Provincial Bank were entitled, and indeed bound to honour cheques so signed . . ." C

He also said (145):

"The plaintiff makes no complaint against the National Provincial Bank.

It is clear that they were bound in pursuance of the directions and authority given in 1888 to honour the said cheques on his account." D

BUCKLEY, L.J., spoke to the same effect (146). These statements must be read in the context of that case, where there was no claim in negligence or otherwise against the paying bank, or any such ground suggested for impugning the bank's relying on the mandate to it. They were not general pronouncements of law, which would exclude such claims in negligence or otherwise, and so to read them would import into them a significance to which the court's mind was not directed at all and which they were never intended to bear. On negligence LORD READING, C.J., said (147): E

"For a firm to pay salary or commission or any debt to a manager by cheques made payable to the firm or order, and for a manager to pay cheques so drawn to his own private banking account after himself indorsing them as agent for the payees, appear to me transactions so out of the ordinary course that they ought to have aroused doubts in the defendants' mind and caused them to make inquiry." F

PHILLMORE, L.J., said (148):

"Abbott was a customer of the collecting bank, well recommended, no doubt, but known to be an employee and a manager; and, being a manager and having the power of signing per pro. for his employer, he was placing cheques which he drew for his employer to his private account. If this happened often enough, and with regard to sufficiently large sums, I think it ought to give rise to some suspicion in the breast of the bank manager or the cashier. If it were material, I do not think that I should be prepared to dissent from the conclusion to which, I think, the learned judge intended to arrive—that there was negligence in cashing some of the earlier cheques, cashing them and paying them to Abbott's account without, at least, some inquiry. But as regards all the middle and later cheques, a suspicion which might have been reasonably entertained would with at least equal reason be lulled to sleep." G

In *Orbit Mining & Trading Co., Ltd. v. Westminster Bank, Ltd.* (149), HARMAN, L.J., said: H

(144) [1914-15] All E.R. Rep. at p. 859; [1914] 3 K.B. at p. 366.

(145) [1914] 3 K.B. at p. 363.

(146) [1914-15] All E.R. Rep. at p. 862; [1914] 3 K.B. at p. 374.

(147) [1914-15] All E.R. Rep. at p. 861; [1914] 3 K.B. at pp. 368, 369.

(148) [1914-15] All E.R. Rep. at p. 867; [1914] 3 K.B. at p. 383.

(149) [1962] 3 All E.R. 565 at p. 578; [1963] 1 Q.B. 794 at p. 822.

- A “It is never possible to lay down a rule as to what constitutes negligence and what avoids it. Each case depends on its own facts.”

He then quoted LORD DUNEDIN (150), quoting ISAACS, J. (151) in the High Court of Australia referring to the *Morison* (152) case as laying down that

- B “. . . the test of negligence is whether the transaction of paying in any given cheque was so out of the ordinary course that it ought to have aroused doubts in the bankers' mind, and caused them to make inquiry,”

with LORD DUNEDIN's comment (153):

- C “If there be inserted after the words ‘given cheque’ the words ‘coupled with the circumstances antecedent and present’, their lordships think this is an accurate statement of the law. The question is necessarily a question of fact.”

HARMAN, L.J., continued (154), quoting LORD DUNEDIN (155):

- D “‘It follows that, being a question of fact, it is really impossible to lay down rules or statements which will determine what is negligence and what is not. Each case must be determined on its own circumstances. In view, however, of what was said in the decision of the High Court of Australia above mentioned, their lordships feel bound to say that they cannot agree with the view of the learned Chief Justice in that case where he says that the care to be taken is not less than a man invited to purchase or cash such a cheque for himself might reasonably be expected to take. This seems to their lordships to apply an inapposite standard, for the simple reason that it is no part of the business or ordinary practice of individuals to cash cheques which are offered to them, whereas it is part of the ordinary business or practice of a bank to collect cheques for their customers. If, therefore, a standard is sought, it must be the standard to be derived from the ordinary practice of bankers, not individuals.’”

- E So it seems to me that the standard of care is that which bankers might reasonably be expected to take according to the ordinary practice of bankers. The test thus seems clearly to be an objective test of reasonableness.

- F These quotations are in line with other cases, already considered, indicating that, in deciding whether there is carelessness in breach of the required standard of care, and whether enquiry ought to be made, and there is negligence, all the circumstances have to be considered, including the extent to which the transaction appears “out of the ordinary course”.

- G One of the relevant circumstances in assessing the degree of the care required is stated by SELLERS, L.J., in *Orbit Mining & Trading Co., Ltd. v. Westminster Bank, Ltd.* (156). He said:

- H “It is not our way of life either in trade or banking or in private relationships to be always on the alert against dishonesty.”

- This is in line with part of a passage, already quoted from the *Penmount Estates* case (157), that under s. 82 the bank officials “have not to be abnormally suspicious”.

- Muchryde v. Eukyu* (158), in line with SIR JOHN ROMILLY, M.R.'s observations in *Jones v. Williams* (159), a case already referred to, states that when, on enquiry,

- I (150) I.e., in *Tazation Comrs. v. English, Scottish and Australian Bank, Ltd.*, [1920] A.C. 683 at p. 688.

(151) I.e., in *State Savings Bank of Victoria Comrs. v. Permewan, Wright & Co.*, (1915), 19 C.L.R. 457 at p. 478.

(152) [1914-15] All E.R. Rep. 853; [1914] 3 K.B. 356.

(153) [1920] A.C. at p. 688.

(154) [1962] 3 All E.R. at p. 578; [1963] 1 Q.B. at pp. 823, 824.

(155) [1920] A.C. at p. 689.

(156) [1962] 3 All E.R. at p. 573; [1963] 1 Q.B. at p. 815.

(157) (1945), 173 L.T. at p. 346.

(158) (1871), 24 L.T. 461.

(159) (1857), 24 Beav. 47.

an answer is received which the enquirer may reasonably believe to be true, he is entitled to act on it. A

If enquiry ought to be made, and no enquiry is made, then the weight of authority establishes, in my view, that it is to be assumed that a true answer would be given; and, if no enquiry is made, that negligence is established. DEVLIN, J., in *Baker v. Barclays Bank, Ltd.* (160) stated, obiter, in the case of a defence under s. 82, where the burden of proving collection without negligence lay on the defendant bank, that B

"... there is at the very least, a heavy burden on him to show that such inquiries could not have led to any action which could have protected the interests of the true owner..."

Earlier, however, he referred (161) to statements of LORD WRIGHT and GREER, L.J., in *Lloyds Bank, Ltd. v. E. B. Savory & Co.* (162) to the effect that it is no answer to negligence to say that an enquiry would have been fruitless; and to the statement of SIR JOHN ROMILLY, M.R., in *Jones v. Williams* (163), quoted by BANKES, L.J., in *A. L. Underwood, Ltd. v. Bank of Liverpool* (164), that it is no answer to say that a false answer would have been given. SIR JOHN ROMILLY, M.R.'s statement, at any rate, was not limited to s. 82, but was clearly based on general principle, which BANKES, L.J., adopted and applied to s. 82. The weight of authority does not seem to me to be in accord with the limited qualification to which DEVLIN, J., guardedly referred. C D

Banking law is not a separate body of law, though, like innumerable other activities, it has statutory provisions dealing exclusively with it, and, being a distinctive and important activity, text-books dealing separately with it. Those aspects of law with which we are at present concerned are aspects of the general law of contract applicable to banking. The principles of that law of contract applicable to banking are the principles of the general law of contract. It seems to me that it is in keeping with this that ATKIN, L.J., in *Hilton v. Westminster Bank, Ltd.* (165), said, in a passage already quoted, that it is the duty of the bank to exercise "reasonable care and skill", that being a duty which he describes as "arising out of the contract" between banker and customer. E F

It seems to me that the passages quoted, in particular from ATKIN and BANKES, L.J.J., in *Hilton v. Westminster Bank, Ltd.* (166) are in keeping with this appreciation. To my mind, in accordance with those quotations, a bank has a duty under its contract with its customer to exercise "reasonable care and skill" in carrying out its part with regard to operations within its contract with its customer. The standard of that reasonable care and skill is an objective standard applicable to bankers. Whether or not it has been attained in any particular case has to be decided in the light of all the relevant facts, which can vary almost infinitely. The relevant considerations include the prima facie assumption that men are honest, the practice of bankers, the very limited time in which banks have to decide what course to take with regard to a cheque presented for payment without risking liability for delay, and the extent to which an operation is unusual or out of the ordinary course of business. An operation which is reasonably consonant with the normal conduct of business (such as payment by a stockbroker into his account of proceeds of sale of his client's shares) of necessity does not suggest that it is out of the ordinary course of business. If "reasonable care and skill" is brought to the consideration of such an operation, it clearly does not call for any intervention by the bank. What intervention is appropriate in that exercise G H I

(160) [1955] 2 All E.R. 571 at p. 584.

(161) [1955] 2 All E.R. at p. 583.

(162) [1932] All E.R. Rep. 106 at p. 118; [1933] A.C. 201 at p. 233; [1932] 2 K.B. 122 at p. 148.

(163) (1857), 24 Beav. at p. 62.

(164) [1924] All E.R. Rep. at p. 235; [1924] 1 K.B. at p. 789.

(165) (1926), 135 L.T. at p. 362.

(166) (1926), 135 L.T. at pp. 362, 358.



A of reasonable care and skill again depends on circumstances. Where it is to enquire, then failure to make enquiry is not excused by the conviction that the enquiry would be futile, or that the answer would be false.

It was submitted for the defendants that where, as here, in the ordinary way, a company by a board resolution authorises persons to sign cheques on its behalf and provides that cheques so signed "shall be valid and binding on the company"

B and that the resolution shall be communicated to the bank and continue in force between the company and the bank until terminated as specified, then the bank is only concerned that the cheques should be signed by the authorised persons. If this were so then it seems to follow that, even if the bank actually knew that the authorised signatories were misapplying the company's funds, it could nevertheless rely on the signatures. This could be so outrageous as to lie outside

C the intention and true construction of the mandate. The mandate does not give the authorised persons' signatures any more conclusive effect than, in the case of an individual's account, a mandate gives the signature of that individual's duly authorised attorney as, for example, in *Madland Bank, Ltd. v. Reckitt* (167), to which I have referred. The mandate is to enable the signatories to sign "on behalf of the company" and bind it vis-à-vis the bank. Clearly the signa-

D tories, because they were authorised to sign "on behalf of the company", could not rely on the mandate to pay for their own purposes. In reality, they would be signing on their own behalf. Nor could the bank rely on the mandate as conclusive to make such payment for the signatories' purposes out of the company's account. Neither the signatories nor the bank would, in my view, be excused by the mandate from any obligation which existed independent of the mandate, such as

E obligations under their respective contractual relations with the company. As between the company and the bank, the mandate, in my view, operates within the normal contractual relationships of customer and banker and does not exclude them. These relationships include the normal obligation of using reasonable skill and care; and that duty, on the part of the bank, of using reasonable skill and care, is a duty owed to the other party to the contract, the customer, who in this

F case is the plaintiff company, and not to the authorised signatories. Moreover, it extends over the whole range of banking business within that contract. So the duty of skill and care applies to interpreting, ascertaining, and acting in accordance with the instructions of a customer; and that must mean his really intended instructions as contrasted with the instructions to act on signatures misused to defeat the customer's real intentions. Of course, *omnia praesumuntur rite esse*

G *acta*, and a bank should normally act in accordance with the mandate—but not if reasonable skill and care indicate a different course.

These conclusions are inconsistent with the acceptance of the submissions for the defendants that (i) a paying bank is concerned exclusively with the mandate from its customer and has no duty of care, or alternatively (ii) the bank is only liable otherwise (a) if it actually knew that a cheque is drawn by a mandated agent

H in breach of his authority, or alternatively (b) if from facts in the actual knowledge of the bank, the irresistible inference is that the cheque is so drawn. I mention the second alternative specifically because it is wished to keep it open.

#### CASES AGAINST THE DEFENDANTS SEPARATELY

I now come to the cases against the defendants separately, dealing first with the cases against them in respect of the first transaction and afterwards with the cases against them in respect of the second transaction. It was emphasised for the defendants that there must be defects in recollection by reason of the long time that had passed since these transactions took place. The investigations by the Board of Trade inspectors and the collapse of the Cradock and Burden companies took place, however, shortly after the second transaction. It would be surprising if, in all the circumstances, the events of the first and second transactions were not deeply impressed on the minds of those taking principal parts in them.

Allowance certainly has to be made for forgetfulness, particularly of the less salient events, but not to an extent that makes it a significantly exceptional feature of this case, compared with other cases in these courts. A

#### FIRST TRANSACTION DEFENDANTS

With regard to the first transaction it will be convenient to deal first with the defendant Mr. Cradock; then with the defendants Mr. Barlow-Lawson and Mr. Jacob, directors of the plaintiff company under Mr. Cradock's control; then with Contanglo, agent for Mr. Cradock in the first transaction; then with the District Bank; and finally with Woodstock. B

##### *The first defendant, Mr. Cradock.*

As I have said, Mr. Cradock is in default of defence, and there is a motion for judgment against him. So all I am concerned with, as against Mr. Cradock, is whether treating the statement of claim as admitted against him, the claim which it makes against him is established in law. That I will deal with after this judgment and in conjunction with the form of any order against other defendants. C

That the alleged purpose of using the plaintiff company's funds was to finance the purchase of stock in the plaintiff company by Mr. Cradock has to be established as against the other defendants. Not by default of Mr. Cradock's defence but positively. D

The plaintiff company, Woodstock and District agree that if any payment was made out of the plaintiff company's account for the purpose of purchasing the plaintiff company's shares, it was £232,500 and not merely the £195,000 paid to Contanglo. As the claim against Contanglo is limited to the £195,000, Contanglo is not concerned with this discrepancy in amount. It is likewise agreed between the plaintiff company, Woodstock and District that there should be an inquiry whether any part of the £232,500 so paid was in fact applied for the plaintiff company's purposes, and, if so, that the amount so applied be deducted from the amount of any liability in respect of such payment of the £232,500. Mr. Barlow-Lawson and Mr. Jacob did not dissent from this course, though an opportunity was given to them to consider their attitude. The course suggested seems to me correct and convenient. E F

As against Woodstock, Mr. Cradock's purpose of using the plaintiff company's moneys indirectly to finance his purchase of stock in the plaintiff company is established by Mr. Sarsfield's letter of Apr. 23, 1958, which I have already quoted in full. It was to achieve that purpose that the £232,500 was paid by cheque from the plaintiff company to Woodstock and endorsed over to Mr. Cradock. Mr. Cradock was already bound by his agreement with Contanglo, whose main provisions I have already stated, to pay the completion price for the stock, which turned out to be £195,000. The transfer of the plaintiff company's funds from National to District and a cheque for £232,500 paid into Mr. Cradock's account to cover the debiting of the District draft for £195,000 to Contanglo, as appears from Mr. Cradock's telephone conversation on Apr. 23 with Mr. McMinn and his and Mr. Sarsfield's conversations with Mr. Reynolds at the beginning of the meeting of Apr. 25, as I have mentioned, and the passage of the amounts through the District Bank with the documentation which I have mentioned, clearly establish Mr. Cradock's purpose and, together with Mr. Sarsfield's letter of Apr. 23, his arrangement with Woodstock to misapply the £232,500 of the plaintiff company's money to finance the purchase by Mr. Cradock of the stock in the plaintiff company. Contanglo accepts that Mr. Cradock's purpose in obtaining the £232,500 was to purchase stock in the plaintiff company and that, unless Mr. Cradock intended to transfer assets of corresponding value to the plaintiff company at the time of or immediately after his acquisition of the stock, it was a dishonest purpose. Although Mr. Cradock wanted a shell company with liquid assets, with which it could acquire some of his properties, no specific property was mentioned at the time of the first transaction. We know that Mr. Cradock did not intend at the time of his receipt of the £232,500 to transfer such assets G H I

A in return for such use by him of the plaintiff company's moneys, because he did not do so. Nor did he later do so or attempt to do so. It is a question of law whether any intention or contemplation that Mr. Cradock may have had to use the plaintiff company at some future time to be recipient of assets of his could be regarded as making honest what would otherwise be dishonest in any relevant sense, and with that I have already dealt and I have concluded that it cannot.

B *The fifth and sixth defendants, Mr. Barlow-Lawson and Mr. Jacob.*

The allegation against Mr. Barlow-Lawson and Mr. Jacob is that they procured that the £232,500 of the plaintiff company's money should be misapplied for the purpose of financing stock in the plaintiff company by Mr. Cradock, in bad faith and in breach of their duties as directors and as part of an arrangement between them, Mr. Cradock, Contango, District and Woodstock or some of such defendants to which the others were privy. They both deny that they were aware that the plaintiff company's money was to be used for such a purpose.

C Mr. Barlow-Lawson had a small engineering business and had before the war been an estate agent in partnership with Mr. Scott of Contango. He gave the impression of being somewhat flamboyant and happy-go-lucky. He repeatedly stressed that he was chairman of a successful company that had been a shell company. He was very easy in manner but not a person of any weight and not comparable in ability or force of personality with such controllers of operations as Mr. Burden or Mr. Scott, whom I saw or, by all accounts, of Mr. Cradock or Mr. Levinson, whom, of course, I did not see. In this case there is a very distinct division both of function and calibre between the controllers and the controlled.

D Mr. Barlow-Lawson was in both respects unmistakably one of the controlled. In his evidence he tried to be truthful and, though he had a marked inclination to create a high opinion of himself, he was apt to come out with the truth when pressed.

E He said that he regarded going on the board of the plaintiff company as a "splendid opportunity" to be a director of a public company. When pressed, however, he agreed that Mr. Scott had asked him to take the same sort of part as he had done on Mr. Levinson's invitation in another take-over, when his directorship lasted three days; and that there was no "splendid opportunity" without the possibility of his remaining on the board. This arose only when Mr. Cradock asked him on Apr. 25, just before the board meeting of that day, to be a director. He later said that he went on the board as nominee of Contango and as a "friendly gesture" to Mr. Scott. He later said what he got out of it was "personal", that he owed money to Contango and so was "under obligation to do this sort of thing". It was Mr. Scott who introduced Mr. Barlow-Lawson to Mr. Cradock. Mr. Barlow-Lawson agreed that he was on the board as nominee, first of Contango and then of Mr. Cradock, and that he was going to do what Mr. Scott or Mr. Cradock told him to do and not to do what they did not tell him to do. He knew that Mr. Cradock was taking over the plaintiff company.

F He authorised the transfer of the plaintiff company's moneys on deposit to Woodstock at eight per cent. without security and without any enquiry about Woodstock. He said: "I was quite happy to do what I was told to do by the virtual owner of the company", and added "because I obviously would have thought that he would not have invested the company's money in something where it would be lost". Later, he added: "He said it was alright, yes, and I naturally took his word, not only was he a respectable sort of bloke, in my opinion, quite wealthy but also the owner of the company". He recognised that, after he became Mr. Cradock's nominee, he gave no service to any in the company except Mr. Cradock. He said that Mr. Cradock probably thought he would sign a cheque for any amount in favour of anybody if he asked him to do so, and that he was right to think so. He admitted that he was "simply . . . the hands and eyes of Mr. Cradock". With regard to the meeting of Apr. 25 he



said: "I did not really know what was happening and what was the intention of any of the parties . . . I trusted everybody there". A

Mr. Jacob was an employee of Mr. Cradock and his companies. He was engaged in managing properties and was paid by those companies £2,500 a year less P.A.Y.E., plus the use of a car and expenses. He was a quieter and abler man than Mr. Barlow-Lawson and, doubtless, was an able administrator. He did not give the impression of being an adventurer and he was not of the calibre of the controllers. His evidence, doubtless largely due to failure of recollection, was not such that much confidence can be placed in it. He knew that Mr. Cradock was purchasing a controlling interest in the plaintiff company, that he wanted a shell company with liquid assets with which he could acquire some of his properties; but no specific properties were mentioned for such acquisition at the time of the first transaction. He knew on Apr. 25, or on the day before, that he was going to be a director of the plaintiff company, and he was told, before the meeting on that day, that the plaintiff company's money would be deposited with Woodstock to earn a higher rate of interest. B C

He denied that Mr. Cradock talked to him about Mr. Sarsfield's letter of Apr. 23. He said he did not talk to him about that kind of personal matter, though he did mostly show him letters dealing with property matters. This is consistent with the picture which has emerged of Mr. Cradock in the course of the evidence. It seems to me that Mr. Cradock was not a person to confide more than necessary in those whom he used as his instruments. Mr. Barlow-Lawson and Mr. Jacob were not expert advisers or controllers of the operation. There was no reason why Mr. Cradock should tell Mr. Barlow-Lawson and Mr. Jacob that he was going to use the company's moneys to pay for the stock. He was astute enough, and there were obviously good reasons for his not informing them of his conduct when he need not do so. D E

It was suggested that Mr. Jacob must have gathered at the meeting of Apr. 25 that Mr. Cradock was going to use the £232,500 cheque to pay for the stock. Of course Mr. Jacob, like Mr. Barlow-Lawson, knew that Mr. Cradock was assuming control of the plaintiff company on Apr. 25, through acquiring controlling interest in its stock; and they both knew that the plaintiff company's funds were going to Woodstock under the cheque which they signed. At the documentation phase of the meeting, when Mr. Jacob signed the cheque, he said Mr. Sarsfield stood behind him, Mr. Barlow-Lawson described the room as "very, very small". It is clear undisputed evidence that no effort at secrecy was apparent in the endorsement of the cheque by Mr. Sarsfield to Mr. Cradock and the handing of it to Mr. Reynolds and the preparation of the accompanying papers for Mr. Reynolds for payment through District. I am invited to conclude that it was inconceivable that Mr. Jacob did not appreciate that the plaintiff company's money was in effect being transferred to Mr. Cradock, and if so that it was for use for payment for Mr. Cradock's acquisition of the stock. I think there is very great force in the submission and it has troubled me; but on balance I am not satisfied that it is established. F G H

Mr. Jacob said that he was told by Mr. Cradock that he was going to be a director of the plaintiff company and that his moneys and that of the plaintiff company's were to be transferred to Woodstock and that he realised that that would involve a resolution of the directors, including himself. He said that he voted for the resolution and the removal of the plaintiff company's account from National to District because Mr. Cradock wanted that. He made no enquiries about the resolutions and never considered the interests of other shareholders than Mr. Cradock, but did what Mr. Cradock, the majority shareholder, asked him to do. He said that, if Mr. Cradock acted honestly, the arrangement was honest, if dishonest it was dishonest, but that there seemed nothing wrong with it, within his knowledge at the time, and that he relied on Mr. Sarsfield, to whose company the cheque was being paid, whom he had met I

A casually once and knew to be a stockbroker. Moreover Mr. Jacob did later buy a small holding of stock in the plaintiff company for himself.

It seems to me, however, that both Mr. Barlow-Lawson and Mr. Jacob were nominated as directors of the plaintiff company to do exactly as they were told by Mr. Cradock, and that that is in fact what they did. They exercised no discretion or volition of their own and they behaved in utter disregard of their duties as directors to the general body of stockholders or creditors or anyone but Mr. Cradock. They put themselves in his hands, not as their agent or adviser, but as their controller. They were puppets which had no movement apart from the strings and those strings were manipulated by Mr. Cradock. They were voices without any mind but that of Mr. Cradock; and with that mind they are fixed in accordance with the view which I have already expressed on the law. They doubtless hoped for the best but risked the worst; and that worst has befallen them.

*The second defendant, Contanglo.*

The claim against Contanglo is in equity as constructive trustee to replace with interest at five per cent. per annum a sum of £195,322 5s. 2d. of the plaintiff's moneys applied in furtherance of an arrangement between Contanglo, Mr. Cradock, the directors, Woodstock and District (or some of them to which the other were privy) in giving financial assistance in connexion with the purchase by Mr. Cradock of stock in the plaintiff company and for Mr. Cradock's benefit, in discharging Mr. Cradock's liability to Contanglo in respect of such purchase, and which amount, being or representing the plaintiff company's moneys, was received by Contanglo knowing that it was so misapplied. The liability to replace the £195,322 5s. 2d. is not disputed, provided that it is established that Contanglo is liable as constructive trustee as claimed. This liability is disputed, however, on the ground, inter alia, that Contanglo is not within the requirements to make it a constructive trustee of those moneys.

The first question that arose was whether the £195,000 received by Contanglo was moneys of the plaintiff company, or sufficiently represented those moneys, as to be the proper subject for such a claim in equity to replace them, as is made by the plaintiff company. This is a question of mixed fact and law.

The draft for £195,000 to Contanglo was drawn by District Oxford Street Branch on the District London office on Apr. 24. That draft was handed over to Contanglo at the beginning of the meeting of Apr. 25. As Mr. McMinn acknowledged, District was committed to meeting it, since it would not contemplate dishonouring its draft. Nevertheless, it had not in fact then been honoured and paid. It was debited to Mr. Cradock's account with District on the same day, Apr. 25.

As we have seen, however, Mr. McMinn as manager of the Oxford Street branch, had the draft so drawn only on the assurance that there would be a draft from National to Mr. Cradock for about £235,000 to cover it. Mr. Reynolds only parted with the draft to Contanglo on the assurance of Mr. Cradock that National would transfer the plaintiff company's credit in its National bank account to its account with District and the assurance of Mr. Sarsfield, in line with his arrangement with Mr. Cradock, that a cheque drawn on the plaintiff company's account with District, in Woodstock's favour, would be endorsed to Mr. Cradock. This scheme was carried out by the necessary resolutions of the plaintiff company's board and by payment of £232,764 from the plaintiff company's account at National to the plaintiff company's account with District and £232,500, out of it, by endorsement into Cradock's account, as I have described. It is completely clear that it was only by this use of the plaintiff company's £232,500 that the £195,000 payment was effected.

Of course, the credit in a bank account is not a total of specific or even floating coins, which are the property of the person whose account it is, but the amount

of a debt payable by the bank to the customer in accordance with their agreement. Money paid into a bank account becomes the property of the bank. So the £195,000, even if debited to Mr. Cradock's account and credited to Contango's account after the £232,500 were credited to Mr. Cradock's account, would not be moneys of the plaintiff company, in the strict sense which I have indicated. It was or represented, however, moneys of the plaintiff company in the sense that it was the plaintiff company's moneys paid into its account and out of its account into Mr. Cradock's account that alone covered and enabled the £195,000 to be paid out of Mr. Cradock's account to Contango. No plaintiff company's moneys, no payment to Contango. It was the credit to Mr. Cradock's account of the £232,500 debited to the plaintiff company's account, that enabled the £195,000 to be debited to Mr. Cradock's account and paid to Contango. It is not, in my view, tenable that misapplication by cheque, debiting and crediting to bank accounts, instead of by coin, would prevent there being a misapplication of what would otherwise be a misapplication with liability to replace the amount misapplied.

It has never been suggested that Woodstock's part in this conversion of a plaintiff £235,000 debit into a Mr. Cradock £235,000 credit contributed any cover, backing, or substance to what Mr. Cradock received and which he, through the District draft, paid to Contango. It seems to me that any relationship of creditor and debtor that arose between Woodstock and Mr. Cradock is no more significant than such relationship between the plaintiff company and District and between District and Mr. Cradock. Where there is one operation to pass, and which does pass, all the benefit of A's fund to B, then if that one operation is a misapplication of that fund, it seems to me that A's claim to have that fund replaced is not to be defeated by the incidental legal relationships that arise in the course of that passage. The claim is a claim of substance, founded in equity, which fastens on the conscience of the recipient. The substance is that A's fund passes to B, in circumstances in which equity says B is liable to replace it. Neither substance nor conscience is affected by the incidental legal relationships that arise in the course of that passage, nor has that been suggested. Different considerations would arise where the fund passes from A to B by a series of disconnected incidents. Where, however, the passage of A's fund to B is designed and takes effect as one operation, equity is not to be defeated by the twists and turns and devious course which that one designed operation pursues. Any indebtedness of Woodstock to the plaintiff company, or of Mr. Cradock to Woodstock, that might arise in the course of that operation, does not, indeed *ex hypothesi* does not, make the operation less a single operation for the passage of the fund from A to B. Such indebtedness would be subsidiary to that operation. It would be a method of achieving, though obscuring it. To say that such indebtedness should in equity prevail over such operation would be to make what is subsidiary paramount; and nonetheless if A's fund passing to B is read as the benefit of the bank's indebtedness to A passing so as to be transformed, to the accompaniment of legal incidents, into the bank's indebtedness to B. Such wizardry is not to defeat equity.

So I conclude that £195,000 received by Contango were moneys of the plaintiff company or, at any rate, sufficiently represented those moneys as to be the proper subject for such a claim in equity to replace them as is made by the plaintiff company.

It was suggested that the payment of the £195,000 to Contango was not for its benefit. Contango itself took every conceivable precaution to secure its payment. That is what the elaborate security arrangements which it had exacted from Mr. Cradock were for. It appeared that the loss to Contango on a winding-up of the plaintiff company would be several thousand pounds, although Contango might well have been able to obtain a better price for the stock than Mr. Cradock paid for it. The payment to Contango secured for it, however, without further doubt or risk, money to pay the accepting stockholders to whom



A it was immediately liable and its £7,500 profit. I have no difficulty in concluding that the payment was to Contango's benefit.

The question then arises whether Contango participated in the operation of misapplying such moneys of the plaintiff company for the purpose of paying for the stock in the plaintiff company bought by Mr. Cradock or knew that the payment to them for the stock was of such moneys and in breach of trust.

B Mr. Scott who, as he said, was in control of the first transaction for Contango with the assistance of Mr. Levinson, denied such participation or knowledge, and there is no direct evidence, though there is circumstantial evidence relied on, to the contrary. The credibility and reliability of witnesses and the true assessment of their evidence, and particularly of Mr. Scott, thus becomes crucial. Mr. Scott, with Mr. Levinson and a Mr. Essex, had acquired a fifty per cent. shareholding in Contango. Mr. Scott and Mr. Levinson were active in carrying on Contango's business, which included the conduct of take-overs. Neither C Mr. Scott nor Mr. Levinson appeared as directors of Contango. Mr. Scott just preferred not to do so, except for a short period when he could not get anyone else as director instead of him. Mr. Meaden, who with Mr. Barlow-Lawson became Contango nominee in the plaintiff company for a day, was a director of D Contango. Mr. Scott was well versed in take-overs, including the take-overs of shell companies. This was not a man, perhaps like some others whom I have seen in this case, paddling or drowning in unfamiliar waters. He was extremely astute, most quick and agile minded, generally, though by no means invariably, aware of the implications of the questions put to him, and on occasion, in difficulty, apt to fence and adjust his answers. His evidence has to be approached with E the utmost caution.

It was Mr. Scott who introduced Mr. Cradock to Contango and who suggested to Mr. Cradock the purchase of the controlling interest in the plaintiff company to him. Mr. Scott was thus both the originator of the purchase and the person who, with Mr. Levinson's assistance, conducted it for Mr. Cradock. It appears from his evidence that the shell was required for injecting properties of Mr. F Cradock into it; and there is no suggestion of any other legitimate purpose why Mr. Cradock should require it. There is thus, the origin of the purchase at Contango's suggestion, the Contango control of the purchase for Mr. Cradock, the Contango knowledge of its purpose, and Contango's business as bankers or financial experts and their expert knowledge of conducting take-overs. Mr. Scott denies, however, any participation or knowledge of how Mr. Cradock was G to provide the money to pay for the stock.

The normal method of providing such money was by bridging finance, the temporary loan from a banker to pay for the shares pending the sale of the H taker-over's properties to the company for payment, which would enable him to repay the bank loan. For a taker over to provide the payment for the shares out of his own moneys would be extremely unlikely. Mr. Scott himself said he could not "ever recollect" such a case. Such a taker-over, though a reputed I millionaire like Mr. Cradock, would hardly be expected to keep the amounts required for such payment unemployed, particularly when he was to be paid for properties to be sold to the company and the profits on which were to be realised by the sale of the shares which he had acquired, the realisation of those profits, free of tax by sale of the shares, was, as explained, the object of the operation. So the payment by the company to the taker-over for the properties would be of a substantial amount, of the order of the price paid for the shares. So if the taker over had properties to inject into the company, they would be available as securities for bridging finance. Such a method of financing the purchase of the shares would be free from objection.

It might even be, at any rate theoretically, conceivable to arrange for the payment for the shares, and the sale of the taker-over's properties to the company, to take place on the same occasion, in such circumstances as to dispense with the need for bridging finance. The evidence of Mr. Coombes, a stockbroker

called as a take-over expert by Contanglo, was, however, that "the idea that you could have everything sewn up and pop in everything in that same afternoon I think is quite impracticable". It might be convenient, if such purchasers of shares and properties could take place on the same occasion, to have the accounts of the company and of the take-over at the same branch of the same bank. The crucial factor is whether the payment of the company's moneys is in consideration for the sale of the properties. A B

If the taker-over has no properties to inject, on the occasion of his payment for the shares, and cannot provide bridging finance, then a way in which he can pay for the shares is by getting the company's money into an account at his own bank, and getting it transferred to himself to cover payment by him for the shares. Mr. Coombes said: "The acquisition of companies with their own assets is a commonplace." He added later that if there were a lapse of time between the purchase of shares and the injection of the assets, "in one way or another how it would work" would be for "the company's moneys in the meantime to be used to provide the purchase price of the shares"; and that the difference between later injecting and never injecting the properties into the company was the difference between an honest man and a crook. Such, at any rate, was the differentiation in the view of an expert in these take-over practices. The danger of using the company's moneys to pay for the shares, without a prior or concurrent injection of properties, was a familiar danger present to the mind of take-over practitioners. So was the danger of an assurance, without security, that properties would be injected later, with the well-recognised risk that they never might be. C D

In our case there is no question of any security or assurance that properties would be injected. What Contanglo say is that they had no knowledge of and were not concerned about the source for payment of the stock at all. As I have said, the only legitimate purpose suggested for the acquisition of the stock was injection of properties with a view to realisation of the profits on them tax free. Contanglo does not suggest, however, that it enquired whether Mr. Cradock was going to inject properties into the plaintiff company on the occasion of his paying Contanglo and taking over the company on Apr. 25. The plaintiff company's board would have had to provide for payment of its moneys in return for the properties. That board, until after the £195,000 draft was handed over and, according to Mr. Scott himself, taken away from the meeting, consisted of the Contanglo nominees. They had passed no resolution to purchase Mr. Cradock properties, nor was there any suggestion that such properties had been identified or valued, or that in any way any preparation had been made or even considered for payment of the plaintiff company's moneys for such properties. Contanglo also knew that the new Cradock-nominated board could not have given any such consideration, or made any such preparation, because one of its members was Mr. Barlow-Lawson who had been one of their nominees, until he became a Cradock nominee on Mr. Cradock's invitation that same morning when Mr. Cradock took over from Contanglo. E F G H

This analysis, particularly in the light of Mr. Coombe's evidence, indicates strongly to my mind that Contanglo, with Mr. Scott in control with Mr. Levinson's assistance, realised perfectly well that there was not to be any injection of properties into the plaintiff company immediately on the Cradock take-over. What would make this much more patently obvious, however, would be knowledge of Contanglo that the plaintiff company's moneys were on that very occasion being lent to Woodstock. Contanglo had ample opportunity to acquire that knowledge, but in its defence and by its representatives in the box it has denied having that knowledge. For reasons which appear later, this is a difficulty which I do not find it necessary to resolve. I

I now come to circumstances which, it is suggested, indicate positively that Contanglo completed the sale to Mr. Cradock, knowing that the plaintiff

A company's moneys were being used to pay for Mr. Cradock's acquisition of the stock.

It was put to Mr. Scott in cross-examination that the one way to make certain that the purchase of the shares was proper, without use of the company's money, would be "to make certain that the company's money was never touched until it came to be used as the purchase price of some property". Mr. Scott replied:

B "I agree". This part of the questioning was introduced by a suggestion that if one were taking over a company one could arrange for the company "to put the company's money into your bank" and thus find that, on telling the bank that one was going to borrow it, the bank would arrange for the payment of the accepting shareholders. The only present significance of the question is that it unmistakably clearly referred to a movement of the company's money from  
C its own bank into the taker-over's bank. Further, the question and answer to which I first referred was followed almost immediately by the question:

"But if one is worried about the propriety of a shell operation and one finds that the company's money is moved as the very first step in the operation, then at any rate one would be suspicious?"

D The answer was: "Yes". "Q.—And rightly suspicious? A.—Yes". When hearing this cross-examination I had no doubt at all that counsel and Mr. Scott were in the first question and answer which I quoted referring to the movement of the company's money from one bank to another; that "never touched" was anything but a more emphatic way of saying "never moved" and certainly had no connotation of being "touched" in any sense of "touching" for a loan  
E or as a transfer from the company. That that was the true view seems to me to be confirmed by a passage considerably later, towards the end of the cross-examination. Immediately after referring to the resolution to pay the plaintiff company's money from National to District, counsel referred to his earlier cross-examination, which I have mentioned, and said:

"I was asking you and you agreed with me that the one way to make  
F certain that the company's moneys were not improperly applied in financing the purchase of its shares was to make certain that the company's moneys were not moved, were not touched until the moment came to pay for the property being put into the company. A.—Absolutely, and that had always been made very clear to us by Mr. Levinson."

In re-examination, in referring to the first question of counsel for the plaintiff  
G company which I quoted, Mr. Scott was asked:

"What did you understand him to mean when he talked about the company's money not being touched? A.—The company's money remains intact in the company's banking account."

This is consistent with the meaning of the cross-examination and reply which  
H it seemed to me they plainly bore. Then came, however, the crucial and significant question and answer:

"Do you consider it in that sense of the word touching the company's money if you move it from an account, shall we say with Lloyd's Bank, to an account in the National Provincial Bank?"

and the answer came: "That is exactly the same thing, as long as it was in  
I a bank account". No objection was taken to that question, and perhaps wisely as it could not be taken until after it had been put. Despite the answer, I must make it unmistakably clear that I had no doubt that in cross-examination Mr. Scott was referring to a movement of the plaintiff company's account from one bank to another.

This conviction is in line with the answer of another take-over expert in cross-examination, namely, Mr. Coombes,

"Q.—Supposing you were acting on behalf of the purchaser of a shell company and you asked him how he was going to finance the purchase and



he says, 'I am going to borrow the money from my bankers on completion day but it is essential that I have the company's moneys transferred to my bankers on the day of completion', what would be your view of that method of financing? A.—I would never do such a thing."

It is important to distinguish this from a transfer of the company's account after completion of a purchase, when it is clear that no question of use of the company's moneys to pay for the purchase arises. Such a transfer was what was effected by the original directors of the plaintiff company, when they transferred the plaintiff company's account from Barclays to National, after the bank had long since confirmed that Contango was in a position to pay accepting stockholders and after receipt of a letter from the bank that cheques were being sent to them.

I have referred to this evidence in detail because to my mind it establishes first the danger of the transfer of the plaintiff company's account from one bank to another, as from National to District in this case; secondly, Contango's knowledge of that danger; and thirdly, an example of Mr. Scott's qualities as a witness which I have mentioned, so far as they might be seen without the vivid impression which he conveyed in the box, and the advantage of the tones of the interchanges between counsel and witness.

There are two other matters to which I must refer. The first is a document headed with the plaintiff company's name and underneath "Financial position Apr. 22, 1958". It shows a calculation of the cost to Mr. Cradock of acquiring the stock, £195,322 5s. 2d. Underneath it shows the plaintiff company's assets namely, cash at bank, £191,292; tax reserves £5,403, Government securities £38,704, amounting to a total of £235,799, and assets in East, with which we have not been concerned, amounting only to just over £6,500, making the plaintiff company's total net assets £222,652 after deducting £19,688 liabilities. The total purchase price is then shown deducted from the plaintiff company's total assets, leaving roughly £27,330. This document was prepared at Mr. Scott's instigation. Mr. Meaden was concerned in its preparation for Contango and said, what is obvious on the face of it, that it showed the plaintiff company's net assets and the amount Mr. Cradock had to pay for the stock. It equally obviously showed (i) the amount of the purchase price deducted from the amount of the plaintiff company's net assets, and (ii) that the plaintiff company's cash at the bank was less than the purchase price. After some cross-examination of Mr. Scott on this document, there came the question with regard to the £27,000, balance of the plaintiff company's assets after deducting the purchase price of the stock in the plaintiff company:

"It is the difference between the net assets of the company and the cost of buying the shares? A.—Yes. Q.—So that it is what will be left in the net assets of the company after taking out of them the cost of buying the shares? A.—Yes."

In examination-in-chief, Mr. Scott had said that the purpose of the document was

"To show Mr. Cradock that after he had injected properties to the extent of the net assets of the [plaintiff company] which were about £222,000, he would then own £719,579 shares in Selangor and would be possessed of cash to the extent of approximately £27,000."

On the same day, Mr. Meaden wrote to the plaintiff company's secretaries, confirming a telephone conversation on that day, requesting a sale of the tax reserve certificates and of government securities and payment of the proceeds into the plaintiff company's account with National. The plaintiff company's money at the bank thus came to exceed the amount Mr. Cradock had to find to pay Contango for the acquisition of the stock.

It seems to me almost inescapable that this document was to show the extent to which the plaintiff company's assets exceeded the price of the shares and that

- A arrangements were made in the light of it to sell readily realisable assets so that the plaintiff company's cash at the bank would exceed the amount payable for the stock. Mr. Scott's explanation was that it was not left to Mr. Cradock to sell the securities after he had obtained control of the plaintiff company because "he was employing us as agents to do certain things and this was part of our service". Further his only explanation was that the document was not to show
- B what would be left of the plaintiff company's moneys after deduction of the purchase price of the stock, but was to show that he would have the stock and £27,000 cash after injecting properties to the value of the net assets of the plaintiff company. There is no reference in the document to any properties being injected at all, and still less to their value; and the document, on its face, does not go beyond deducting the cost of acquisition of the stock from the net assets. I am
- C satisfied, as I have explained, that the immediate injection of assets was not contemplated, and that Contanglo knew this perfectly well. The immediate sale of the plaintiff company's securities was, however, carried out by Contanglo, with the result that the plaintiff company had cash at the bank before payment by Mr. Cradock to Contanglo of an amount exceeding the amount of that payment, and that the plaintiff company's cash was moved by Contanglo from
- D National to Mr. Cradock's District branch. These observations are unaffected by the consideration relied on by counsel, though not in fact by Mr. Scott in his evidence, that in the event Mr. Cradock scooped £235,000 of the plaintiff's moneys which were virtually all its assets, and not its assets less liabilities shown on Contanglo's document. It seems to me that, taken in conjunction with Mr. Scott's explanation of it and the other evidence, the document weighs against Contanglo.
- E There was a great deal of evidence and argument directed to the question whether the Contanglo representatives, Mr. Scott, Mr. Levinson and Mr. Meaden left the meeting of Apr. 25 before the resolution of the plaintiff company's board to make a loan of £232,500 to Woodstock was passed. For the plaintiff company, however, it was stated that it was no part of its final submission to me that the Contanglo representatives left at any particular stage, or did not leave before the
- F resolution on the Woodstock loan. So I will deal with this question briefly. The original draft minutes, drawn up by the secretaries' representative, Mr. Ringshall, had shown them as leaving at the end of the meeting; but Mr. Ringshall was very confused by the proceedings. In his draft he arranged the items by subject-matter and not chronologically, and he altered them, most probably at Mr. Levinson's indirect instigation, to show that the representatives left before the Woodstock
- G resolution. Nobody else apparently made that complaint of the draft; but Mr. Ringshall says he would not have made the alteration if he thought it incorrect. The only direct evidence was that the Contanglo representatives left before the Woodstock resolution. This was the evidence of Mr. Scott, Mr. Meaden, Mr. Barlow-Lawson and Mr. Jacob, but it was too unsatisfactory to be reliable. Such evidence would, however, be in line with Mr. Coombe's evidence, on take-
- H over board meetings, that it would be normal for the Contanglo representatives to leave at that stage; and the Woodstock resolution did not appear on the agenda which Mr. Levinson prepared for the meeting. Indeed, if Contanglo knew otherwise of the Woodstock resolution, my impression is that its representatives would be sufficiently well advised to leave before it was reached. So the view which I favour is that the Contanglo representatives left before the
- I Woodstock resolution.

The transfer to District could well have been made by Mr. Cradock's nominees later than Apr. 25, or even at the meeting of Apr. 25, after the Contanglo representatives left. No innocent reason for its being made before they left has been sustained; but Mr. McMinn and Mr. Reynolds, although they hoped and were prepared for it, yet seem hardly to have expected it then. The resolution to transfer, however, would enable what otherwise would not be feasible, namely the plaintiff company's moneys to be used to cover the payment of the draft to Contanglo. Without cover for that draft Contanglo representatives could not

expect to depart with it. Contango took every precaution to provide against Mr. Cradock failing to complete. As Mr. Scott said: A

"There is many a slip between the cup and the lip. We completed our transaction on [Apr. 24]. For some reason or other, unforeseen reason it may be, Mr. Cradock may not have been able to complete with us. Q.—You think the whole thing on the 25th might have gone off? A.—It could have done quite well." B

Mr. Scott also said that it was Mr. Cradock wanting the plaintiff company's money moved to District on [Apr. 25] and on the agenda for that day's meeting, that set his mind at rest and he knew that Mr. Cradock would be able to complete. Contango secured, through their nominees on the plaintiff company's board, that the resolution for that movement was passed. C

Contango knew the amount of money that Mr. Cradock had to find to pay for acquisition of the stock; that the plaintiff company's assets were liquid; that without the realisation of securities the plaintiff company's balance at the bank was less than the money it required to pay Contango for the stock; that the securities were substantially all realised and credited to the plaintiff company's account at National as Contango itself had provided, thus bringing the balance at the bank above the amount of the Contango draft for the stock; that Mr. Cradock had wanted the plaintiff company's moneys at National transferred to Martin's Bank and that he changed this and on Apr. 24 required it transferred to District, Oxford Street branch, on the morning of Apr. 25; that it then knew that Mr. Cradock would be able to complete; that it knew the danger of such a transfer resulting in the plaintiff company's moneys being used to finance the purchase of the shares in the plaintiff company; that it received a banker's draft on the morning of Apr. 25 for £195,000 for Mr. Cradock's acquisition of the stock; that the banker's draft was drawn on the District Bank; that, on the same occasion, and when Contango was still in control of the plaintiff company's board and knew that its draft was drawn on the District Bank, and before Contango representatives departed from the board with the draft, the plaintiff board in the presence of a District representative passed a resolution to transfer about £232,700 to the District, Oxford Street Branch: and after that Contango representatives departed with the £195,000 draft. All this in circumstances in which Contango knew, as I have concluded, that there was no contemporaneous or immediate injection of assets by Mr. Cradock into the plaintiff company. D E

From the evidence about take-over bids, in general, and their dangers; the analysis of the evidence on this first transaction; and my impression of the evidence, particularly of Mr. Scott; I am left at the end of the day convinced, without reasonable doubt, that Contango knew perfectly well that the plaintiff company's moneys were being used and misapplied to pay them the £195,000 for the acquisition by Mr. Cradock of stock in the plaintiff company, and participated in the operation of misapplying that money of the plaintiff company, knowing that such misapplication constituted a breach of trust. F G H

*The third defendant, District.*

The claim against District is first, in equity as constructive trustee, to replace with interest at five per cent. £232,500 of the plaintiff company's money applied in furtherance of an arrangement between District, Mr. Cradock, Contango, the directors of the plaintiff company and Woodstock (or some of them to which the others were privy), not for the purposes or the benefit of the plaintiff company but for the purpose of giving financial assistance in connexion with the purchase by Mr. Cradock of stock in the plaintiff company, or alternatively with the knowledge which District had, by reason of particularised documents, or ought to have had as a reasonable banker by reason of the specified documents and knowledge of matters alleged in the statement of claim, of such application for the said purposes, and which sum District nevertheless paid and debited to the plaintiff company's account. The claim against District is further or alternatively for I



A damages for negligence in performance of the duty which, as bankers, they owed to the plaintiff company as their customer, in honouring a cheque for £232,500 drawn on the plaintiff company and debiting it to the plaintiff's account, without making any or sufficient enquiry of Mr. Barlow-Lawson, Mr. Jacob, Mr. Cradock and Mr. Sarstfield, or any of them, of the purpose for which the £232,500 was being paid to Mr. Cradock, by a cheque in favour of Woodstock, endorsed to B Mr. Cradock.

In the claim in equity against District, the allegation that District ought to have known the said purposes does not include any allegation that District ought to have made enquiries, because particulars given of the allegation that District ought to have known did not include any reference to enquiries. This contrasts with the claim of negligence against District, which includes the C allegation that District ought to have made enquiries of Mr. Barlow-Lawson and others as I have already mentioned. (It also, incidentally, contrasts with the claims against the Bank of Nova Scotia in equity and negligence, to which we shall come later, which both include allegations that enquiries ought to have been made). Therefore the allegation in equity against District, that District knew or ought to have known the said purposes, must be established by direct proof of D actual knowledge, by actual knowledge found by inference or, in accordance with particulars pleaded and the objective test which, in considering the law on constructive trustees, I have concluded applies, by proof of facts which would have brought home the knowledge to the mind of a reasonable banker. So if District knew, or the facts were such that a reasonable banker would have known, the said purposes, the plaintiff company (on proof of other essential allegations) E is entitled to succeed in equity and in negligence. If, however, the facts were such as only to put a reasonable banker on enquiry, then the plaintiff company would succeed (on proof of other essential allegations) in negligence but not in equity, simply because with regard to the plaintiff company's claim in equity reference to enquiry is not pleaded as part of the particulars provided by the plaintiff company.

The knowledge of District, with which we are concerned, admittedly includes F the knowledge of Mr. McMinn, the manager of the District Bank, Oxford Street branch. It also, in my view, clearly includes the knowledge of Mr. Reynolds, though it would appear that he did not have any substantial relevant knowledge which Mr. McMinn did not also have. It is true that the Oxford Street branch was a small branch consisting of only eight persons, and that it was completely inexperienced in take-overs. But it was a branch which, under the District G organisation, was empowered to deal with take-overs, even of the substantial and somewhat complex kind with which we are concerned in this case. Ignorance and inexperience of take-overs applied to Mr. McMinn equally with Mr. Reynolds and no more excludes Mr. Reynolds' knowledge than Mr. McMinn's knowledge from being the knowledge of the bank. Mr. Reynolds was not a page boy. He was second to Mr. McMinn, acting in Mr. McMinn's place in Mr. McMinn's absence, H and he went to the meeting of Apr. 25 as the bank's representative to handle the interchange of drafts and the opening of an account for the plaintiff company and obviously considered himself, without dispute by the bank, to have authority to accept the endorsed cheque in place of the banker's draft. Mr. Reynolds was a responsible official of the bank, whose knowledge, in my view, is clearly knowledge of the bank.

I It is not disputed by District that at the crucial moment of debiting the plaintiff company's account and crediting Mr. Cradock's account with the £232,500, the bank knew that the £232,500 came indirectly from the plaintiff company to Mr. Cradock. Nor do I understand it to be disputed, what is in any case clearly indisputable, that the £232,500 from the plaintiff company was cover for the £195,000 payment to Contango. As stated for District, "The only defence, therefore, is that they (that is, District) did not know that it was cover for the purchase of the shares by Mr. Cradock". Subject to this defence, District clearly assisted in the alleged misapplication of the plaintiff company's

money. So, in the claim in equity, the question is—has it been established by direct evidence or inference from the evidence that the bank knew, or are facts established which would have brought it home to the mind of a reasonable banker, that the plaintiff company's £232,500 paid indirectly to Mr. Cradock was cover for the purchase of shares in the plaintiff company by Mr. Cradock?

In approaching the evidence, I bear in mind the passages already quoted from *MACKINNON, L.J.*, in *Penmount Estates, Ltd. v. National Provincial Bank, Ltd.* (168) and *SELLERS, L.J.*, in *Orbit Moving & Trading Co. v. Westminster Bank, Ltd.* (169), to the effect that the banker does not have to be abnormally suspicious or always on the alert against dishonesty, and *PEARCE, L.J.*'s observation in *Archbalds (Freightage), Ltd. v. S. Spanglett, Ltd. (Randall, Third Party)* (170):

“In so many cases of deception it is hard even for the persons deceived to imagine in retrospect how they could have made such a mistake, yet the fact remains that people are misled into foolish errors.”

Perhaps this last quotation cuts both ways in this case, but at any rate it seems to me a reflection on human behaviour which weighs in favour of foolishness rather than wickedness. I also bear in mind that Mr. McMinn, in the ordinary course of banking business, should decide on Apr. 25 whether to honour the plaintiff company's cheque to Woodstock, endorsed to Mr. Cradock, although he would be entitled to suspend payment, pending justifiable investigation.

Mr. McMinn and Mr. Reynolds are gentlemen very much, if I may be permitted a colloquialism, out of the same stable. They were both completely honest, conscientious, solid, reliable, slow without ability comparable to those whom I have referred to as controllers in these transactions, completely inexperienced in company take-overs or such transactions as we are concerned with in this case, both with admirable qualities for conducting the ordinary everyday banking business of the ordinary small bank branch office. Some of Mr. McMinn's answers were defensive, changeable and contradictory, but I am completely satisfied that this was not because he was in the least being unhelpful or trying to mislead, but because he was concerned not to commit himself or his bank by an answer which he had not adequately considered, and because in some parts of his evidence he was just thinking aloud to and around the answer as he went along. On occasion, however, he found that he had become involved in a defensive attitude from which he was too slow and tenacious to withdraw.

District first comes into the operations, with which we are concerned, on Apr. 23, 1958, when Mr. Cradock telephoned Mr. McMinn that he could “influence” the transfer to him of the account of the plaintiff company “in which he had been interested for some time”. Mr. McMinn replied that he would be interested in having the account. Mr. Cradock then asked Mr. McMinn to arrange a banker's draft for £195,322 5s. 2d. to Contango and for a District representative to take it to the National Bank on Apr. 25, where he would collect in exchange a banker's draft for about £235,000 in favour of Mr. Cradock. This arrangement about the drafts was confirmed by a letter to Mr. McMinn, signed by Mr. Cradock as “governing director”, without specifying of what company, but on notepaper headed with the Mr. Cradock group headquarters address. So, at that stage, Mr. McMinn knew that Mr. Cradock could influence the transfer of the plaintiff company's account from National to District and that the draft from District to Contango was to be covered by a draft to District, to be collected from National. Mr. McMinn denied that any other relevant information passed between him and Mr. Cradock and this, I have no doubt at all, was true. In particular there was no mention of the plaintiff company's moneys being used to cover the Contango draft or to pay for stock in the plaintiff company.

(168) (1945), 173 L.T. at p. 346.

(169) [1962] 3 All E.R. at p. 573; [1963] 1 Q.B. at p. 815.

(170) [1961] 1 All E.R. 417 at p. 421; [1961] 1 Q.B. 374 at p. 383.

- A Mr. McMillin then instructed Mr. Reynolds to attend the meeting on Apr. 25 to exchange the drafts, and to be prepared for the possibility of a new company account being opened with their branch. Mr. Reynolds accordingly attended the meeting prepared to carry out this business. Mr. Reynolds said that amongst other documents he took a cheque or a cheque book with him. If it were a single cheque, he could not suggest any explanation for his doing so, when it was put to him that to take a single cheque would be explicable if it were to make a payment out of the plaintiff company's new account of virtually all the moneys paid into it, as by the cheque to Woodstock. The evidence was that no cheque book was debited to the plaintiff company's account until June 11, although there might well have been, by slip, a delay until this date in debiting a cheque book issued on Apr. 25. However, a cheque book was debited to Mr. Cradock's account on Apr. 25 and there is nothing to show whether or not the Woodstock cheque came from the book. All this goes to whether District knew before the meeting, at its lowest that one payment was to be made out of the plaintiff company's account immediately. I am satisfied that District did not know this. Certainly the Woodstock cheque, which is what the single cheque form would presumably be used for, took District completely by surprise.
- D When Mr. Cradock and Mr. Sarsfield had explained to Mr. Reynolds, at the meeting, that the plaintiff company's account would be transferred to District and that the plaintiff company would draw a cheque on District for £232,500 in favour of Woodstock as a loan, and that it would be endorsed by Woodstock as a loan by Woodstock to Mr. Cradock, and Mr. Reynolds had thereupon parted with the £195,000 draft in favour of Contango, the position was that (subject
- E to the signatures on the cheque, including the endorsement, being in order) the cheque would be as good as a draft, because the plaintiff company's balance at National would be transferred by a banker's draft from National to District. It introduced, however, two new features to District: (i) the plaintiff company's moneys were now the cover for the District draft, which Mr. Reynolds had parted with, and which was debited to Mr. Cradock's account; and (ii) whilst, in Mr.
- F Reynolds' view, the making of a loan by A to B and B to C was normal, to do so by endorsement was "most unusual"; and the endorsement would make the second loan of precisely the same amount as the first loan, unless it was part of a larger loan, which it was not suggested to Mr. Reynolds by Mr. Sarsfield or Mr. Cradock.

- G During the board meeting which followed, Mr. Reynolds was in the group apart from the board meeting group and had very little idea of what was going on. After that, he took part in the documentation with regard to the opening of the plaintiff company's account, including the receipt of the National drafts and the payment of the Woodstock cheque to Mr. Cradock's account. After the single cheque reference the next matter relied on, with regard to the claim against District, was the undertaking to District from National given to Mr. Reynolds. This was the
- H undertaking dated Apr. 25, 1958, signed by Mr. Snell and addressed to the District, Oxford Street branch manager, to deliver to him 713,579 stock units in the plaintiff company together with a completed transfer deed in favour of District Bank (London) Nominees, Ltd., "as soon as certain formalities of stamping and registration had been complied with". Mr. Reynolds' evidence was that it was given to him by a person whom he thought to be representative of National, as
- I he was about to leave the meeting. Mr. Reynolds agreed that the undertaking was given to him as being there on behalf of District's customer Mr. Cradock. Mr. Reynolds said that he may have read it but not carefully, that it came as a surprise to him, that it was a letter from one bank to another which called for no immediate action and so he asked no question about it. He denied that the explanation for his not asking was that he knew that the shares in the plaintiff company, referred to in the letter, were Mr. Cradock's shares, or that he knew before the undertaking that they were to be transferred to the District Bank (London) Nominees, Ltd. I do not find this behaviour of Mr. Reynolds odd.



He was slow and deliberate and engaged in take-over business which was strange to him. When he saw that the undertaking called for no immediate action and was from another bank it seems to me that the natural thing for such a person so placed was to do nothing but take it back with him for his bank manager to deal with. I accept this evidence of Mr. Reynolds; but this evidence means that District was informed, immediately after the transfer of the plaintiff company's account by Mr. Cradock's influence to District and payment out of the plaintiff company's account of a large sum indirectly to Mr. Cradock, that this large holding in the plaintiff company was to be transferred to District nominees without the beneficial owner being named, when the only person for whom District was acting with regard to the plaintiff company was Mr. Cradock; that National gave District an undertaking, without District ever having asked for it, to make the transfer; and that it was given to Mr. Reynolds as being present on behalf of District's customer Mr. Cradock. Moreover this information to District, obtained in the setting of the operations described on Apr. 25, followed on the information which District already had of those operations.

When Mr. Reynolds reported back to Mr. McMinn, Mr. McMinn said that his account was confused, which accords with Mr. Reynolds' own evidence of his recollection of the board meeting part of the proceedings at the National Bank. Mr. McMinn was, however, "horrified" because Mr. Reynolds brought back, instead of the banker's draft in favour of Mr. Cradock, a cheque in favour of Woodstock endorsed by Mr. Sarsfield to Mr. Cradock, when he had already parted with the District draft to Contango which District was bound to honour. Mr. McMinn was concerned, because if the endorsement was not in order, District might be held liable for conversion. So, as I have explained, he set about and eventually obtained proper confirmation of the endorsement. As Mr. Reynolds said, there was what he described as "the fixation on the endorsement". The branch had bank instructions about conversion of cheques and the dangers of endorsements. They had no such instructions about the dangers of payments, if in accordance with a mandate to the bank; and Mr. Reynolds had been told that the endorsed cheque represented a loan by the plaintiff company to Woodstock and by Woodstock to Mr. Cradock and that loan, Mr. McMinn said, was "in his mind". So I have no difficulty in believing that these two conscientious bank officials went, if I may so describe it, flat out in blinkers for endorsement with hardly a glance for anything else. Mr. McMinn said that when he saw the undertaking he did not connect it with the draft in favour of Contango and that he was mystified by the undertaking and decided to wait to hear further on completion of the formalities of stamping and registration mentioned in the undertaking. This is very much a repetition of Mr. Reynolds' behaviour when he received the undertaking, and to my mind it is equally in character, but Mr. McMinn, despite his slowness and inexperience, agreed in cross-examination that he knew that the undertaking must have something to do with the events of the meeting.

Various documents were relied on by District as indicating that Mr. McMinn did not realise on Apr. 25 that Mr. Cradock was purchaser of the stock in the plaintiff company. I have found these documents of very little assistance. I will, however, refer, though briefly in the circumstances, to the principal of these documents. On May 13, Mr. McMinn wrote to Mr. Snell recording that Mr. Snell said that he was unable to give information who the beneficial owner of the stock was, and that he had "been in touch with our customer", meaning Mr. Cradock, to arrange for National to give the information. On the same day Contango wrote to National that the shares were held to the order of Mr. Cradock; and on May 14 National wrote to Mr. McMinn that they were instructed by their principal Contango that the shares were to be so held. It seems to me that, as the stock was delivered to District by National, it was from National that the information should come who was the beneficial owner and only on the instructions of the

- A principal for whom National held the stock, namely Contango, and that, accordingly, any oral information from Mr. Cradock direct with regard to this would not be satisfactory. However, Mr. Cradock would naturally, as District's customer—who introduced the plaintiff company to District—be the person to whom District would turn when information was not forthcoming in the first place from National. Thus these letters throw no light one way or the other on Mr. McMinn's state of knowledge, on the 25th, of the beneficial ownership of the stock.

The other of these documents to which I will refer is Mr. McMinn's report of May 25 to his head office. Mr. McMinn said, with regard to the undertaking,

"I had no knowledge that this was part of the day's transactions. Mr. Cradock had made no reference to a transfer of stock and I decided to await developments so far as this was concerned."

- C As I have already said, however, he agreed in cross-examination that he knew, when he saw the undertaking on the 25th, that it must have something to do with the events of that day's meeting. He explained that the report meant that "it was not part of the day's transactions that Mr. Cradock had told me previously". So this document likewise does not establish that he did not have the knowledge after the meeting upon seeing the undertaking.

- D I pass now from the documents, on which I said District relied, to a most important document, which is an extract from a minute of Mr. McMinn's dated Apr. 25, though, in view of the contents of the minute, it was clearly composed not earlier than Apr. 28 and not later than May 3. For the plaintiff company the date most favourable to District is accepted, namely May 3. The document is headed "Extract from Manager's minute book at 413, Oxford Street, London, W.1" and then underneath "Selangor United Rubber Estates, Ltd." and the date is Apr. 25, 1958. Then the body of the minute commences:

- "Our customer, Mr. Francis R. Cradock, has been negotiating the purchase of this public company for some time, and completion took place today. The account has been transferred to us from the National Bank, Whitehall. Form No. 36 has been completed; any two directors may sign on the account. After the resignation of the old board, Mr. Francis Arthur Jacob and Mr. Francis Evelyn Barlow-Lawson were appointed directors. Mr. Jacob is known to us as Mr. Cradock's estate manager, and he has a private account at this office. The company's account was opened with two drafts for a total of £232,764 which, we assume, represented the balance transferred from the National Bank. A cheque for £232,500 was immediately drawn on the account in favour of Woodstock Trust, Ltd., and this cheque was endorsed in favour of Mr. Cradock, who paid it to his credit. There was a contra entry in his account of £195,322, a draft drawn in favour of Contango Banking and Trading Co., Ltd., which was delivered to the National Bank at the time of the completion. We have since obtained a letter from Woodstock Trust dated Apr. 25, confirming that it was in order for the cheque, which they had received from the Selangor United Estates, Ltd., in the sum of £232,500, to be endorsed by the company in favour of Mr. F. R. Cradock. The letter explained that the item represented a loan to him of the same amount, bearing interest at the rate of eight per cent. per annum."

Form No. 36 was a form of mandate to the Bank.

- I Mr. McMinn could not recollect nor make any reasonably acceptable suggestion for any source of information in that minute except (i) his telephone conversation with Mr. Cradock on Apr. 23, (ii) Mr. Reynolds' report on the meeting of Apr. 25, together with the documents which he brought from the meeting, (iii) a conversation with Mr. Sarsfield on the afternoon of the 25th, followed by a letter signed by Mr. Sarsfield of the same date, purporting to confirm for the Woodstock board that the Woodstock cheque endorsement was in order, and (iv) a certified copy of the minute of the meeting of Apr. 25 received by Mr. McMinn with a letter dated May 2.

Mr. McMinn's reference in the words "competition took place today" is clearly to the completion of the purchase of the plaintiff company, which he had just mentioned earlier in the same sentence. He agreed in cross-examination that such completion involves payment for shares in the company and the handing over of some document of title and possibly a change in the directors of the plaintiff company. In the next sentence of the minute he refers to the transfer of the account to District, and I find it irresistible in the context that Mr. McMinn realised when he wrote the minute that the transfer by Mr. Cradock's "influence" was as the result of the completion of the purchase. He then almost immediately refers to the resignation of the old board and afterwards to the appointment of Mr. Jacob and Mr. Barlow-Lawson as directors, though Mr. Barlow-Lawson had already been appointed and, as appeared from the minutes which Mr. McMinn received on May 3, Mr. Barlow-Lawson was not appointed after the resignation of the old board at all, he was a member of the old board. So Mr. McMinn did not see the substitution of a new for an old board mentioned in the minutes, but could only have inferred it from concluding that on completion there was a change in control of the plaintiff company. As he agreed when cross-examined on the minute,

"I had had time to think of what had happened on Apr. 25 and obviously the control of the company had changed hands, which would imply that the majority shareholding had changed hands"

and "that the purchase had been completed" or, perhaps more accurately, the implication was the other way round.

Mr. Reynolds said that on the buying of control of a company and its completion he would expect payment of the purchase price, transfer of the shares and the appointment of the purchaser's nominees as directors. Mr. McMinn says that he assumed that the advance from National "represented the balance (that is, of the plaintiff company's account in National) transferred from the National Bank". He then says that the Woodstock cheque was "immediately" drawn on the plaintiff company's new District account and endorsed to Mr. Cradock and paid to the credit of his District account, where there was, he says, a contra entry of the £195,322 draft drawn in favour of Contango "delivered to the National Bank at the time of completion". So he connected the Contango draft with the completion. He did not mention the undertaking in the minute, though, as I have said, he agreed that he connected it with the events of the meeting of Apr. 25. Reference to the undertaking may well have been omitted, because he was awaiting events about it, as he said, or perhaps because it was directed to the transfer rather than to the purely banking aspect of the operation.

Mr. McMinn said that the opening words, referring to Mr. Cradock "negotiating the purchase" rather than "purchasing" indicated that Mr. Cradock was purchasing for another. The letter of Apr. 24, which I mentioned, he signed as "governing director", which might indicate that he was concerned in the first transaction for his group of companies; but it seems to me immaterial whether he was acting for himself or another. If his actions were for another, then indications that the plaintiff company's money was being used to purchase the plaintiff company's shares by Mr. Cradock would mean purchase by Mr. Cradock for another, which, as we know, was in fact himself. Mr. McMinn's explanation that "negotiating the purchase" indicated that Mr. Cradock was purchasing for another was based on Mr. McMinn's construction of his own language, influenced, I think, by his defensive approach. I do not accept that Mr. McMinn, when he wrote the minute, looked beyond Mr. Cradock or considered that Mr. Cradock was acting as an agent.

The payment of the £232,500 into Mr. Cradock's account was clearly to the benefit of District. When it was paid out of the plaintiff company's account, Mr. McMinn realised this perfectly well, as appears from his evidence. In his memorandum of May 20 to his head office he said "I took the view that as we had



A released our draft we were committed at this stage", which he explained as meaning that, on Apr. 25, after releasing the District draft for £195,000 to Contanglo, District would either have to rely on getting the £195,000 from Mr. Cradock or pay the Woodstock cheque into his account. He could have relied on the shares mentioned in the undertaking as security for payment by Mr. Cradock, but that did not occur to him and, indeed, could not have occurred to him if, as he said, he did not realise that the shares mentioned in the undertaking had been purchased by Mr. Cradock. It is clear that, at the time that the Woodstock cheque was honoured by Mr. McMinn, he was fully aware that it was designed to make good Mr. Cradock's debt for the Contanglo draft, and in that sense its payment was a benefit designed for the bank. Its relevance for present purposes is insofar as it bears on the knowledge which the plaintiff alleges. This relevance is, to my mind, as evidence of District's and of Mr. McMinn's personal and official interest in the honouring of the cheque, and thus on the course which they took and the evidence which they give. It is not relied on as an independent ground for establishing liability, apart from the alleged knowledge.

So it was, as District well knew, on the change of control of the plaintiff company with a differently constituted board, by completion of the purchase of its majority shareholding, involving payments of its price and handing over of documents of title, that the following events occurred immediately and virtually simultaneously, to District's knowledge: the plaintiff company's account was transferred from National to District by banker's drafts; the documents for drawing on the new District account were signed; the new account was drawn on by cheque for an amount not far short of its total credit, which cheque, by endorsement, transferred the plaintiff company's moneys to Mr. Cradock. Moreover Mr. Cradock, as District knew, was the person whose "influence" had secured the transfer of the plaintiff company's account to District and who had "been negotiating the purchase", and who had obtained the banker's draft for £195,000, already delivered by District to Contanglo and debited to Mr. Cradock's account, on promise of cover which the Woodstock cheque drawn on the plaintiff company's account would alone now provide.

These facts appear clearly to convey that the plaintiff company's money was being used to finance the purchase of shares in the plaintiff company by Mr. Cradock. Mr. McMinn agreed that he may have drawn the conclusion in May that the plaintiff company's money was being used to finance the purchase of the shares. He also agreed that he had all the material to draw that conclusion on Apr. 25. Mr. Reynolds agreed that the most likely explanation of the material was that the shares were being purchased by Mr. Cradock out of District's moneys replaced by the plaintiff company's moneys. Having regard to the evidence, in particular of Mr. Coombes and Mr. Scott, on the indications of the use of a company's money to buy its shares, then it seems to me a fortiori that a reasonable banker would have no hesitation, on the facts available to District and Mr. McMinn in particular on Apr. 25, in concluding, before debiting the plaintiff company's account with the Woodstock cheque payment, that the plaintiff company's moneys were being used for the purchase of the stock in the plaintiff company by Mr. Cradock. Mr. McMinn and Mr. Reynolds did not do so, because they were completely without any experience in such take-over transactions, because they were not of a calibre to deal with such matters, and, being the kind of persons that they were, they had what Mr. Reynolds not inaptly called a "fixation" about getting the endorsement confirmed.

For reasons already given in considering the law, District, in my view, is liable as claimed in equity because it paid the Woodstock cheque out of the plaintiff company's moneys in circumstances known to District before the payment and in which a reasonable banker would have concluded that the payment was to finance the purchase by Mr. Cradock of the stock in the plaintiff company, even though Mr. McMinn and Mr. Reynolds did not then realise that the payment was being so used. This does not seem to me exacting for a bank, or to require from it

any unreasonable standard of care, or cause any substantial inconvenience to the conduct of its affairs, as was suggested—although without substantiation by evidence. The evidence showed that the banks put severe limits, as is common knowledge, on powers of bank managers to grant overdrafts and thus risk the bank's money—limits which bear no comparison at all with the amounts at risk of the plaintiff company on the Woodstock cheque. The evidence also showed that District gave explicit instructions to avoid their being liable for conversion of cheques, when acting as collecting banks. For my part, I can see no substantial difficulty in banks providing against such exceptional transactions, involving substantial amounts, as in this case, being carried through by officials completely inexperienced in such transactions and unqualified to deal with them. If a bank allows such officials to conduct such business it is asking for the kind of trouble which it has got in this case. It does not seem to me hard on a bank to say that it cannot rely on escaping liabilities by entrusting its business to officials completely unqualified to deal with it when if it ensured—as it readily could—that such business would be handled by qualified officials it would, in the event of loss, be liable.

I can deal briefly with the claim in negligence in the performance of the duty which as bankers District owed to the plaintiff company as their customer by honouring the £232,500 cheque drawn on the plaintiff company's account, without any or sufficient enquiry as to the purpose for which it was being applied. It is, of course, common ground that the plaintiff company was District's customer at the relevant time, when the Woodstock cheque was paid, and that District made no enquiry.

All the matters already considered as relevant to the question whether a reasonable banker would have known the purpose for which the £232,500 was to be applied are also relevant (if, as I have concluded (171), there was a duty of care from District to the plaintiff company as its customer) to the question whether the circumstances establish that (in accordance with that duty) District should have enquired as to the purpose for which the money was being applied. If a reasonable banker should have known the purpose as I have concluded, then a fortiori District should, in the performance of its duty of care, have made enquiry. The plaintiff company's directors were obviously persons of whom enquiry should be made.

Mr. McMinn said that if there were a cheque for a large amount, signed by two directors and made payable to one of them, he would, before paying the cheque, enquire of the other of them whether the payment was for a proper consideration. He said he would make the enquiry whether he was paying banker only, or both paying and collecting banker. He agreed also that he knew that Mr. Cradock was in a position to control the share holding or the board and thus influence the transfer of the plaintiff company's account to District. So it was submitted that, even apart from other factors, the transfer of the plaintiff company's account to District by Mr. Cradock's influence, followed immediately by payment by endorsement of a cheque to Mr. Cradock of almost the total amount of over £200,000 paid into the account to meet the £195,000 indebtedness to District for the Contango draft, was such circumstance as to put a reasonable banker on enquiry. I agree. Moreover, when there are added the other matters already considered as relevant to the question whether a reasonable banker would have had knowledge of the purposes for which payment of the plaintiff company's moneys indirectly to Mr. Cradock was made, the establishment of the plaintiff company's case in negligence is correspondingly strengthened. So I conclude that, on negligence too, the plaintiff company's case against District is established.

*The fourth defendant, Woodstock.*

The claim against Woodstock is that it is liable to account as constructive

(171) See p. 1137, letter I, ante, and letter B, above.

A trustee for, and repay with interest, £232,500 of the plaintiff company's moneys, applied to enable Woodstock to lend £232,500 to Mr. Cradock to purchase stock in the plaintiff company in the furtherance of an arrangement made by the defendants to the first transaction claim, including Woodstock (or some of them to which the others were privy), or, alternatively, received of Woodstock knowing that it was or represented money of the plaintiff which had been so misapplied.

It is perfectly clear from Mr. Sarsfield's letter of Apr. 23, 1958, to Mr. Cradock, which I have already quoted fully, that the plaintiff company's £232,500 paid to Woodstock was for the purpose of paying it over to Mr. Cradock to finance the purchase by him of stock in the plaintiff company. That Mr. Sarsfield, a director of Woodstock, by his part in the meeting of Apr. 25, which I have already described, including his endorsement to Mr. Cradock of the £232,500 cheque to Woodstock (later confirmed by the Woodstock board) took part in carrying out the arrangements mentioned in the letter of Apr. 23, 1958, as varied in some immaterial respects over which we need not pause.

For Woodstock it was submitted that there was no reason for supposing that Mr. Sarsfield had any idea on Apr. 25 that Mr. Cradock would not inject assets into the plaintiff company. This is doubtless so if the injection referred to was not injection contemporaneously with or immediately on the purchase of the stock, but at some wholly undetermined time in the nebulous future. There was no reference at all to injection of assets, still less in return for Woodstock's endorsement or payment to Mr. Cradock. The letter makes it clear, in express terms, that the money was to be used for the purchase by Mr. Cradock of the stock in the plaintiff company—not for purchase by the plaintiff company of properties transferred to it from Mr. Cradock or anyone else. So it is clear that Woodstock knowingly participated in applying £232,500 of the plaintiff company's moneys in giving financial assistance for the purchase by Mr. Cradock of stock in the plaintiff company and knowingly received that sum accordingly.

Woodstock is, in my view, liable as constructive trustee as claimed, subject to three questions of law which I shall deal with later, namely, novation, satisfaction and illegality. Indeed, Woodstock did not dispute its liability as constructive trustee as claimed, subject to those three questions of law which in substance constituted its defence.

#### SECOND TRANSACTION DEFENDANTS

The liability, with which I will now deal, of the second transaction defendants separately is subject to the decisions on the questions of law, which I have indicated will be dealt with after considering the cases against these defendants. In particular, the present consideration of liability is on the footing that Mr. Cradock's payments of £207,500 and £42,000 were payments to the plaintiff company so as to become the plaintiff company's own moneys at the plaintiff company's disposal. How far there were such payments, however, will be considered when I come to deal with them under the heading of "satisfaction".

*The first and eighth defendants, Mr. Cradock and Mr. Burden.*

The first two defendants with whom I am concerned in the second transaction are Mr. Cradock and Mr. Burden, and it will be convenient to deal with them together.

Of course, the motion for judgment against Mr. Cradock, in default of defence, applies to the claims against him in the second transaction. The claims against Mr. Cradock are based on the allegations that he was a party to an arrangement with Mr. Burden and Mr. Sinclair to misapply the plaintiff company's moneys by the second transaction—in the case of the £207,500 to finance the purchase of the stock in the plaintiff company by Mr. Burden from Mr. Cradock—and that he received the plaintiff company's moneys knowing them to be so misapplied. As in the first transaction, however, Mr. Cradock's part in the second



transaction, so far as it bears on the cases with regard to the other defendants, A  
has to be established positively.

The claims against Mr. Burden are based on the allegations that he misapplied the £207,500 and the £42,000 of the plaintiff company's moneys, in bad faith and in breach of his duty as director and furtherance of an arrangement with Mr. Cradock and Mr. Sinclair to misapply them, in the case of the £207,500 to finance the purchase by him of shares in the plaintiff company from Mr. Cradock, B  
and that he knowingly received those sums knowing that they had been so misapplied.

The claim against Mr. Cradock and Mr. Burden is in equity to replace those sums with five per cent. interest.

Mr. Burden, whatever his faults, was a likeable person with attractive boyish qualities, though on occasion he gave the impression of ruthlessness. He was an accountant, knowledgeable about companies and business. He was quick and had very considerably ability. In general he appreciated the significance of the questions put to him. He was insistent throughout on declining to say in evidence anything which he said was not within his direct personal knowledge; but I was left with the firm impression that such professed ignorance was on occasion a relief to him. His evidence has to be approached with considerable C  
caution; but, subject to these reservations, particularly with regard to evidence that directly affected himself, he was generally helpful and co-operative. D

Mr. Burden's evidence was that Mr. Stekel and Mr. Kraft introduced the acquisition of the plaintiff company to Mr. Burden, that Mr. Stekel and Mr. Kraft acted for Mr. Cradock, that they told Mr. Burden that they would organise the transaction in such a way as to use the plaintiff company's liquid resources E  
to buy the controlling block of shares in the plaintiff company without infringing s. 54 of the Companies Act, 1948, and without Mr. Burden having to find cash of his own for the purpose. Mr. Burden did not find any cash and made no application to any bank to finance the purchase. He said that he left it to Mr. Stekel and Mr. Kraft to organise the transaction. Mr. Stekel and Mr. Kraft acted as agents for both Mr. Cradock and Mr. Burden in agreeing and carrying F  
through the transaction. I accept this evidence of Mr. Burden.

Mr. Burden did not in any material respect dispute the facts as prima facie established by the documents and already stated by me. He agreed that none of the circle of three cheques for £207,500 each could have been met apart from the others in the circle; and he agreed that he obtained the stock. So that, if the Cradock £207,500 payment to the plaintiff company was a real payment of G  
that sum for the plaintiff company's own purposes, then the payment to Mr. Burden for payment to Mr. Cradock for the shares which Mr. Cradock sold to Mr. Burden was a misapplication of the plaintiff company's funds to finance the purchase by Mr. Burden from Mr. Cradock of the stock in the plaintiff company which Mr. Burden obtained. Mr. Burden also agreed that, assuming Mr. Cradock's £42,000 cheque to the plaintiff company was a real payment of that sum to the plaintiff company for the plaintiff company's purposes in return for the H  
Mr. Briggs bills, then the payment by the plaintiff company to Mr. Burden of £42,000 was a payment for which the plaintiff company got nothing. The facts with regard to the Hopper agreement I have already sufficiently stated; and there is no evidence that comes anywhere near establishing that the plaintiff company had any interest in the Hopper agreement. Nor is there any reasonable I  
foundation for concluding that Hopper's assets or any other assets were to be injected into the plaintiff company as part of the completion of the purchase of the shares in the plaintiff company by Mr. Burden, or in return for the £42,000 payment to Mr. Burden.

So, in accordance with my conclusions already stated on the relevant law, but subject to the questions of law that I shall deal with later, I conclude that Mr. Burden is liable to replace the £207,500 and the £42,000 with interest as claimed.

A *The ninth defendant, Mr. Sinclair.*

The claim against Mr. Sinclair is in equity to replace with five per cent. interest the sums of £207,500 and £42,000 of the plaintiff company's moneys, misapplied in bad faith and in breach of duty as director of the plaintiff company and pursuant to an arrangement between Mr. Cradock, Mr. Burden and himself, as to the £207,500 to finance the purchase by Mr. Burden from Mr. Cradock of stock in the plaintiff company, and as to the £42,000 otherwise than for the purposes of the plaintiff company. Mr. Sinclair's case, as presented in his final speech, was principally that he was party to the payments because he was led to assume that they were for the injection of assets into the plaintiff company.

[HIS LORDSHIP reviewed the evidence and the relevant facts and circumstances concerning the claim against Mr. Sinclair in regard to the £207,500 cheque and concluded:] I am satisfied that Mr. Sinclair knew perfectly well that the £207,500 cheque drawn on the plaintiff company had been paid as the plaintiff company's bank account showed, and that it had been paid without any injection of assets; and in the repetitions over the same ground in his evidence he only once suggested the possibility that Mr. Burden might be raising funds from a bank to finance the purchase of the shares. It is clear that Mr. Sinclair handed over the plaintiff company's cheque, without security, into the control of Mr. Burden, who was buying control of the plaintiff company and, according to Mr. Sinclair's evidence, on an assurance of the injection of assets into the plaintiff company "as a concomitant", but without any security for such injection or any step being taken to identify or value such assets and without being able to give any explanation why the cheque for assets should be so handed over beforehand. This was, at its lowest, a misapplication of the plaintiff company's funds. I am completely satisfied, however, that Mr. Sinclair knew that they were to be used to pay for the purchase by Mr. Burden from Mr. Cradock of the stock in the plaintiff company and that he handed them over for that purpose. Doubtless he hoped and expected that there would be, at some stage, an injection of some assets; but neither his hopes nor his expectations nor the assets materialised, and they do not prevent his being liable with respect to the £207,500 as claimed.

[HIS LORDSHIP then turned to the £42,000 payment from the plaintiff company's funds, briefly referred to the evidence and continued:] Although the evidence lacks the precision that could be wished, I am satisfied that Mr. Sinclair concurred in the payment of the £42,000 to Mr. Burden without consideration for it and without considering whether it was in the plaintiff company's interests to do so. It seems to me that Mr. Sinclair knew what he was doing and what risks he was running and making the plaintiff company run, though doubtless with regard to the £42,000, as with regard to the £207,500, in the hope and expectation that assets would at some future time be injected by Mr. Burden into the plaintiff company. If Mr. Sinclair did not perfectly well know this, then the conclusion seems irresistible that he was just a Mr. Burden man, doing exactly what Mr. Burden told him to do, regardless of his responsibilities, and, for reasons already given in considering the law, that abnegation in favour of Mr. Burden does not, in my view, enable him to escape liability.

So, subject to the outstanding questions of law, I conclude that Mr. Sinclair is liable as claimed with regard to the £42,000 as with regard to the £207,500 paid out of the plaintiff company's funds to Mr. Burden.

*The seventh defendant, The Bank of Nova Scotia.*

The claim against the Bank of Nova Scotia ("Nova Scotia") can be dealt with comparatively briefly, despite its importance. The relevant law has already been dealt with and after a very thorough and powerful analysis of the case against Nova Scotia by its counsel, counsel for the plaintiff company, at the

end of the day, presented his case within a comparatively small ambit and, A  
and, in my view, very rightly and helpfully so.

The case is against Nova Scotia in equity as constructive trustee to replace  
the £249,500 with five per cent. interest and for damages for common law  
negligence in performing the duty owed by it as banker to the plaintiff company  
as its customer by paying the £249,500 out of the plaintiff company's account. B  
The case in equity is based, not on actual knowledge, but on knowledge which  
it is said Nova Scotia would have had if it had made enquiries which it was  
under a duty to make. The case in negligence is also based on failure to make  
enquiry which it ought to have made. In equity, Nova Scotia would be liable  
to the same extent as it would have been if it had known what it would have  
known if it had made proper enquiries and assuming that honest answers  
would have been thus obtained. In negligence, if one's failure of duty to make C  
enquiries is established, then negligence is established and what follows is  
damages in the usual way. No distinction has been drawn between facts putting  
on enquiry under the equitable claim on the one hand, or under the negligence  
claim on the other hand, and, in my view, for reasons already given in considering  
the law, the standard in each case is that of a reasonable banker. The first  
material question in each case is whether the facts would have put a reasonable D  
banker on enquiry. If so, the question would arise whether it should have  
made enquiries which it did not make and, in the case of the equitable claim,  
what answers it would have received to such enquiries.

The plaintiff company alleges that Nova Scotia ought to have had knowledge  
of the purposes for which the moneys were to be applied from the facts alleged  
in the statement of claim and through their officials who honoured the cheques. E  
Further particulars, given in the course of the hearing, consisting of documents  
were not relied on. There seems to be no advantage in making further reference  
to particulars, since the matters on which the plaintiff company eventually  
rested its case were limited to three only, to which I shall soon come.

The only Nova Scotia representative with whom we need to be concerned is  
Mr. Evans, who was the second ranking official of the Nova Scotia branch F  
dealing with this matter. Mr. Evans gave evidence and he was rightly accepted  
for the plaintiff company as a completely honest, reliable and helpful witness.  
The mandate for the drawing of cheques on the plaintiff company's account at  
Nova Scotia, signed by Mr. Sinclair and Mr. Burden, as the plaintiff company's  
cheques for £207,500 and £42,000 were signed, is accepted by the plaintiff  
company as being in order. G

I now come to the three matters relied on by the plaintiff company to establish  
that Nova Scotia is, in accordance with the law which I have already considered,  
to be treated as having knowledge because it was put on enquiry and indisputably  
made none.

1. On Feb. 10, almost immediately after the banking resolutions of Jan. 26  
and after the mandate was given, the plaintiff company's cheque for £207,500 H  
was paid out of its account at Nova Scotia. What is relied on is that this payment  
was, in itself, and in relation to other entries in the plaintiff company's bank  
account, for a very large sum and that it was paid immediately after the resolu-  
tions and mandate. It was suggested that these facts were enough in themselves  
to put the Nova Scotia bank on enquiry. But this payment of £207,500 was not  
an isolated payment out of the account, but a payment counter-balanced by a I  
payment into the account. It was in fact part of the three cheques circular  
movement, and it was as such that it was presented to and seen by Nova Scotia.  
It therefore seems to me unrealistic and unhelpful to consider what the effect  
of such payment in isolation would have been, had it occurred—which it did  
not.

2. The payment was to Mr. Burden's account with Nova Scotia and that  
account was opened with that payment and was closed after three credit items  
were counter-balanced by corresponding debit items (the credit items being the



- A £207,500 and £42,000 and a sum of £44,600, with which we are not concerned, debited and credited on Apr. 28, 1960). Again the £207,500 was part of the circular cheque operation, as Nova Scotia knew, and it was the first of the items in Mr. Burden's account with Nova Scotia. The account remained open after this. The £42,000 debit and credit was the second item in the account; and the account again remained open and in fact was operated for the third item.
- B Nova Scotia has to be judged in the light of the facts before it when it honoured the cheque, and not in the light of the subsequent events. The £207,500 cheque was paid by Nova Scotia in the light of what was then known to Nova Scotia, and the £42,000 in the light of what was known when that sum was paid, including, doubtless, its knowledge of what had occurred when the £207,500 was paid. Each of these two cheques from the plaintiff company into Mr.
- C Burden's account was part of similar circular movements of cheques between the same parties, and, again, they must be judged, not in isolation, but as part of these circular movements. So the opening and closing of Mr. Burden's account taken in isolation does not appear to me to be realistic or helpful, when it can only be truly assessed as part of the operation of which it formed part.

- D 3. So I come to the third matter relied on by the plaintiff company, which is the nub of the plaintiff company's case against Nova Scotia. It is the circular movement of the £207,500 cheque and the explanation given to Mr. Evans about it. Mr. Evans said that he had no recollection of any event involving the £42,000 cheques. The bank's liability for that later operation seems to me to stand or fall with its liability for the £207,500 cheque operation—nor do I
- E understand that, in this respect, any party has sought to draw any distinction between them.

- On Feb. 10 during the luncheon hour, when the manager and probably a counter official were out, Mr. Evans was in charge and at his desk behind the counter. Mr. Bieber called and Mr. Evans attended to him. He asked for the manager and Mr. Evans took him into the manager's room. Mr. Evans agreed
- F that Mr. Bieber could have asked for the manager because it was a very unusual transaction; and that he gave his explanation as a serious explanation to have some effect on Mr. Evans's mind and, it could be, to set it at rest. Mr. Bieber produced the three cheques which he wanted debited and credited to the accounts of the plaintiff company and Mr. Cradock and an account to be opened for Mr. Burden. He explained, either voluntarily or in answer to Mr. Evans, that they
- G were for "internal accounting reasons" or "internal book-keeping reasons". Mr. Evans filled in three paying-in slips, with copies for the parties, for the payment of the three cheques through their accounts. He had no knowledge of Mr. Burden or Mr. Bieber, but Mr. Bieber had the cheques and Mr. Evans considered the position and accepted what Mr. Bieber said. Was the result of his consideration wrong and ought a reasonable banker to have made enquiry,
- H which Nova Scotia did not make?

- There is no suggestion that Mr. Evans or Nova Scotia was in fact suspicious and Mr. Evans denied that he was suspicious. Mr. Evans knew that Mr. Cradock had had a large holding of stock in the plaintiff company in November, 1958, but he did not know that he had a holding in the plaintiff company in February, 1960. He did not know that Mr. Burden had any intention of purchasing any
- I of those shares or that any deal with regard to the stock in the plaintiff company was being transacted or contemplated. He believed what Mr. Bieber said, and he had no knowledge with regard to Mr. Bieber, Mr. Cradock, Mr. Burden or the plaintiff company that would cause him to doubt Mr. Bieber's explanation. He saw that, at the end of the three cheque operation, the balance in the accounts would be exactly the same as before.

Mr. Evans was cross-examined on Mr. Bieber's explanation—not, however, on "accounting reasons" or "book-keeping reasons", but upon their being "internal". Mr. Evans suggested that, though he agreed that the debiting

and crediting of the cheques would be payment, they would also be evidence of payment; and this, of course, was not challenged. The cross-examination then went on the footing that "internal" applied only to internal to the plaintiff company. In this cross-examination Mr. Evans agreed that it was an inappropriate description and, therefore, an unsatisfactory explanation; but Mr. Bieber had not said of "internal" that it was internal to the plaintiff company, and counsel for Nova Scotia rightly observed that it could refer to internal to the parties. Counsel for the plaintiff company himself very fairly suggested in cross-examination that "internal" might well have been used to describe moneys passing between a company and its subsidiaries; and, similarly I should have thought, between a company and some individuals, even though subsidiaries and individuals could be regarded as external to the Company. As my conclusion on the law is that the standard to be applied is the objective standard of a reasonable banker, what I am concerned with is not Mr. Evans' subjective reaction and statement on cross-examination that "internal" made Mr. Bieber's explanation unsatisfactory, but whether it should, in the circumstances at the time, have put a reasonable banker on enquiry.

In my view, it is quite immaterial whether Mr. Bieber's explanation was in answer to an enquiry or not. If it was in answer to an enquiry, which did not put on further enquiry, *cadit quaestio*; and if it would have been an answer to an enquiry that was not put and did not put on further enquiry, then similarly *cadit quaestio*. The only purpose of the enquiry is to get an answer, not to perform some ritualistic mumbo-jumbo, and if the purpose of the enquiry is served without the enquiry it is so much better for the saving of words—though not, unfortunately, in this judgment.

The explanation stands subject to the criticisms that were made, and rightly made, of it in cross-examination. It is right that the explanation should be dissected verbally, as it was, so that all the implications are brought out clearly for the assistance of the court. When it comes to judgment, however, I have to regard it, not as technical terms in conveyancing, or words used with precision in some leisurely legal document, but as more rough and ready language used in a business context and to be accepted or rejected or questioned with expedition. In the *Penmount Estates* case (172) the bank was held not negligent, though, as **MACKINNON, L.J.** said (173),

"there were a good many questions on which a lawyer who is trained very differently from a bank clerk, would probably have had it in mind to cross-examine".

So regarding the explanation, in the light of all the relevant considerations which I have referred to in considering the law, and of the surrounding circumstances which I have mentioned, it seems to me that the explanation, justifiably assumed to be honest, did not put Nova Scotia on further enquiry. What in the final analysis is said to put a reasonable banker on further enquiry is the one word "internal". Despite it being subject to the criticisms which I have described, that is not to my mind enough.

If, contrary to my view, Nova Scotia were under a duty to make enquiry, then as they did not do so the claim in negligence would succeed. Success in the claim in equity would depend on the answer which Nova Scotia would receive to their enquiries, on the footing that the answers were truthful. The obvious persons of whom enquiry should be made were the plaintiff company's directors, the signatories Mr. Sinclair and Mr. Burden. If Mr. Sinclair had been asked to explain what the payment by the plaintiff company was for, he would have said, in accordance with my finding in considering Mr. Sinclair's liability, that it was for payment by Mr. Burden for Mr. Cradock's stock in the plaintiff company. Alternatively, he would have said, as he maintained in his evidence,

(172) (1945), 173 L.T. 344.

(173) (1945), 173 L.T. at p. 346.

A that the cheque was drawn pending completion of such purchase and, perhaps, "as a concomitant" to injection of assets into the plaintiff company by Mr. Burden; or that he wholly relied on Mr. Burden. Mr. Sinclair said no payment would have taken place if Nova Scotia had enquired of him about the payment. Mr. Burden would have said, if he answered truthfully to the enquiry, that he was using the £207,500 to pay for the purchase of Mr. Cradock's stock in the plaintiff company, and the £42,000 for his own purposes or for purchasing the Hopper Company, with the addition, perhaps, that he had it in mind, though without telling anybody, that he might make it over to the plaintiff company. Payment in the face of any of these answers would, in my view, make Nova Scotia liable in equity as claimed; but, as I have said, no occasion for enquiry, in my view, arose (see p. 1144, letter H, ante) and, therefore, Nova Scotia is not

C liable.

#### THE REMAINING QUESTIONS OF LAW (5) TO (9)

Namely, (5) Novation, (6) Satisfaction, (7) Loss from the second transaction, (8) Illegality, (9) Section 448 of the Companies Act, 1948.

#### D 5. *Novation.*

I come now to two inter-related but separate defences to liability on the first transaction, first novation and, secondly, satisfaction. With regard to each of these defences it will be convenient to consider law and fact together. Novation is relied on by Woodstock to exonerate it from its alleged liability which is as

E constructive trustee on the first transaction. Satisfaction is relied on to exonerate from liability all those who might be held liable as claimed on the first transaction, whether as trustees, constructive trustees or in negligence. First, then, novation.

It is claimed by Woodstock and not disputed by the plaintiff company that there was a contractual liability, a debt, from Woodstock to the plaintiff company with regard to the £232,500 paid under the plaintiff company's cheque to Woodstock in the first transaction. The plaintiff company, of course, in this action claims not on that debt but against Woodstock (inter alios) as constructive trustee to account for and replace that sum. It is not disputed that there was a novation. The issue is whether it was limited to Woodstock's separate debt to the plaintiff company or extended to the liability alleged in the action against

G Woodstock as constructive trustee, jointly and severally with others. In the course of the argument the question arose whether the second transaction was a sham cloaking what did not appear on its surface. The defendants brought forward convincing considerations to the contrary, and as the plaintiff company was not concerned to press opposition to this, I will not pause over it.

The novation relied on is that which, it is not disputed, occurred by reason of the resolution at the first meeting of the plaintiff company's board on Jan. 26, 1960, and the exchange of cheques between Mr. Cradock and Woodstock, acting on the footing of that resolution, to all of which I have already alluded. The resolution was that "the amount due to the company from Woodstock Trust, Ltd., F.R.C. Properties and General Investment, Ltd., and M.V.R. Motors, Ltd., be taken as to £207,500 . . . by . . . Mr. Cradock . . . and as to £42,000 . . . or such balancing figure as may be due by Henry Briggs Son & Co. (Trust), Ltd."

I

The resolution itself points to a debt and not to a liability in equity. The "amount due" and the "balancing figure" indicates specific liquidated amounts into whose calculation the interest rate (eight per cent on the debt) would enter, and there was no basis for an equitable claim against F.R.C. and M.V.R. which, in the resolution, were bracketed and treated on the same footing as Woodstock. It is clear from Mr. Cradock's letters in evidence, that his mind was directed to the contractual debt; and Mr. Jacobs' evidence was to the effect that no



thought was given to the equitable claim. Indeed, the case of the relevant defendants has throughout been that the payment of the £232,500 by the plaintiff company to Woodstock was a loan, and that there was no question of any basis for an equitable claim against Woodstock any more than against M.V.R. and F.R.C. I am satisfied that none of the relevant parties had in mind any other basis of liability of Woodstock to the plaintiff company than in debt with regard to the plaintiff company's loan to Woodstock. In my view, what this novation, on its true construction, was purporting to effect was the substitution of Mr. Cradock and Mr. Briggs in place of Woodstock as debtor with regard to the amount due under the £232,500 loan to Woodstock at eight per cent. interest. Is it, nevertheless, a novation which disposes of Woodstock's liability in equity as constructive trustee?

For Woodstock it was conceded that it was precluded before me, by the ratio decidendi in *Quistclose Investments, Ltd. v. Rolls Razor, Ltd. (in voluntary liquidation)* (174) from succeeding in the submission that the relationship of debtor and creditor for money lent ipso facto excludes any conception of constructive or other trust arising out of what establishes the relationship of debtor and creditor; but the submission was kept open for a higher court.

It seems to me at least questionable whether novation, as contrasted with release, is applicable to wrongdoing at all as contrasted with contract; but I will not pursue this, as it was not canvassed before me and it does not affect my conclusion. It is sufficient that it was not suggested, nor in my view could it reasonably be suggested, the Mr. Cradock and Mr. Briggs by novation took over the liability of Woodstock in equity as constructive trustees. So what the submission for Woodstock comes to is that, though it was novation, it was novation with regard to debt only. It could only be elimination with regard to the separate claim in equity. There was no conscious act of such elimination, for example by express release or agreement. Nor, in my view, is it necessarily implied in the novation.

It is said, however, that, so far as the same facts establish rights and remedies at common law and equity, then an agreement, where appropriate by release assignment or novation, affecting the rights and remedies at common law would equally affect those in equity. It is not disputed that this may occur where liabilities and remedies are provided in common law and equity to secure payment of the same sum for the same reason on the same facts, for example for a principal to recover an agent's secret profit; where the common law implies a contract for payment of the money as money had and received to the principal's use, and equity imposes a constructive trusteeship of the money for the principal; the common law use and the equity trusteeship being applied because in the eyes of common law and equity alike it is inequitable for the agent to retain the money. In our case, however, the basis of the claim which is made in equity against Woodstock as constructive trustee is separate from any claim which might have been made against it as debtor but which, in fact, has not been made. The claim in equity is based on the application of the money by the plaintiff company's directors with the participation of Woodstock, through the loan, to the purchase of the plaintiff company's stock. The claim in debt is made on the loan, the claim in equity on surrounding circumstances that make the loan an instrument of misapplication of the plaintiff company's funds by the directors, with the participation of Woodstock. The claim in debt existed without relying on the facts establishing the constructive trusteeship; and the claim with regard to the constructive trusteeship would exist even though the money paid by the plaintiff company to Woodstock did not constitute a loan. The claim in debt arises ex contractu, and in equity from wrongdoing, in debt for the amount lent plus eight per cent. interest, and in equity to replace the amount misapplied at an equitable rate of interest. The claim at common

A law is against Woodstock only, the claim in equity is against Woodstock jointly and severally with others.

In my view, the novation which occurred, neither in intention, nor on construction of the contract which constituted novation, nor in its effect, comprised any obligations as constructive trustee upon which the plaintiff company's claim is founded in these proceedings. What it did was to place Mr. Cradock and Mr. Briggs in the place of Woodstock with regard to Woodstock's outstanding debt to the plaintiff company.

#### 6. Satisfaction.

So I pass to the defence of satisfaction, which, as I have said, is relied on against all claims based on the first transaction. The plaintiff company and those who are defendants with regard to the second transaction contest this defence of the defendants to the first transaction. The satisfaction relied on is satisfaction of Woodstock's debt to the plaintiff company for £232,500 plus outstanding interest at eight per cent. taken over as to £207,500 by Mr. Cradock and as to £42,000 (or the balance of the debt) by Briggs.

Any such satisfaction was of the whole of the Woodstock debt, and as that debt was in respect of £232,500 plus interest at eight per cent. in exceeded the principal amount of £232,500 claimed by the plaintiff company and any conceivable rate of interest which the court might allow on it up to the date of such satisfaction. Consequently, if there were satisfaction, as the defendants submit, the plaintiff company's loss on the first transaction in respect of which it now claims would have been made good, and there would have been no loss in respect of which the defendants could be held liable on the first transaction.

The satisfaction of Woodstock's debt is said to be effected in accordance with the plaintiff company's resolution of Jan. 26, which I have mentioned, by a cheque for £207,500 in settlement of Mr. Cradock's liability and bills payable on future specified dates for a total of £42,000 in settlement of Mr. Briggs' liability; such cheque for £207,500 being delivered on Jan. 26, 1960, and paid on Feb. 10, 1960, as part of the circular movement of three cheques for the same amount which I have described; and such bills being later handed to Mr. Cradock for a cheque dated Feb. 19, 1960, for £42,000 from Mr. Cradock to the plaintiff company and paid on Feb. 25, 1960, as part of another circular movement of three cheques for the same amount, which I have also described. The giving of a cheque with regard to a pre-existing debt is a conditional payment, whose condition is satisfied on the cheque being honoured, whereupon it becomes actual payment as from the giving of the cheque (*Marreco v. Richardson*, (175)). Both the Mr. Cradock's cheques were honoured in this case, in the context of the three cheque circular movement. The question is whether, having regard to what is involved in this movement as part of the second transaction, there was satisfaction?

As I have indicated, the second transaction with its circular movement of cheques was not a sham. In particular, the plaintiff company and Nova Scotia expressly accepted, with regard to the £207,500 cheques, that Mr. Cradock intended to pay off his debt to the plaintiff company by his cheque; that Mr. Burden intended to pay for the stock by his cheque; that Mr. Cradock intended to transfer the stock to Mr. Burden; that Mr. Sinclair and Mr. Burden intended to pay £207,500 of the plaintiff company's moneys to Mr. Burden; and, with regard to the £42,000 cheque, that Mr. Cradock intended by his cheque to redeem the Mr. Briggs' bills and to satisfy Mr. Briggs' indebtedness to the plaintiff company; that Mr. Burden intended to pay £42,000 to Mr. Cradock with regard to Hopper; and that Mr. Sinclair and Mr. Burden intended £42,000 of the plaintiff company's money to be paid to Mr. Burden.

As the second transaction was not a sham, there was payment to the plaintiff company of £207,500 plus £42,000; but was the payment satisfaction?

It was submitted that if the payment by the plaintiff company for £232,500 in the first transaction (and likewise of £207,500 in the second transaction) was to give assistance as alleged by the plaintiff company for the purchase of stock in the plaintiff company, then it was for a purpose made illegal under s. 54 of the Companies Act, 1948, and the payments were unlawful and the plaintiff company's claim therefore fails; or, alternatively, that the payment was valid, in which case the payment of £207,500—it was not only admitted but was submitted—was likewise valid and the payment of the £207,500, together with a payment of £42,000, was in satisfaction of the debt with regard to the £232,500 and interest. It is immaterial whether the validity of such payments arose because s. 54 did not apply at all or because it did not operate, on its wording, to invalidate the payments in accordance with the first ground of decision in *Victor Battery Co. Ltd. v. Curry's Ltd.* (176), which I will consider later when dealing with illegality under s. 54.

Insofar as the plaintiff company's claim fails, on the ground of illegality, then there is no need to rely on satisfaction. The defence of satisfaction only becomes material on the footing that illegality does not make the debt to the plaintiff company irrecoverable. And it seems to me that, as the payments of £207,500 and £42,000 were in fact made, it is immaterial to the defence of satisfaction whether they were tainted with illegality or not. If not, they would stand, and, if tainted, the court would lend no assistance with regard to them and they would likewise stand. It does not follow, however, that because the payments are effective as payments, therefore they operate in satisfaction of the debt. So I return the question asked earlier: were these payments of £207,500 and £42,000 satisfaction?

Such payments, if treated in isolation, would constitute satisfaction. But do they constitute satisfaction in the circumstances in which they were made? If these payments, amounting to £249,500, were only made as part of the three cheque circular movements, by which the payments to the plaintiff company were dependent upon corresponding payments out by the plaintiff company's directors from the plaintiff company's account to the payer, by a scheme in which the payer participates and without advantage to the plaintiff company, then the payer is giving with one hand what he at the same time takes away with the other. The plaintiff company has the satisfaction of a conduit pipe. Even if one whistles half time when the money is in the plaintiff company's hands, yet it must be the final result that matters in this as in other little games, the more so if the game is fraudulent and dishonest and fixed from the start. Satisfaction must be true and real satisfaction and not part of what makes satisfaction a mockery. I do not find it surprising that there is no authority for such a conclusion: and it is my conclusion.

#### 7. Loss from the second transaction.

Did the plaintiff company suffer any loss by reason of the second transaction?

I have concluded that no satisfaction was established by the second transaction, because the payment to the plaintiff company under its three-cheque-circular movement was not, in reality, a payment for the plaintiff company to have at all. As the payment to the plaintiff company did not, however, provide any money for the plaintiff company, the plaintiff company received no money under the second transaction capable of being misapplied; and as the three cheque operation thus, so far as it affected the plaintiff company, merely substituted Mr. Burden's liability to the plaintiff company in place of Mr. Cradock's liability to the plaintiff company, and the plaintiff company conceded that neither was good for the money, there was no damage within the claim for negligence. These considerations are fatal to the plaintiff company's claims based on the second transaction. In the case of *Nova Scotia* they are additional to the reasons which have already been given for the failure of the claims against it. In the cases of Mr. Burden and Mr. Sinclair the absence of receipt by the



A plaintiff company of money capable of being misapplied reverses the decision against them which, as I have indicated, I would otherwise have made.

If, however, there was satisfaction, so that the plaintiff company obtained the £249,500 for itself and its own purposes, the question then arises whether there was misapplication of those moneys under the second transaction, and who was liable for such misapplication, and whether there was negligence on the part of Nova Scotia with regard to those moneys?

With regard to the claim in negligence, it was submitted for Nova Scotia that any damage thereby suffered was too remote to be recoverable. *Overseas Tankship (U.K.), Ltd. v. Morts Dock & Engineering Co. Ltd., The Wagon Mound* (177) laid down that in tort "the essential factor in determining liability is whether the damage is of such a kind as the reasonable man should have foreseen" and whether the defendant "foresaw or could reasonably foresee the intervening events which led to its [i.e. the damage] being done". It was submitted for District that in a claim based on negligence of an agent under contract (as distinct from direct breach of contract), such as the claims in negligence against the banks in this case, the first passage quoted provided the test. This was not disputed and the case proceeded on that footing.

D It seems to me that, if a bank pays a cheque out of its customer's account as Nova Scotia did, and does so negligently, then the loss to the customer is that loss which a reasonable man should have foreseen and is, in the absence of special circumstances, the amount paid on the cheque. It was suggested, however, that there was a special circumstance, namely that when Mr. Cradock was the debtor of the plaintiff company he was not good for the amount of the cheque, as the plaintiff company conceded, and, therefore, so the argument went, the substitution of Mr. Burden as debtor in place of Mr. Cradock resulted in no loss. This submission, however, which we are considering only becomes material if there has been, by the Cradock cheque, a real genuine payment to the plaintiff company for itself constituting satisfaction; and if Mr. Cradock was not good for the amount there was no satisfaction. The special circumstance that Mr. Cradock was not good for the money, i.e. was unable to meet the cheque to the plaintiff company, seems to me contrary to the very hypothesis on which the submission is made, namely that the money was the plaintiff company's own real money as the result of the payment of the cheque by Mr. Cradock. This seems to me the answer to Nova Scotia's submission that there was no damage because Mr. Cradock was not good for the amount of his cheque.

G To pursue the submission on the footing that Mr. Cradock effectively paid to the plaintiff company for itself the amount of the cheque, which he was unable to pay, seems to me to lead to mental contortions that appear, happily, to be unnecessary.

### 8. *Illegality.*

H It was submitted that, insofar as the plaintiff company's claim was founded on payment of its moneys as means of giving financial assistance for the purchase of stock in the plaintiff company, the payment was unlawful and the plaintiff company's claim fails. This submission does not affect the plaintiff company's claim with regard to the £42,000 but it does affect claims made by the plaintiff company with regard to the £232,500 (including the £195,000 claimed against Contango) and the £207,500, insofar as these claims are based on breach of trust and on constructive trusteeship.

I Of course, if the plaintiff company does not establish the breach of trust or requisite constructive trusteeship, there is no need to rely on the defence of illegality against a claim founded on them. So this defence goes on the assumption that, in the case of the directors, breach of trust or fiduciary duty and, in the case of the other defendants, constructive trusteeship is established.

Section 54 of the Companies Act, 1948, provides that

"it shall not be lawful for a company to give . . . any financial assistance for the purpose of . . . a purchase . . . made or to be made by any person of or for any shares in the company . . .".

It is not disputed by the plaintiff company that if a contract or "consensual arrangement" is illegal *ex facie*, or made for an illegal purpose, then the court will not assist in enforcing the contract or "consensual arrangement" (whether e.g. by specific performance, money judgment, or damages) or to recover property (including money) passed in pursuance of it. The plaintiff company contends, however, that such refusal of the court to assist is limited to cases of contract or "consensual arrangement" and does not extend in particular to claims based on breach of trust.

The ambit, within which such consequences of the illegality operate, has by no means been clearly defined. This amply appeared from the arguments before me. The usual field of its operation is certainly contract; but then contract is the field which gives most scope for its operation.

The principle governing such consequences of illegality is not, however, just a twig of any particular branch of the law, but is rooted deeply in public policy—that the courts are not to be instruments for aiding illegality. The policy is not that the courts are not to be instruments for aiding illegality in contract, but may be instruments for aiding illegality in other branches of the law. It is in accordance with this substantial public policy nature of the courts' refusal of aid to illegality that such illegality is not treated as a matter of pleading, or a matter merely as between the parties, but as a matter of which the court will, of its own initiative, take cognisance irrespective of pleadings or wishes of the parties. The objection to aiding illegality is thus not limited in its origin in public policy to any particular form of action.

The principle has, of course, been stated in various terms in the authorities. It has been stated in terms, primarily at any rate, directed to contract, in particular in an accumulation of passages in *Taylor v. Chester* (178) upon which the plaintiff company heavily relied. That, however, was the case of a claim based on contract, namely a contract of bailment. (The relevant illegality was the illegal purpose of that contract. There was a second count in court, namely *detinue*, but it was irrelevant to consider the illegal purpose with regard to *tort*, since the claim in *detinue* was defeated by proof of the contract of bailment.)

The principle has also been stated in general terms: "... we will not assist an illegal transaction in any respect" (per LORD ELLENBOROUGH, C.J. in *Edgar v. Fowler*, (179) "No court will lend its aid to a man who founds his cause of action on an immoral or an illegal act" (per LORD MANSFIELD, C.J. in *Holman v. Johnson* (180); "The act itself being forbidden, I do not think it can be a source of civil rights in the courts of this country" (per LORD RADCLIFFE in *Boissevain v. Weil*, (181)). The first two of these cases were contract cases; and it has been rightly urged for the plaintiff company that the words used should be understood in the contractual context in which they occurred. This would still leave open the question whether the words should be confined to contract by the contractual context, or whether they should be read as words of more general significance, of which contract was a particular application.

In *Boissevain v. Weil* (182) the claim was founded primarily in debt for repayment of the sum borrowed in foreign currency, contrary to war-time Defence (Finance) Regulations, 1939; but there was an alternative claim for money had and received, on the principle of unjust enrichment. Moreover, the view was expressed, without decision in view of the relevant pleading being inadequate, that whether such a claim for money had and received was based on an imputed promise to pay or upon the principle of unjust

(178) [1861-73] All E.R. Rep. 154; (1869), L.R. 4 Q.B. 309.

(179) (1803), 3 East 222 at p. 225.

(180) [1775-1802] All E.R. Rep. 98 at p. 99; (1775), 1 Cowp. 341 at p. 343.

(181) [1950] 1 All E.R. 728 at p. 734; [1950] A.C. 327 at p. 341.

(182) [1950] 1 All E.R. 728; [1950] A.C. 327.

A enrichment, the court would not assist (see in particular LORD RADCLIFFE (183) and LORD SIMONDS (184), expressing his concurrence with the Court of Appeal which had so decided). The relevance of this reference is that it goes to show that a claim, though it be not based on promise or contract, but on the equitable principle of unjust enrichment, yet is affected, like contract, by illegality. It also sustains the view that LORD RADCLIFFE, in stating that he  
 B did not consider than an illegal act " can be a source of civil rights in the courts of this country ", deliberately intended the wide meaning which his words *prima facie* bear.

The plaintiff company contended that this case did not establish more than that the law will not impose an obligation to do that which, if it had been agreed between the parties to it, would have been illegal. The imposing of an  
 C obligation by law is, however, the counterpart of a recognition of a right by law; and all the rights, and the only rights, in which we are concerned in this court are rights recognised by law. So the contention may be amended to read that the case does not establish more than that the law will not assist (or thus recognise) a right to do an illegal act which if it had been agreed between the parties to that act would have been illegal. This goes well beyond saying that  
 D the consequences of illegality which have been mentioned are limited to contract or to " consensual arrangements ". Moreover having got so far, there seems no justification for importing any limitation that the illegal act must be such that was capable of being agreed between parties to it.

It seems to me, with the greatest respect to the able argument advanced for the plaintiff company, that the statement quoted from LORD RADCLIFFE (183),  
 E understood in its ordinary *prima facie* meaning, is to be preferred to confining this principle of illegality to contract and " consensual arrangements ". Does the principle, however, prevent an action succeeding for breach of trust in doing what is illegal?

In *Steen v. Law* (185) directors of a company, incorporated in New South Wales, lent the company's funds which the directors had to give financial  
 F assistance to purchase the company's shares. The liquidator of the company claimed that there had thus been a breach of a New South Wales section, which, so far as material, was in the terms of s. 54; and that the directors had thereby committed a breach of their fiduciary duty to the company and should reimburse the company the sums so illegally applied. It was not contended that the directors were absolved from accounting by reason of the illegality of  
 G the loan by the company. Such illegality was clearly before the Privy Council and, if available against such a claim, provided a complete answer to it. Yet the point was neither taken by the defendants nor by the Privy Council; and it seems to me for the very good reason that the company was not relying for its claim on the unlawful loan and the relationship of creditor and debtor thereby created, but upon the misapplication by the directors of the company's moneys  
 H by way of the unlawful loan. That is the position with regard to the plaintiff company's claim in our case. It was founding its claim, as in our case, not on a wrong done by it as a party to the unlawful loan, but as a wrong done to it by parties owing a fiduciary duty to it. The courts were being invited, as in our case, not to aid illegality but to condemn it. If this were not so, the courts would give redress to companies against directors for misapplication and breach  
 I of fiduciary duty which did not involve the company in illegality, but no redress if they were so serious as to involve the company in illegality.

I appreciate that, in the ordinary case of a claim by a beneficiary against a trustee for an illegal breach of trust, the beneficiary is not a party to the illegality; but that, when directors act for a company in an illegal transaction with a stranger, the company is itself a party to that transaction and therefore

(183) [1950] 1 All E.R. at p. 734; [1950] A.C. at p. 341.

(184) [1950] 1 All E.R. at p. 730; [1950] A.C. at p. 335.

(185) [1963] 3 All E.R. 770; [1964] A.C. 287.



to the illegality. The company, therefore, could not rely on that transaction as "the source of civil rights" and, therefore, for example, it could not successfully sue the stranger with regard to rights which it was claimed that the transaction conferred. If, however, property had passed under the illegal transaction, it is common ground that the right which the holding of that property conferred would be good against all the world, since the court would not assist the only party which had a better title, namely the party from whom it passed under the illegal transaction, to recover it. The right of the holder would be assisted by the courts, because it would be a right established by the holding, without having to rely on any right claimed to be conferred by the illegal transaction - and nonetheless because it was in pursuance of the illegal transaction to which the holder was a party, that the holding in fact arose (see particularly *Sajan Singh v. Sarlara Ali*, (186) and *Chettiar v. Chettiar*, (187). In a claim based on an illegal breach of trust the claimant does not rely on a right conferred or created by that breach. On the contrary, he relies on a right breached by the breach, as the very words "breach of trust" indicate. It is only on the footing that there is a breach of trust that the defence of illegality becomes relevant. So it is assumed, for present purposes, that there is a breach of trust against the plaintiff company by those who are directors and by those who are claimed to be constructive trustees. The constructive trustees are, it is true, parties with the plaintiff company itself to the transaction which is illegal. The plaintiff company's claim, however, for breach of trust is not made by it as a party to that transaction, or in reliance on any right which that transaction is alleged to confer, but against the directors and constructive trustees for perpetrating that transaction and making the plaintiff company party to it in breach of trust owing to the plaintiff company. The breach of trust includes the making of the plaintiff company a party to the illegal transaction. So it seems to me clear on analysis that the plaintiff company is not precluded from relying on breach of trust by a party to an illegal transaction, to which the plaintiff company itself is a party, when the breach includes the making of the plaintiff company a party to that very transaction. Those who proved to be constructive trustees, sharing the responsibility with the directors for the breach of trust, share the liability too.

The result is that the plaintiff company in this case would not, by reason of illegality, be prevented from being reimbursed money paid by it unlawfully under a transaction to which it is a party. This, however, does not mean that this would nullify the ordinary operation of illegality with regard to companies and parties outside the company, and not being or treated as being a trustee to it. But it would prevent such operation shielding those whose position or conduct makes them responsible as owing a fiduciary duty or as constructive trustee.

In the course of the argument *Victor Battery Co., Ltd. v. Curry's, Ltd.* (188) was considered at length, with its implications for this case. It does not seem to me, on the views which I have taken on the different questions of law which have arisen, that the *Victor Battery* case (188) affects my conclusions. As, however, that case has been relied on in various ways in the course of the hearing, and as it may conceivably be material to matters which will have to be considered at the close of this judgment, it may assist the parties, as well as showing a proper and grateful appreciation of the very able argument addressed to me, if I deal with it.

In that case the plaintiff company issued a debenture to secure a loan by another company to another person for the purchase of shares in the plaintiff company. The plaintiff company asked for a declaration that the debenture was invalid. It was decided: (i) that where a company gave by means of a security, which was a debenture, financial assistance for or in connection with

(186) [1960] 1 All E.R. 269 at pp. 272, 273; [1960] A.C. 167 at pp. 176, 177.

(187) [1962] 1 All E.R. 494; [1962] A.C. 294.

(188) [1946] 1 All E.R. 519; [1946] Ch. 242.

- A the purchase of shares in the company, the debenture was a valid debenture, and (ii) that even assuming that the debenture was an illegal contract, the plaintiff company was not a person for whose protection the illegality had been created, so that it was not relieved from the operation of the rule that a party to a transaction void for illegality cannot recover property transferred under it, which is in accordance with the maxim in pari delicto potior est conditio
- B defendantis.

The Court of Appeal in the unreported case of *Essex Aero Ltd. v. Cross* (189) has since confirmed that a company within s. 54 is not a person for whose protection the illegality has been created. As a debenture creates a floating security, which confers a property interest in the property for the time being subject to the security, then it would be in accordance with well established

- C law already referred to that the property interest should remain in the debenture-holder despite the illegality. I am not concerned in this case with any question of the second ground of decision; but considerable criticism has been made of the first ground of decision (see *Dressy Frocks Pty., Ltd. v. Bock*, (190); *E. H. Dey Pty., Ltd. (in liquidation) v. Dey*, (191) and see PALMER ON COMPANY LAW (20th Edn.) p. 443). It is with this first ground of decision that I am
- D concerned.

What was suggested in argument was that if the debenture in the *Victor Battery* case (192), being "security" within s. 54, was valid, then the loans to Woodstock and to Mr. Burden were valid, since "loan" and "security" are treated together on the same footing in s. 54, i.e. in the provision that it shall not be lawful for a company to give "whether by means of a loan, guarantee, or the provision of security or otherwise, any financial assistance . . .". ROXBURGH, J., said (193):

- "The section provides, not that it shall not be lawful for a company to provide a security in order to give financial assistance, but that it shall not be lawful for a company by means of the provision of security to give any financial assistance. In my judgment, 'security' prima facie means 'valid security', although I do not say that it must mean that. Moreover, the words of the section are not 'purport to give financial assistance' but 'give financial assistance' and I cannot see how an invalid debenture could give any financial assistance".
- F

Thus it was insisted that the security must itself be the means of giving financial assistance and that an invalid security could not give financial assistance because, as I understand it, of its invalidity. It has been doubted (for example in the Australian cases) whether an invalid security cannot give financial assistance. In a narrow strict sense, the security itself gives no financial assistance, in the narrow sense of payment, at all, but is security for the repayment of the financial assistance or payment that is given; but that is so however valid the security. The financial assistance for which the security is given is, therefore,

G

H what must be referred to in the section as giving "by means of . . . the provision of security . . . financial assistance". It is in that looser sense that the security is the means of giving financial assistance within the meaning of the section; and this is so even if "security" is interpreted as the document by which this security is given and under which the payment is made. Moreover, in that looser sense, its being the means of giving financial assistance does not depend on

I its being valid, at any rate, when the financial assistance is in fact given. Indeed, the greater the invalidity the greater the assistance, because the less the liability to repay.

I would very readily believe, as ROXBURGH, J., has arrived at an opposite conclusion, that this reasoning is erroneous. Assuming that it is erroneous, it nevertheless does not seem to me necessary to follow from ROXBURGH,

(189) (Nov. 1961), unreported.

(190) (1951), 51 S.R. (N.S.W.) 390.

(191) [1966] V.R. 464.

(192) [1946] 1 All E.R. 519; [1946] Ch. 242.

(193) [1946] Ch. at p. 248; [1946] 1 All E.R. at p. 522.

J.'s observations (194) which I have quoted, that a loan by a company of money as a part of a transaction by which that money is to purchase, and does purchase, shares in the company is a valid loan. Such a loan, unlike the debenture in the *Victor Battery* case (195) is a transfer of the purchase money of the shares, and the transfer is nonetheless effective because the loan is invalid. If such a loan is valid, then it seems to me that it can only be on the ground that the section itself establishes that, despite its declaring it unlawful for a company to give by means of a loan financial assistance for the purchase of shares in the company, yet the ordinary consequences of such illegality are not to follow. Statute, of course, could so provide expressly or by implication.

References in the *Victor Battery* judgment (196) might be called in aid of such a conclusion. (i) That s. 45 of the Companies Act, 1929 (the predecessor of s. 54 of the Act of 1948) unlike s. 79, does not indicate an intention to avoid the security. Section 79 (now replaced by s. 95 of the Act of 1948 (197)) was not, however, dealing with illegality, whose consequences are well established under the general law, but with registration of charges, where the consequences of non-registration were not provided by the general law and, therefore, had to be provided in the statute. (ii) That the section does not indicate an intention to punish the lender. This is unless, be it added (as in our case) the lender is the company: so the lender in our case does not come within this observation. (iii) That to destroy the security, which may be for very large amounts, is out of all proportion to the £100 fine imposed by s. 54. This is a common well-recognised consequence accepted by the courts in cases of transactions being made unlawful and participants being subjected to relatively light criminal punishment. That such provisions might prove a positive boon to the principal offenders has been similarly accepted on the well-accepted ground of public policy that the courts will not aid unlawful transactions but let the consequences fall where they lie. (iv) That a person with "knowledge of what the principal offender is doing" may suffer far more than the principal offender. This is subject to the same observation as in (iii); and the lender would have the "knowledge". (v) The section was designed against the use of cash in shell companies to purchase the shares of those companies. That would, if the plaintiff company establishes its allegations, place the defendants within the design of the section. If the section can be interpreted so as to exclude what is within this design and to exclude what is outside it, then effect can be given to the distinction, but no-one has suggested such an interpretation; and in its absence there appears no good reason for relying on it in some way to exclude the *Victor Battery* case (195) any more than to include what, ex hypothesi, on interpretation is indistinguishable from it, namely the present case. It is with hesitation and misgiving that I come to a conclusion different from that of ROXBURGH, J. (195), but I must state what I see, however faulty my sight.

For my part, I conclude that the loan by the plaintiff company to Woodstock and the payment of the £207,500 by the plaintiff company to Mr. Burden were made unlawful and avoided by s. 54; but for reasons already given this conclusion does not, in my view, defeat the plaintiff company's claims in this case.

#### 9. Section 448 of the Companies Act, 1948.

Those defendants who were directors of the plaintiff (i.e., Mr. Barlow-Lawson, Mr. Jacob, Mr. Burden and Mr. Sinclair) rely in their defence on s. 448 of the Companies Act, 1948. That section provides:

"(1) If in any proceeding for negligence, default, breach of duty or breach of trust against an officer of a company or a person employed by a company as auditor (whether he is or is not an officer of the company) it appears to the court hearing the case that that officer or person is or may be

(194) [1946] Ch. at p. 248; [1946] 1 All E.R. at p. 522.

(195) [1946] 1 All E.R. 519; [1946] Ch. 242.

(196) [1946] 1 All E.R. at p. 521; [1946] Ch. at p. 247.

(197) For s. 95, see 3 HALSBURY'S STATUTES (2nd Edn.) 533.



A liable in respect of the negligence, default, breach of duty or breach of trust, but that he has acted honestly and reasonably, and that, having regard to all the circumstances of the case, including those connected with his appointment, he ought fairly to be excused for the negligence, default, breach of duty or breach of trust, that court may relieve him, either wholly or partly, from his liability on such terms as the court may think fit."

B There are, therefore, three requirements for relief, namely that the defendant (i) acted honestly, (ii) acted reasonably, and (iii) ought fairly to be excused.

The breach of trust relied on is a dishonest breach of trust. Mr. Burden I have held liable for such a breach and, therefore, he is outside the requirements of s. 448. Similarly, in my view, Mr. Sinclair is also outside its requirements. For Mr. Barlow-Lawson and Mr. Jacob, however, it may be said that their responsibility for the dishonest breach was because they put themselves at Mr. Cradock's disposal as I have described; and, as I have indicated, it is the alternative view in the case of Mr. Sinclair that he similarly put himself at the disposal of Mr. Burden. Even assuming that this participation in the breach was not dishonest within the section, yet for them, as directors of a public company, to dispose of large sums, constituting virtually the whole of the plaintiff company's assets, without any regard whatsoever for minority shareholders, and without consideration, but blindly at the behest of the majority shareholder who nominated them to the board, is not to act reasonably. Nor should they fairly be excused.

D I have no hesitation in concluding that none of them comes within the requirements of s. 448 and that they should not be relieved under its provisions.

# E THE OVERALL RESULT

The overall result, therefore, is that the plaintiff company succeeds in its claims based on the first transaction and fails in its claims based on the second transaction (198). So it succeeds: (i) against Contanglo as constructive trustee to repay £195,000 with interest; (ii) against District as constructive trustee to repay £232,500 with interest and for damages for negligence; (iii) F against Woodstock as constructive trustee to repay £232,500 with interest; (iv) against Mr. Barlow-Lawson and Mr. Jacob as directors and trustees to pay £232,500 with interest.

This is no more than an indication of the result. The form of order which will work out the result with precision I will, as I have indicated, deal with after the parties have had an opportunity of considering the judgment. I will G then also deal with the plaintiff company's claim for expenses and with costs.

Order accordingly.

Solicitors: *Solicitor, Board of Trade* (for the plaintiff company); *Gouldens* (for the second defendants); *Bower, Cotton & Bower*, agents for *Slater, Heelis & Co.*, Manchester (for the third defendants); *Beer & Co.* (for the fourth defendants), H *Simmons & Simmons* (for the seventh defendants).

[Reported by JACQUELINE METCALFE, Barrister-at-Law.]

(198) The reason in regard to the claims against Mr. Burden and Mr. Sinclair is that stated at p. 1148, letter I, ante.

\* (Continued from p. 1081) *Montreal Trust Co. v. Canadian National Ry. Co.*, [1939] 3 All E.R. 930; [1939] A.C. 613; *United Australia, Ltd. v. Barclays Bank, Ltd.*, [1940] 4 All E.R. 20; [1941] A.C. 1; *Re V.G.M. Holdings, Ltd.*, [1942] 1 All E.R. 224; [1942] Ch. 235; *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Ltd.*, [1942] 2 All E.R. 122; [1943] A.C. 32; *Bowmakers, Ltd. v. Barnet Instruments, Ltd.*, [1944] 2 All E.R. 579; [1945] K.B. 65; *Gray v. Southouse*, [1949] 2 All E.R. 1019; *Reading v. A.G.*, [1951] 1 All E.R. 617; [1951] A.C. 507; *H. L. Bolton (Engineering) Co., Ltd. v. T. J. Graham & Sons, Ltd.*, [1956] 3 All E.R. 624; [1957] 1 Q.B. 159; *Re P. (G.E.) (an infant)*, [1964] 3 All E.R. 977; [1965] Ch. 568; *Curtis's Furnishing Stores, Ltd. v. Freedman*, [1966] 2 All E.R. 955; *Re Gale (decd.)*, [1966] 1 All E.R. 945; [1966] Ch. 236; *Snook v. London and West Riding Investments, Ltd.*, [1967] 1 All E.R. 518; [1967] 2 Q.B. 786; *Marfani & Co., Ltd. v. West Midland Bank, Ltd.*, [1967] 3 All E.R. 967.

## HEATON (Inspector of Taxes) v. BELL.

[COURT OF APPEAL, CIVIL DIVISION (Danckwerts, Salmon and Fenton Atkinson, L.JJ.), May 7, 8, 9, 1968.]

*Income Tax—Income Perquisites or profits of office or employment—Car loan scheme for employees—Adjustment of employee's wage to meet cost—Scheme terminable by fourteen days' notice—Adjustment was a reduction of wage rate, not a deduction from wages—Car loan not a taxable perquisite of employment—Income Tax Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 10), s. 156 (Sch. E), as amended—Finance Act, 1956 (4 & 5 Eliz. 2 c. 54), s. 10, Sch. 2, para. 1.*

A printing company operated a voluntary car loan scheme for employees earning less than £2,000 a year. Under the scheme the company lent each participating employee a car of his selection, and paid full comprehensive insurance and road tax for each year and the cost of decarbonising in the second year. The employee provided petrol, oil, grease and other incidentals and provided cleaning and running maintenance. He signed a memorandum of terms of service under which "an amended wage basis" came into operation when the scheme was applied, and the employee received a weekly wage reduced by a sum of £2 10s. later increased to £2 18s. a week in a particular case (there were several references to reduction of wages in the documents relating to the scheme). No provision was made for payment of the reduction during absence through illness (when no wages were payable). The employee was to make use of the car for the more efficient discharge of his duties, was not to permit any other person to drive or use it except in an emergency, was to keep it clean and in good condition and to hold it ready for inspection at any time. Either the company or the employee could cancel the obligation or authority to use the car by giving fourteen days' notice, when the car was to be returned to the company. The employee's original wage would then be restored. An employee within the scheme was assessed to income tax under Sch. E\* to the Income Tax Act, 1952, as amended by the Finance Act, 1956, s. 10, Sch. 2, para. 1, on the basis that the benefit of having the car constituted a perquisite of his employment.

**Held:** the weekly sum (viz., the £2 10s., later £2 18s., weekly) was not part of the emoluments of the taxpayer from his employment within para. 1 of Sch. E to the Income Tax Act, 1952, as amended, for the following reasons—

(i) when the taxpayer entered the scheme there was a reduction in his wages, not a deduction from his gross wage after the gross wage was ascertained, and accordingly the weekly sum was not part of his gross wage for tax purposes (see p. 1162, letter H, p. 1166, letter E, and p. 1168, letter B, post).

(ii) the taxpayer's right to have the use of the car was not something that could be turned into money, for he was not to permit others to drive it and, if the right to use the car were cancelled by notice, the consequence would be that the right to use it ceased, not that the taxpayer thereby converted his former right into increased wages: accordingly the right to use the car was not a taxable perquisite (see p. 1166, letter B, p. 1167, letter I, and p. 1168, letter D, post).

*Tennant v. Smith* ((1892), 3 Tax Cas. 158) and *Abbott v. Philbin* (*Inspector of Taxes*) ([1960] 2 All E.R. 763) applied.

Decision of UNGOED-THOMAS, J., ([1968] 1 All E.R. 857) reversed on (ii).

[As to the character of emoluments chargeable to income tax under Sch. E, see 20 HALSBURY'S LAWS (3rd Edn.) 312, 313, para. 574, and as to deductions

\* Tax under Sch. E, now s. 10 of the Finance Act, 1956, as amended, is charged, so far as relevant to this report, on the "emoluments" of the employment "for the year of assessment". "Emoluments" are defined in para. 1 (1) of Sch. 2 to the Act of 1956 as including "all salaries, fees, wages, perquisites and profits whatsoever".

- A from such emoluments, see *ibid.*, p. 326, para. 598; for cases on taxation of salaries, perquisites and profits of employment, see 28 Digest (Repl.) 225-237, 971-1040, and on deductions for the purposes of Sch. E, see *ibid.*, 242-247, 1059-1099.

For Sch. E as amended, see 36 HALSBURY'S STATUTES (2nd Edn.) 408, 409, 448, 449, and 31 *ibid.*, 149, 156.]

Cases referred to:

- B *Abbott v. Philbin* (*Inspector of Taxes*), [1960] 2 All E.R. 763; [1961] A.C. 352; [1960] 3 W.L.R. 255; 39 Tax Cas. 82; Digest (Cont. Vol. A) 890, 1058a.  
*Machon v. McLoughlin*, (1926), 11 Tax Cas. 83; 28 Digest (Repl.) 234, 1025.  
*Nicoll* (*Inspector of Taxes*) v. *Austin*, (1935), 19 Tax Cas. 531; 28 Digest (Repl.) 230, 1003.  
*Tennant v. Smith*, [1892] A.C. 150; 61 L.J.P.C. 11; 66 L.T. 327; 56 J.P. 596;  
 C 3 Tax Cas. 158; 28 Digest (Repl.) 216, 916.  
*Wilkins* (*Inspector of Taxes*) v. *Rogerson*, [1960] 1 All E.R. 650; [1960] Ch. 437; [1960] 2 W.L.R. 515; *affd.*, C.A.; [1961] 1 All E.R. 358; [1961] Ch. 133; [1961] 2 W.L.R. 102; 39 Tax Cas. 344; Digest (Cont. Vol. A) 890, 1048a.

### D Case Stated.

- D The taxpayer appealed to the Commissioners for the Special Purposes of the Income Tax Acts against an assessment made on him under Sch. E to the Income Tax Act, 1952, for the year 1963-64 in the sum of £1,532, less agreed expenses of £11 and superannuation payments of £7. The question for determination was whether or not the sums of £2 10s. per week up to May 31, 1963, and £2 18s. thereafter, being the amount of car loan scheme adjustments, were correctly  
 E included in computing the taxpayer's emoluments from his employment within the meaning of para. 1 of Sch. E\*. The taxpayer contended before the commissioners as follows. (i) That the company which employed him had given him the choice between receiving his wages in money only or wages in money of a reduced amount and the use of a car. The taxpayer agreed to enter the company's  
 F car loan scheme whereby he obtained the use of a car and suffered a reduction in his monetary wage. (ii) That the taxpayer was not an employee who came within the provisions of s. 163 of the Income Tax Act, 1952. (iii) That the taxpayer was precluded, under the terms of the company's car loan scheme, from allowing anyone else to make use of the car except in an emergency so that while the taxpayer remained in the scheme the use of the car could not be turned into  
 G money. (iv) That even if the use of the car had a monetary value then the amount chargeable to tax was what the taxpayer, as employee, could get for it, which was nil, and not the cost of the scheme to the company. The Crown contended before the commissioners as follows. (a) That on authority, as the deduction in arriving at the net wage paid to the taxpayer was variable, and the net wage could not be arrived at until the gross wage had been determined, the taxpayer's emoluments  
 H were the gross wage before any deduction for the use of the car. (b) That in any event the taxpayer's emoluments were to be arrived at before taking into account the deduction for the use of the car. (c) That, in the alternative, if the true wage were a net wage plus the use of the car, then the use of the car was money's worth because the taxpayer could surrender his rights under the contract and so revert to his former wage and turn the benefit to pecuniary account.

- I The commissioners found† that the taxpayer's wage was the taxable gross wage excluding the sum by which it was reduced in respect of the car loan scheme and that the use of the car was not money's worth. They allowed the taxpayer's appeal and reduced the assessment to the £1,385. On July 11, 1967, as reported at [1968] 1 All E.R. 857, *UNGOED-THOMAS, J.*, allowed the Crown's appeal against that decision, holding that, while the weekly sum in respect of the car loan scheme was not part of the taxpayer's wage (which was reduced by that amount), yet

\* The facts of the case are set out at p. 1158, letter F, to p. 1161, letter I, post.

† The full terms of the commissioners' decision are set out at p. 1162, letters B to D, post.



the car loan to the taxpayer was a perquisite of money's worth, because it could be turned to account by the taxpayer's giving notice to determine the loan and reverting to receiving a wage that would be increased by the amount of the weekly sum. The taxpayer appealed to the Court of Appeal. A

*Desmond Miller, Q.C., and J. R. Phillips, Q.C., for the Crown.*  
*G. B. Graham, Q.C., and T. H. Walton for the taxpayer.* B

**DANCKWERTS, L.J.:** This is an appeal against the judgment of **UNGOED-THOMAS, J.** (1), dated July 11, 1967, by which he affirmed the decision of the Special Commissioners of Income Tax, given at a hearing on Mar. 1, 1966, on one point and disagreed with them on the second point. The question arises in regard to the use of a motor car which the taxpayer's employers allowed him to have on certain terms and conditions. Mr. Bell, the taxpayer, was a machine-minder in the lithographic department of John Waddington, Ltd., and he earned a substantial wage because, as is stated by the commissioners in the Case Stated, he was assessed under Sch. E to the Income Tax Act, 1952, for the year 1963-64 in the sum of £1,532 (less agreed expenses of £11 and superannuation payments of £7). Then, as a result of the freedom from taxation of the sums which he paid in respect of the use of the motor car, he was reduced to a figure of £1,385. He D was paid a weekly wage on the basis of so much an hour, and overtime at the rate of time and a quarter, and he had a bonus and certain other things.

The first, and main, question is whether the sum which he had to pay, or to allow for, or which was otherwise dealt with in respect of the use of the motor car, which varied from about £2 9s. a week to a larger sum at various times of his employment, was to be taken as part of the calculations which resulted in the amount of his total wage; i.e., whether it was a reduction of his gross wage for taxation purposes, or whether it was a deduction from his wages, made after the wage had been ascertained. That was the first point in the case. The other point which arises before the decision of the first point is whether his perquisite, or profit, as part of the emoluments which he had, was capable of being evaluated, and was taxable. E

I must turn now to the Case Stated. I think I can start with para. 4: F

"The [taxpayer] was at all material times employed by the company as a machine-minder in the lithographic department. (5) In 1954 the company decided to introduce a voluntary car loan scheme for the benefit of certain employees who earned less than £2,000 a year and who were not directors of the company." G

That is a reference to certain limitations of allowances which appear in the relevant Act. "The managing director wrote to each employee who was eligible to join in the scheme as follows: " I do not think that I need read the letter: it was rather a flowery one, no doubt full of good stuff, which does not, I think, matter for the purposes of this case. Then a document was disclosed which is in the Case Stated: H

"Private and Confidential. Waddingtons craftsmen's car loan service. Conditions. (1) John Waddington, Ltd., will loan a new car (Ford Popular—Austin A30—Ford Anglia or Morris 8) selected by the proposed user. (2) John Waddington, Ltd., will pay full comprehensive insurance for each year of the service. (£15 per annum). (3) John Waddington, Ltd., will pay the road tax for each year of the service. (£12 10s. per annum). (4) John Waddington, Ltd., will arrange for the decarbonising of the car during the second year. (5) The user will sign a simple agreement. [I think this next one is important.] (6) An amended wage basis will come into operation if the application is accepted. (7) The user will provide his own petrol, oil, grease and other incidentals. (8) The user will provide for cleaning and I

- A running maintenance. (9) If the car is under repair for maintenance or following an accident the amended wage basis will still apply. (10) Completion of application form does not mean acceptance by the company. They reserve full discretion on each application."

That is signed "John Waddington, Ltd.". Then the document continues:

- B "(b) A memorandum of terms of service to be signed by an employee who wished to join the scheme. (Para. (6), below). (c) An application form to be filled in and signed by an employee who wished to join the scheme. (para. (6), below). When in 1954 the scheme was finally settled, a meeting was arranged for all the company's employees concerned to hear the details of how the scheme would operate. (6) The [taxpayer] attended the meeting of employees in 1954 when the scheme was introduced but did not join the scheme until 1961. In the meantime the [taxpayer] did not attend any further meetings in connexion with the scheme but all relevant information was circulated to the employees and detailed information could be obtained if desired. On Feb. 10, 1961, the [taxpayer] signed an application form to join the scheme. A copy of the [taxpayer's] application form is annexed hereto . . . The [taxpayer] selected an Austin A40 de luxe car and on Mar. 3, 1961, signed a 'memorandum of terms of service'. A copy of the [taxpayer's] memorandum of terms of service is annexed hereto, marked B [cf., p. 1161, letters E and F, post] and forms part of this Case."

I will deal with the documents presently. I think, it is more convenient to go on with the reading of the Case Stated:

- E "On May 30, 1961, Mr. H. D. Brearley, the officer of the company in charge of the scheme wrote to Mr. Stephens, the secretary of the company, as follows: 'Craftsmen's car service. The Austin A.40 de luxe car reg. No. 3248 RO recently delivered has been allocated to [the taxpayer]. [The taxpayer] is a newcomer on the scheme and I am sending with this letter his signed agreement form and his completed application form fully approved. He would like to take the car away today at 5.15 p.m. and if you will let me have the usual note saying that the car is insured, I will see that it is handed over to him.' On the same day, May 30, 1961, Mr. Stephens wrote to Mrs. Nicholson of the company's wages office, as follows: 'Dear Mrs. Nicholson, A new car has been made available to the following person(s). Will you please arrange the necessary weekly wage reduction. Craftsman: '—and it is the second one—[the taxpayer] [and there is a space for clock No.] 'On and from: Pay day Friday, June 2, 1961. Yours sincerely.'
- G "The 'necessary weekly wage reduction' made in respect of the [taxpayer's] Austin A.40 car, registered No. 3248 RO was £2 9s., first applied on pay day Friday, June 2, 1961. The Austin car was handed over to the
- H [taxpayer] on May 30, 1961. The company made a summary giving details of each of the cars supplied and the weekly wage reductions of some of its employees under the craftsmen's car scheme. A copy of the company's summary in respect of the [taxpayer] from Feb. 20, 1961, to June 5, 1964, is annexed hereto marked C [see p. 1161, letters G to I, post] and forms part of this Case. The company also kept a register of the cars supplied to craftsmen
- I and an extract showing details of the Austin car No. 3248 RO is annexed hereto, marked D [see p. 1161, letter I, post] and forms part of this Case."

And then on Feb. 26, 1962, Mr. Brearley wrote a letter to all the employees in the scheme, saying that for various reasons the costs had gone up and therefore the amount which was material in reference to the use of the car had to be increased. I do not think I need read that.

"The effect of this alteration in the rate on the [taxpayer's] weekly wage reduction was to increase the amount to £2 14s. 6d. from Apr. 1, 1962. On

June 1, 1962, the Austin car being one year old the [taxpayer's] wage reduction was amended to £2 10s." A

That means that as the car was older—it was, I think, only in the scheme two years—the charge, or the payment relating to it was reduced.

"The memorandum from the secretarial department to the wages office effecting this change read as follows: 'Adjustment to craftsman's wages. Name: [the taxpayer]. Whether in scheme already: Yes. Adjustment required: £2 10s. with effect from pay week ended June 1, 1962'." B

And then para. (8).

"At the end of May, 1963, the Austin being two years old, the [taxpayer] arranged with Mr. Brearley to exchange it for a Morris 1100 de luxe, reg. No. 330 RAR. (An extract from the register giving details of this car is in exhibit D.) The [taxpayer] signed an amendment to his memorandum of terms of service (exhibit B) to cover the Morris car. The [taxpayer's] wage reduction was amended to £2 18s. The memorandum from the secretarial department effecting this change is mutatis mutandis the same as that mentioned in para. (7). C

"(9) Each employee of the company received a weekly pay slip showing the wages to which he was entitled. The [taxpayer's] pay slip for the week ending June 5, 1964, was taken as an example of the manner in which the company calculated the wages of its employees. The figures for that week were set out thereon as follows: (1) Flat rate, forty-three hours, £22 6s. 7d.; (2) Overtime premium, 2.0625 hours, £1 5s. 7d.; (3) Cost of living bonus, 11s. 8d.; (4) shift premium, £4 9s. 4d.; (5) Bonus, £4 12s. 8d.; (6) Spray or hair money, 3s. 4d.; (7) Holiday pay, blank, and £33 9s. 2d. is an addition of the items that appear from (1) to (6); and then comes £2 13s. 6d. which is the sum relating to the car. There is then a line and the reduction, or deduction, as the case may be, is made, resulting in a figure of £30 15s. 8d. which is described as 'taxable gross wage'. Then there come: 'Standard deductions, £1 17s.; graduated pension contribution, 7s. 8d.; P.A.Y.E. £2 3s.' D

amounting in all to £4 7s. 8d., which is deducted, showing a net wage of £26 8s. A copy of the pay slip is annexed. E

"The taxpayer's weekly wage reduction under the scheme is shown in the pay slip as £2 13s. 6d., item number 8, which was the only deduction in arriving at the taxable gross wage, items 2 to 6 being additions to the flat rate of £22 6s. 7d. for forty-three hours' work. The wage reduction had been amended to this figure on the car becoming one year old in a manner as described in paras. (7) and (8) above. F

"The [taxpayer] was paid the flat rate per hour which was standard for his classification. The overtime premium was calculated at one and a quarter times the flat rate. The cost of living bonus was fixed each January. The shift premium was paid for shift work and was calculated on the basis of the flat rate. The bonus figure was calculated on production figures but came in one week later than the flat rate of wages." G

Then there is para. (10), which I must read, which dealt with the case where the employee was absent through sickness, and that sort of thing: H

"Whenever an employee was absent through sickness and received no wage, no deduction was made for the use of the car because the agreement between the company and the employee under the scheme was that the employee should accept a reduced wage. If there was no wage it could not be reduced and no adjustment of any kind was made under the scheme. The [taxpayer's] pay slip for the week ending Dec. 13, 1963, when the [taxpayer] was absent through sickness was in the same form as exhibit C, but with an I



A entry only for one item (number 5) being a bonus of £2 8s. 10d. which related to the previous week. No wage reduction was made under the scheme and the taxable gross wage was shown as £2 8s. 10d. The pay slip for the week ending Nov. 8, 1963, shows similarly no reduction where there was no wage. Copies of the [taxpayer's] pay slips for the weeks ending Dec. 13, 1963, and Nov. 8, 1963, are annexed.

B “(11) In his evidence the [taxpayer] stated that if he had ever been asked whether the company supplied him with a car at a rent deducted from his wage he would have said that he had accepted instead a lower wage and a car free. He admitted that he had probably made a rough estimate of what it would cost to obtain the use of a car but added that his main concern had been to see whether he could afford to run a car. The [taxpayer] did not agree that in order to check his wages he would have to calculate the wage he would have received if he had not joined the scheme and then make a deduction for the car. As the figures were all set out on the pay slip all that he had to do was to check the arithmetic.

C “The [taxpayer] understood the last two lines of the memorandum of terms of service to mean that the agreement could be cancelled by either party giving fourteen days' notice, and that if it were cancelled he would receive his former wage without any deduction.”

D I should now turn to the exhibits or annexures. I do not think that I need bother with A. B reads:

E “Memorandum of terms of service. During my service with you as lithographer and the carrying out of the various duties you properly assign to me, I am to make use of motor car No. 3248 RO for the more efficient discharge of my duties. I am not to permit anyone other than myself to drive or use the car except in an emergency. I am to pay for maintenance and running. I agree to keep the car clean and in good condition and to hold it ready for inspection at any time. You have generously agreed to licence and insure the car and to pay for decarbonisation when necessary. Either of us may cancel my obligation and authority to use the car on fourteen days' notice. Dated Mar. 3, 1961,”

F and that is signed by the employee.

Then annexure C has the heading:

G “John Waddington, Ltd. Craftsmen's car scheme. Ralph Garland Bell, litho machine minder of 19, Howard Avenue, Halton, Leeds, 15. Signed application form Feb. 10, 1961. Signed memorandum of terms of service Mar. 3, 1961. New Austin A.50 de luxe car 3248 RO handed over to R.G.B. on Tuesday, May 30, 1961.”

H Then there come certain things which, though these are statements in documents of the employers, seem to me to have some relevance: “Wage reduction 49s. per week first applied pay day Friday, June 2, 1961”; ditto ditto “increased to 54s. 6d. per week on pay day Friday, Apr. 6, 1962 (general increase)”; ditto ditto “changed to 50s. per week on pay day Friday, June 1, 1962”; ditto ditto

I “changed to 45s. 6d. per week on pay day Friday, June 7, 1963. R.G.B. handed in 3248 RO and collected new Morris 1100 de luxe 330 RAR on Friday, May 31, 1963. Wage reduction changed to 58s. per week on Friday, June 7, 1963; wage reduction changed to 53s. 6d. per week on Friday, June 5, 1964.”

Then there are certain things on D, but I do not think anything turns on D. It merely records the sale of the Austin on June 27, 1963. I do not find anything much on item D, except that the words “Reduction (1st yr.) (2nd yr.) (3rd yr.) (4th yr.)” appear and seem to me consistent with the other documents in the case.

Those being the facts, I can pass by the contentions, the cases which were referred to, and the reference to the statement by ROWLATT, J., in *Machon v. McLoughlin* (2) which I do not propose to refer to. I come now to p. 14, where the conclusions appear of the Special Commissioners:

"On the facts of this case it seems to us that the wage is what it is said to be on the pay slip dated June 5, 1964 (exhibit E), namely the taxable gross wage, that is to say the sum of the items (1) to (6), less item (8). On this basis we have to consider whether the use of the car is money's worth. We have to bear in mind the cases of *Tennant v. Smith* (3) and *Wilkins (Inspector of Taxes) v. Rogerson* (4), the latter being the case of the suit from Montague Burton, Ltd. Now here we think that the position is distinguishable from the case of *Abbott v. Philbin (Inspector of Taxes)* (5) [which was the case where an employee had an option to obtain shares]. The use of the company's car is not an option and we think that the question is whether the [taxpayer] in having the use of the car has money's worth. From the memorandum of terms of service (exhibit B) the [taxpayer] was not to permit anyone else but himself to drive or use the car except in an emergency. In these circumstances the use of the car is not in our view money's worth. Accordingly we hold that the appeal succeeds in principle and as the figures have been agreed between the parties we reduce the 1963-64 assessment on the [taxpayer] to £1,385."

That is the decision of the Special Commissioners.

The case came before UNGOED-THOMAS, J. (6). As I have indicated, UNGOED-THOMAS, J., affirmed the decision of the commissioners on one point. He held that it was a reduction in reaching the assessable wage of the taxpayer and was not a deduction from his wage after it had been ascertained. That, I think, states shortly the effect of the question decided, and the effect of the commissioners' and the judge's decision, and I will just read one paragraph from the judge's judgment (7):

"In particular the reference in the condition, originally mentioned in the letter introducing the scheme to the employee, to 'an amended wage basis' coming into operation, and the fact that, in the inter-party pay slip, the only provision for payment was accordingly made by way of subtraction from wages without any provision for payment even in respect of a week when no wage was earned, seem to me, despite the impressive considerations which have been urged on behalf of the Crown, to establish that the true view of this transaction is that there was one contract for payment of the wage less an amount to be calculated in arriving at that wage, and not two contracts, one for the payment of the wage and an entirely separate contract for the deduction of an amount from that wage after it had been calculated."

That seems to me to be a correct view. It seems to me that all the documents show, in the course of events between the parties, that there was an alteration from the wage structure when the taxpayer took advantage of the scheme and obtained the use of this car. That being so, the first question naturally must fall, I think, to be decided against the contention of the Crown, in that it is a reduction in the wage receivable by the taxpayer and therefore was not to be taken into consideration as a part of his gross wages out of which he made a payment by way of deduction which then, in that case, forms part of his taxable wage.

The second question, however, as it seems to me, gives considerably more trouble. Much of the relevant statutory provision applicable to the case is set out

(2) [1926], 11 Tax Cas. 83.

(3) [1892] A.C. 150; 3 Tax Cas. 158.

(4) [1961] 1 All E.R. 358; 39 Tax Cas. 344.

(5) [1960] 2 All E.R. 763; 39 Tax Cas. 182.

(6) [1968] 1 All E.R. 857.

(7) [1968] 1 All E.R. at p. 866.

A by the judge (8), and I think that it would be a good thing to understand what we are talking about in that case. The judge said (8):

“Section 156, Income Tax Act, 1952, provides: ‘... shall be charged’ under Case 1, on ‘emoluments for the year of assessment’; and the Finance Act, 1956, Sch. 2, para. 1, provides, *inter alia*: ‘... the expression “emoluments” shall include all salaries, fees, wages, perquisites and profits whatsoever.’ The contention put forward before me by the Crown was a contention which was put forward before the commissioners, and the judge quotes: ‘that ... if the true wage was a net wage plus the use of the car, then the use of the car was money’s worth because the [taxpayer] could surrender his rights under the contract and by this revert to his former wage and turn the benefit into pecuniary account.’ The commissioners’ observations were: ‘From the memorandum of terms of service ... the [taxpayer] was not to permit anyone else but himself to drive or use the car except in an emergency. In these circumstances the use of the car is not in our view money’s worth.’”

D Now I want to make a few observations with regard to that. If one considers the plain and strong terms by which the taxpayer had use of this car, he could not get money by selling it. He could not sell it, because in fact it was the property of the company who brought about the scheme, who thereby got a capital allowance of some sort under the rules relating to tax; he could not let it out on hire. He could not make money in that way any more than there was any way in which he could pass the use of the car, or part with possession of the car, at all.

E The point which was made was that he might, perhaps, undertake to drive people about the country, or something of that sort, but I think that on a proper construction of the terms on which the car was presented to him he was not entitled to do that; he should entirely use it for his own family purposes, and, therefore, it was not a case where the car was to be used for work purposes, or anything of that sort. He simply had the benefit of the use of the car, and, of course, it might save him, it is quite true, some expenses such as ‘bus fares, perhaps, and shoe leather, and that sort of thing, but I do not think that was really the basis of the value of the car which could be based on money terms. Our trouble is really whether it was possible to assess the value to this employee of the opportunity to use the car.

F I will read on, because the judge accepted, I think, that contention just recently raised on behalf of the Crown, and reached what seems to me a very odd conclusion. He said (9):

G “That was not directed to the contention put forward by the Crown. The commissioners arrived at their conclusion, without dealing with the Crown’s contention, on a basis which, as I understand it, was not put before them by the Crown, nor put before me by the Crown. The taxpayer, whilst also accepting that, to be taxable, the perquisite must be money or money’s worth convertible into money, puts his case in two ways. It is said, first, that the documents we are dealing with here, particularly the Case Stated, show that the employee was paid weekly, that the car could not be turned into money in any one week, and that, therefore, in any one week there was here no money’s worth because the car loan could not be turned into money in that week. The short answer to that is that the assessment is made upon ‘emoluments ... for the year of assessment’. The relevance of the perquisite is that it is contained in the definition of ‘emoluments’, so we are dealing with ‘perquisites for the year of assessment’. Therefore, the taxpayer could, after fourteen days’ notice in the year, turn it into money, if it could be turned into money at all.”

(8) [1968] 1 All E.R. at p. 866.

(9) [1968] 1 All E.R. at pp. 866, 867.



Well, the last observation, I think, is the one which is correct; it could not be turned into money at all. I think that the statement that it could be turned into money by terminating the use of the car is based—with due respect to the judge—on a complete fallacy. When one determines the use of the car one gives up the car; one no longer has that perquisite of the car; one simply has not got the car any more. It passes out of the picture, and what happens is that the wage which the taxpayer was originally entitled to will be based on the ordinary terms of service which will come from the company concerned. That does not seem to me to be converting the use of the car into money, but it is a parting with the car; he has the car no more, and, of course, he cannot pass any relevant consideration, as far as I can see. I find myself quite unable to accept that reasoning by the judge for the purposes of this case.

There was discussion in this case whether it might not be right to take into consideration, in arriving at the value of the perquisite of the use of the car, that it might be said to be money's worth in that it should be fixed by regard to the money which was paid by the employers. There was a case of *Wilkins (Inspector of Taxes) v. Rogerson* (10), in the reports of which I appeared as the judge of first instance, and I was affirmed by the Court of Appeal. It concerned a claim by which a particular company provided suits for its employees from Montague Burton, Ltd., well known in that line. The suits which were provided cost the company, the employers, £14 15s., and the question was whether the employee was assessable on that sum of £14 15s. or not, and the decision of myself and the Court of Appeal was: not so; the amount of the benefit he got was its value if he had turned the suit into money. It was apparently agreed, or established, that when he got the suit it would then become a second hand suit and he could sell it for £5, and accordingly he was to be assessed on that £5 figure, but not on the price of £14 15s.

Of course that case does not involve, really, the same sort of considerations as the present one at all, because, not being able to sell, or hire out, or do anything else in any other way with the car, one could not get any figure approaching or in any way relating to the amount that it cost. In the course of argument which came before me I said this (10):

“Well, possibly if you could not find any other standard, the amount of the value of the perquisite which the employee had must be judged by the amount which has been spent on it by his employers.”

That was rather echoed, I think, in the Court of Appeal by LORD EVERSHED, M.R.

Another case which has been discussed was *Nicoll (Inspector of Taxes) v. Austin* (11), in which the managing director of a company was occupying a house with amenities such as a very good garden, and so on. It was the intention of his company that he should live there, and, he, finding it expensive to keep up, and the company, regarding it as a matter of prestige that he, the managing director, should occupy that house and garden, agreed to reimburse him for the money he had to spend in keeping it up in that way. The true situation was put by DONOVAN, L.J., in *Wilkins (Inspector of Taxes) v. Rogerson* (12) when he pointed out that the proper method of calculating the taxable amount in *Nicoll (Inspector of Taxes) v. Austin* (11) was not on the amount which was paid by the employers but the amount of the remuneration of the managing director which was reimbursed by the company of which he was managing director.

Be that as it may, it would be very difficult to evaluate what was the money's worth, if any, of the car to the employee in the present case, because it seems to me in the first place quite clear that it was not the amount which the employee

(10) [1960] 1 All E.R. 650; 39 Tax Cas. 344; *affd.*, [1961] 1 All E.R. 358; 39 Tax Cas. at p. 350.

(11) (1935), 19 Tax Cas. 531.

(12) [1961] 1 All E.R. at p. 362; 39 Tax Cas. at p. 354.

A was charged with. If that standard was to be applied, however, it must be the payments which were made for the benefit of the employee by the company. That would not be the capital amount which would be spent on the perquisite in question, but it could possibly be interest on that sum; it would no doubt be the payments for insurance and road tax, and decarbonising, and perhaps interest on the capital expenditure by the company. That would be not only  
 B difficult to assess but it seems to me it would also mean that the case would have to be remitted to the special commissioners to find the amount.

A case was mentioned by SALMON, L.J., which, it seems to me at any rate, renders that mode of assessing the value not admissible for the purposes of this case. That is the case of *Abbott v. Philbin (Inspector of Taxes)* (13), which was a case in the House of Lords, and the passage I would refer to in the speech of  
 C LORD RADCLIFFE is this (14):

"The difficulty in dealing with this point lies wholly in relating words used by several members of the House in *Tennant v. Smith* (15) apparently of general import, to circumstances that they were not dealing with. The benefit of a right of occupation of part of bank premises which the occupier could only enjoy for the service of the bank is not very like the benefit of an option to take up freely transferable shares at a fixed price. The basis of the Revenue's claim in *Tennant v. Smith* (15) was really to tax the bank manager on expenditure which he was saved, not on any money that he got or could get, while tax on the full annual value of the premises was taken from the bank itself. It was not, however, the view of the House that profits or perquisites, to be taxable, could consist only of money paid. It was accepted that they could include objects or things of value received, payments in kind, so long as they were 'capable of being turned into money' (LORD HALSBURY, L.C., (16) 'money—or that which can be turned to pecuniary account' LORD WATSON (17), 'money payment or payments convertible into money' LORD MACNAGHTEN (18), 'that which could be converted into money' LORD HANNEN (19)).

"I think that it has been generally assumed that this decision does impose a limitation on the taxability of benefits in kind which are of a personal nature, in that it is not enough to say that they have a value to which there can be assigned a monetary equivalent. If they are by their nature incapable of being turned into money by the recipient they are not taxable, even though they are, in any ordinary sense of the word of value to him. It is obvious that this conception raises many attendant uncertainties which are not, so far as I know, cleared up except where some particular class of benefit in kind has offended the eye of the legislature and has been dealt with by special legislation. Must the inconvertibility arise from the nature of the thing itself, or can it be imposed merely by contractual stipulation? Does it matter that the circumstances are such that conversion into money is a practical, though not a theoretical, impossibility; or, on the other hand, that conversion, though forbidden, is the most probable assumption?

"I do not think that the decision of this case can go very far, if any distance, to clear up such points as these. I think that the Crown are right in saying that a line has to be drawn somewhere between convertible and non-convertible benefits and that, somehow, we have to put a general meaning on the not very precise language used in *Tennant v. Smith* (20).

(13) [1960] 2 All E.R. 763; 39 Tax Cas. 82.

(14) [1960] 2 All E.R. at pp. 773, 774; 39 Tax Cas. at p. 124.

(15) [1892] A.C. 150; 3 Tax Cas. 158.

(16) [1892] A.C. at p. 156; 3 Tax Cas. at p. 164.

(17) [1892] A.C. at p. 159; 3 Tax Cas. at p. 167.

(18) [1892] A.C. at p. 163; 3 Tax Cas. at p. 170.

(19) [1892] A.C. at p. 165; 3 Tax Cas. at p. 172.

(20) [1892] A.C. 150; 3 Tax Cas. 158.

What I do not think, however, is that a non-assignable option to take up freely assignable shares lies on that side of the line which contains untaxable benefits in kind."

I should say that the other law lords in the case which I have just been citing took very much the same view as LORD RADCLIFFE. That seems to me to dispose of the second point in this case. I find it impossible to say that the benefits obtained from the use of this car can be turned into money, and that they can be evaluated. In those circumstances they fall on the other side of the line referred to by LORD RADCLIFFE, and they are not taxable. It seems to me that the Special Commissioners reached the right conclusion on this point as well as on the first point, and that the judge, I am afraid, was wrong in his decision in reversing that determination. It seems to me that the appeal succeeds on the second point. The first point was rightly decided both by the Special Commissioners and by the judge, but on the second point the judge was wrong, and the appeal must be allowed in favour of the taxpayer on that point.

**SALMON, L.J.:** I agree and add only a few words since we are differing from the judge (21). The first point seems to me to come to this: was the taxpayer's remuneration £x a week, from which the employers retained £y in respect of the use of the car which they put at his disposal, or was the taxpayer's remuneration £x minus £y a week, plus the use of the car? In other words, did the element in respect of the use of the car constitute a deduction from, or a reduction in, his wages? If it was a deduction from his wages it is undoubtedly taxable.

I agree with DANCKWERTS, L.J., that on the documents there is an inescapable inference that the £y element to which I have referred was in truth a reduction in his wages. When the letter was written by the managing director in 1954 to all the employees including the present taxpayer, offering them participation in the scheme to which DANCKWERTS, L.J., has referred, it made it quite plain that it was a condition of the scheme that if the employee joined his wages would be varied. The words of the circular letter were: "An amended wage basis will come into operation if the application is accepted." The taxpayer did apply to join the scheme, by the notice which he served some seven years later, on Feb. 10, 1961. Presumably he was then agreeing to an amended wage basis.

It is permissible to observe, although I do not think much importance can be attached to it, that in the employers' internal documents what I call the £y element is in every document referred to as a reduction in wages. What is more important than the internal documents, however, is the pay slip for June 5, 1964, which we have seen, and which I think it is fair to assume is a typical sample of the pay slips the taxpayer received week by week after he joined the scheme. This shows elements of remuneration in the first seven items, which add up in this particular week to £33 9s. 2d., but that figure is reduced by the £y element which in this week was £2 13s. 6d., so that the taxable gross wage is shown as the difference between the two. Then there are shown "standard deductions, graduated pension contribution", and "P.A.Y.E." and the net wage was £26 8s. Week after week this man accepted pay slips in that form, having signed an application to join the scheme which involved his wage basis being re-assessed. I think it is quite impossible, in those circumstances, to decide the first point in any other way than that in which it was decided by the commissioners and the judge (21).

The next point that arises is this: is the element of the taxpayer's remuneration which consists of the use of the car taxable? That depends on whether it was a "perquisite" within the meaning of that word in the Finance Act, 1956.



- A I should have thought, applying common sense (which is perhaps an uncertain guide in this branch of the law) that it was clearly a perquisite. There is no doubt but that it was money's worth. It has been argued, however, that it is only a perquisite within the meaning of the Act of 1956 if it is not only money's worth but also something which is convertible into money. I am bound to say that this, to me, is a strange concept which may lead to strange results. I can
- B imagine a case where an employer might pay a man a very small money wage, or, indeed, no remuneration in money, but supply him with a house and a motor-car, clothes, food and drink, perhaps, to a value of approaching £2,000 a year, and write into the contract of employment a clause that the man should not sell or turn any of these things into money, which probably in any event he would not intend to do. It would seem that in those circumstances he would be in
- C the fortunate position of not having to pay income tax.

- The doctrine that no form of remuneration is taxable unless it is something which is money or money's worth and convertible into money stems from the case of *Tennant v. Smith* (22), which was decided in the House of Lords as long ago as 1892. There are the dicta in the speeches of the distinguished members of the House in that case which clearly lay down the doctrine. *Tennant v.*
- D *Smith* (22), however, is quite obviously distinguishable from cases such as the present. The bank manager in that case did not occupy the house at the bank as any part of his remuneration. He was required to live in the house as part of his terms of service: all that he gained from this was the incidental benefit that it may have saved him some rent.

- I confess that I tried hard at one stage of this appeal to find some way of
- E adhering to what seemed to me to be reality, and holding that the use of the car was a perquisite which was certainly money's worth, and ought to be taxed, although it was not convertible into money. It is quite obvious however from what was said by the House of Lords in 1959 in *Abbott v. Philbin* (*Inspector of Taxes* (23), that such a finding is impossible. However distinguishable *Tennant v. Smith* (22) may be from cases such as the present, *Abbott v. Philbin* (23) makes
- F it plain that it has for years been recognised that the principles laid down in *Tennant v. Smith* (22) are of general application, and, in particular, that they do apply to cases such as the one which we are now considering. It is certainly far too late for the Court of Appeal, at any rate, to do anything about it.

- Since, therefore, what I have called the £y element is not taxable unless it is convertible into money, the third point is: is the judge's finding (24) that
- G it is convertible into money supportable? He took the view that this use of the car was convertible into money, because the taxpayer could give up the use of the car on a fourteen-day notice. Strangely, in my view, he thought that this perquisite should be taxable only for fifty weeks of the year but not for fifty-two weeks of the year, because of the fourteen-day notice. This is an approach which I am bound to say I am quite unable to understand, but, since
- H no-one has sought to support it in this court, I need not deal with it.

- At one stage I was in no way troubled by this point that the use of the car was convertible into money. It seemed to me that it was plainly wrong, and then counsel for the Crown did put a doubt in my mind, but I come back to my original view, with some reluctance. I do not think that it is possible to say that this taxpayer could have converted the use of the car into money. He
- I had the use of the car and he could give it up. He did not receive anything but the use of the car. If he gave up the use of the car it is true to say that there would have been another variation of his contract of employment and his weekly remuneration in money would have gone up by £y. I cannot, however, agree that in any true sense of the word he could convert the use of the car into money, and therefore I concur in allowing the appeal.

(22) [1892] A.C. 150; 3 Tax Cas. 158.

(23) [1960] 2 All E.R. 763; 39 Tax Cas. 82.

(24) [1968] 1 All E.R. at p. 867

FENTON ATKINSON, L.J.: I would only add a word or two on the questions arising from this case. The first question, as I see it, is this: Is this a case where the taxpayer's wage was reduced by agreement, as he contends, or is it a case where the taxpayer was applying a part of his gross wage in a particular way, as the Crown say? In my view there is the clearest evidence to support the view of the Special Commissioners and the judge (25) that this was the case of a reduction of the gross wage by agreement, and I have nothing to add on that point to what my lords have said.

The second question is whether the use of the car was a perquisite within para. 1 of Sch. 2 to the Finance Act, 1956. On this question I agree with the view of the Special Commissioners and am unable to accept the judge's view (26). I reach that conclusion the more readily as it seemed to me that counsel for the Crown in this court scarcely sought to support the judgment of the court below (27). The perquisite which the Crown contends must be treated as a part of the emoluments, as I see it, is the use of the car for so long as the taxpayer enjoyed that use.

Apart from authority, I, myself, would be led astray into thinking that the use of the car represented money's worth to the taxpayer. He, at least, reckoned that it was worth either £2 10s. or £2 15s. a week. But the authorities establish beyond all argument that for a perquisite to become taxable it must be money's worth in the sense that it may be converted into money, and on the terms of the agreement between the employers and the taxpayer it is quite clear—and both sides agree—that the use of this car could not in any way be converted into money. For myself, I cannot see that the fact that the taxpayer could terminate his agreement for the use of the car, and thereafter enter into a fresh agreement for a higher wage, is relevant in deciding whether the use of the car was convertible into money.

As to the main argument that counsel for the Crown addressed to us on this second point, it seemed to me that he was really repeating the argument that counsel advanced to the Court of Appeal in *Wilkins (Inspector of Taxes) v. Rogerson* (28), according to LORD EVERSHED, M.R.'s note of the argument:

"I say . . . that where the employee accepts an offer from his employer to spend money on his behalf, then he is chargeable on the money spent, and not on the value of the thing bought for him."

That argument was expressly rejected by the Court of Appeal in that case. I agree this appeal must be allowed on the second point.

*Appeal allowed on second point. Leave to appeal to the House of Lords refused.*

Solicitors: *Solicitor of Inland Revenue; Biddle & Co., agents for Hepworth & Chadwick, Leeds (for the taxpayer).*

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

(25) [1968] 1 All E.R. at p. 866.

(26) [1968] 1 All E.R. at p. 867.

(27) [1968] 1 All E.R. 857.

(28) [1961] 1 All E.R. at p. 360; 39 Tax Cas. at p. 352.

A YOUNG AND MARTEN, LTD. *v.* McMANUS CHILDS, LTD.

[HOUSE OF LORDS (Lord Reid, Lord Pearce, Lord Upjohn, Lord Wilberforce and Lord Pearson), March 12, 13, May 6, 7, 8, July 10, 1968.]

*Building Contract—Breach of contract—Fitness or quality of materials—Two warranties implied, fitness for purpose and good quality—Sub-contract for work and materials—Defective materials supplied—Material specified by contractors, manufactured only by one manufacturer—Specified material obtained, but having undetectable defects, due to faulty manufacture, rendering it not of good quality—Material supplied and fixed by sub-contractor—Whether sub-contractor liable for supplying such material.*

In a contract to do work and to supply materials two warranties may be implied in respect of the materials supplied, a warranty of their reasonable fitness for the purpose and a warranty of their good quality, in particular against latent defects\*; where the materials are chosen by the party for whom the work is to be done, warranty of their fitness is not implied but, unless excluded by the circumstances (or by the terms of the contract), a warranty of quality will be implied (see p. 1173, letters D and H, p. 1175, letter B, p. 1176, letter I, to p. 1177, letter A, p. 1177, letter E, p. 1180, letter D, and p. 1181, letter B, post).

Dictum of DU PARCQ, J., in *G. H. Myers & Co. v. Bent Cross Service Co.* ([1933] All E.R. Rep. at pp. 13, 14) applied, but the illustration given at p. 14 doubted.

The respondent contractors, who were building dwelling-houses on their land, sub-contracted† the roofing to the appellants. The respondents specified that Somerset 13 tiles should be used for the roof. These tiles were made only by one manufacturer and in specifying these tiles the respondents' representative, who was highly skilled and experienced, relied on his own judgment and skill. The appellants sub-contracted the supplying and laying of the tiles; and this sub-contractor obtained the tiles from the manufacturer. Owing to some fault in the manufacture the tiles had a latent defect, not apparent on inspection, but which became apparent after they were fixed and exposed to weather. In answer to a claim by the respondents for damages suffered by reason of the defects in the tiles the appellants contended that, since the tiles were chosen by the respondents' representative and there was only one manufacturer of the tiles, there was no implied warranty of the fitness or quality of the tiles by the appellants.

**Held:** the appellants were liable in damages on an implied warranty of quality of the tiles, the fact that the tiles were obtainable only from one manufacturer being insufficient to negative the implication of the warranty (see p. 1172, letter H, p. 1173, letter H, p. 1175, letter E, p. 1177, letter F, p. 1178, letter B, and p. 1181 letters A and B, post).

Per LORD PEARCE: if it is known to both parties that the manufacturer gives no warranty to the contractor, that fact is a strong indication that no warranty is being given to the contractor (see p. 1175, letter D, post; cf., p. 1172, letter H, and p. 1181, letter B, post).

Decision of the COURT OF APPEAL (sub nom. *Prior v. McManus Childs, Ltd.* (*Young & Marten, Ltd., Third Parties*), [1967] 3 All E.R. 451) affirmed.

**[Editorial Note.]** This decision should be considered with that in *Gloucester County Council v. Richardson*, p. 1181.

As to obligations concerning workmanship and materials in building contracts, see 3 HALSBURY'S LAWS (3rd Edn.) 435, para. 818; 442, para. 837; and for cases on the subject, see 7 DIGEST (Repl.) 345-347, 35-48.]

\* To use materials which appeared to be defective would be a breach of the contractual duty to exercise care and skill in the doing of the work (see p. 1174, letter B, post).

† The case was decided on the basis that there was a contract between the respondents and the appellants, though in fact the contract was not made by the respondents (see p. 1171, letter F, post).



## Cases referred to:

- Atkinson v. Bell* (1828), 8 B. & C. 277; 6 L.J.O.S.K.B. 258; 108 E.R. 1046; 39 Digest (Repl.) 612, 1250.
- Cammell Laird & Co., Ltd. v. Manganese Bronze and Brass Co., Ltd.*, [1933] 2 K.B. 141; *reversd.* H.L., [1934] All E.R. Rep. 1; [1934] A.C. 402; 103 L.J.K.B. 289; 151 L.T. 142; 39 Digest (Repl.) 544, 784.
- Clay v. Yates* (1856), 1 H. & N. 73; 25 L.J.Ex. 237; 27 L.T.O.S. 126; 156 E.R. 1123; 39 Digest (Repl.) 450, 51.
- Donaghue v. Stevenson*, [1932] All E.R. Rep. 1; [1932] A.C. 562; 101 L.J.P.C. 119; 147 L.T. 281; 36 Digest (Repl.) 185, 458.
- Duncan v. Blundell* (1820), 3 Stark. 6; 1 Digest (Repl.) 613, 2002.
- Francis v. Cockrell* (1870), L.R. 5 Q.B. 501; 39 L.J.Q.B. 291; 23 L.T. 466; 34 Digest (Repl.) 208, 1460.
- Gardiner v. Gray* (1815), 4 Camp. 144; 171 E.R. 46; 39 Digest (Repl.) 556, 861.
- Gloucester County Council v. Richardson*, [1967] 3 All E.R. 458; *affl.* H.L., post p. 1181.
- Jones v. Bright* (1829), 5 Bing. 533; 7 L.J.O.S.C.P. 213; 130 E.R. 1167; 39 Digest (Repl.) 553, 832.
- Jones v. Just* (1868), L.R. 3 Q.B. 197; 37 L.J.Q.B. 89; 18 L.T. 208; 39 Digest (Repl.) 531, 675.
- Lee v. Griffin*, [1861-73] All E.R. Rep. 191; (1861), 1 B. & S. 272; 30 L.J.Q.B. 252; 4 L.T. 546; 121 E.R. 716; 39 Digest (Repl.) 444, 9.
- Myers (G. H.) & Co. v. Brent Cross Service Co.*, [1933] All E.R. Rep. 9; [1934] 1 K.B. 46; 103 L.J.K.B. 123; 150 L.T. 96; 3 Digest (Repl.) 102, 285.
- Randall v. Newson* (1877), 2 Q.B.D. 102; 46 L.J.Q.B. 259; 36 L.T. 164; 39 Digest (Repl.) 539, 745.
- Readhead v. Midland Ry. Co.*, [1861-73] All E.R. Rep. 30; (1869), L.K. 4 Q.B. 379; 39 L.J.Q.B. 169; 20 L.T. 628; 30 Digest (Repl.) 237, 857.
- Samuels v. Davis*, [1943] 2 All E.R. 3; [1943] 1 K.B. 526; 112 L.J.K.B. 561; 168 L.T. 296; 39 Digest (Repl.) 541, 763.

**Appeal.**

This was an appeal by the appellants, Young and Marten, Ltd., from an order of the Court of Appeal (SELLERS, DAVIES and RUSSELL, L.J.J.), dated June 23, 1967, and reported [1967] 3 All E.R. 451, allowing the appeal of the respondents, McManus Childs, Ltd., against the decision of the official referee, His Honour NORMAN RICHARDS, Q.C., dated Oct. 6, 1966. The respondents carried on the business of builders and built in 1958 a group of houses for sale on land that they had acquired for the purpose. The building works were executed by a company known as Richard Saunders & Co., Ltd., which for the purposes of this case was treated as the agent of the respondents. The appellants contracted with R. Saunders & Co., Ltd., for supplying and fixing roofing tiles for the houses. On behalf of the company a Mr. J. Saunders, who was a director of the company and an experienced builder, had specified Somerset 13 tiles for the roofing. The appellants sub-contracted with Acme Roofing Co. (London), Ltd., for supplying and fixing Somerset 13 tiles. These tiles were made by one manufacturer only, John Browne & Co. (Bridgwater), Ltd., from which Acme Roofing Co. (London), Ltd. obtained the tiles. These tiles were generally of good quality but owing to some defect in the manufacture which could not have been detected by any reasonable examination before they were fixed, the particular tiles supplied began to laminate and shale during the winter next following the completion of the houses. The houses were sold to various purchasers seventeen of whom sued the respondents in the county court. The appellants were made third parties. The actions consolidated and ultimately were transferred to the official referee for trial. The official referee found in favour of the plaintiff purchasers against the respondents, awarding damages totalling £3,693. On Oct. 6, 1966,

A the official referee dismissed the third party proceedings brought by the respondents against the appellants, and subsequently the respondents' appeal was allowed by the Court of Appeal, as stated above.

*Sir Joseph Molony, Q.C., and Quentin Edwards* for the appellants.

*C. J. S. French, Q.C., and S. G. Davies* for the respondents.

B Their lordships took time for consideration.

July 10. The following opinions were delivered.

LORD REID: My Lords, some time before 1958 the respondents decided to build a number of houses for sale. They contracted with Saunders. Saunders then sub-contracted with the appellants for the roofing. There was a discussion about the type of tiles to be used and Saunders for "prestige" reasons decided to have a rather expensive type, Somerset 13, made by Browne of Bridgwater. I think that it is clear that Saunders, who was highly skilled and experienced, relied entirely on his own skill and judgment in making this decision. The appellants' representative agreed with his choice, but that does not appear to me to mean that Saunders relied to any extent on the judgment of the appellants' representative. The appellants then sub-contracted the tiling work to Acme, and Acme obtained the tiles from Browne.

The houses were completed and sold in 1958. But very soon these tiles began to give trouble. It is agreed that the defects in these tiles could not have been detected by any reasonable examination before they were fixed on the roofs; and it is agreed that generally these tiles are of good quality and that there must have been some fault in the manufacture of this batch. Various attempts were made to put matters right for which Browne assumed liability, but they were unavailing, and ultimately the owners of a number of the houses decided to re-roof them and successfully sued the respondents for the cost. The respondents brought in the appellants as liable to them on an implied warranty. Normally the appellants would then have brought in Acme and Acme would have brought in Browne; but before they could do so time had run out under the provisions of the Limitation Acts. For reasons which it is not material to consider this case is proceeding on the footing that, although there was in fact no contract between the appellants and the respondents, Saunders must be regarded as the respondents' agent who made a contract between them and the appellants.

This is a contract for the supply of work and materials and this case raises a general question as to the nature and extent of the warranties which the law implies in such a contract. As regards the contractor's liability for the work done there is no dispute in this case: admittedly it must be done with all proper skill and care. The question at issue relates to his liability in respect of material supplied by him under the contract. The appellants maintain that the warranty in respect of materials is similar to that in respect of work, so that, if the selection of material and of the person to supply it is left to the contractor, he must exercise due skill and care in choosing the material and the person to supply it; but where, as in this case, the material and the supplier were chosen by the respondents, the appellants maintain that there was no warranty as to the fitness or quality of the tiles. The respondents admit that, if it is held that the choice of this type of tile was theirs and theirs alone, there can be no implied warranty that this type of tile was fit for the contract purpose. But they say that there still was a warranty that the tiles would be of good quality and that that warranty must be implied notwithstanding the fact that they left no choice to the appellants in selecting the person who was to supply the tiles. If that is right then the respondents must succeed. The loss was not caused by Somerset 13 tiles being unsuitable for the contract purpose: it was caused by the tiles which were supplied being of defective quality.

There is not very much authority on this matter, so it may be well first to consider it as a question of principle. In my view no warranty ought to be

implied in a contract unless it is in all the circumstances reasonable. If authority A  
be required for that proposition I find it in the judgment of the Exchequer  
Chamber in *Readhead v. Midland Ry. Co.* (1):

“Warranties implied by law are for the most part founded on the presumed B  
intention of the parties and ought certainly to be founded on reason and  
with a just regard to the interests of the party who is supposed to give the  
warranty, as well as of the party to whom it is supposed to be given.”

I take first the general question of the contractor's liability where the material C  
which he is required to use can be obtained from any one of several suppliers  
and the choice of suppliers is left to him. There is no doubt that in every case  
he is bound to make a proper inspection of the material before using it, and he  
will be liable if the loss is caused by the use of material which reasonable inspec-  
tion would have shown to be defective. The question is whether he warrants  
the material against latent defects.

There are in my view good reasons for implying such a warranty, if it is not  
excluded by the terms of the contract. If the contractor's employer suffers loss  
by reason of the emergence of the latent defect, he will generally have no redress  
if he cannot recover damages from the contractor. If, however, he can recover D  
damages the contractor will generally not have to bear the loss: he will have  
bought the defective material from a seller who will be liable under s. 14 (2)  
of the Sale of Goods Act, 1893, because the material was not of merchantable  
quality; and if that seller had in turn bought from someone else there will again  
be liability, so that there will be a chain of liability from the employer who suffers  
the damage back to the author of the defect. Of course the chain may be E  
broken because the contractor (or an earlier buyer) may have agreed to enter  
into a contract under which his supplier excluded or limited his ordinary liability  
under the Sale of Goods Act, 1893; but in general that has nothing to do with  
the employer and should not deprive him of his remedy. If the contractor chooses  
to buy on such terms, he takes the risk of having to bear the loss himself if the  
goods prove to be defective.

Moreover many contracts for work and materials closely resemble contracts F  
of sale: where the employer contracts for the supply and installation of a machine  
or other article, the supply of the machine may be the main element and the work  
of installation be a comparatively small matter. If the employer had bought the  
article and installed it himself, he would have had a warranty under s. 14 (2)  
and it would be strange that the fact that the seller also agreed to install it  
should make all the difference. G

The speciality in the present case is that these tiles were only made by one  
manufacturer. So the contractor had to buy them from him or from someone  
who bought from him. Why should that make any difference? It would  
make a difference if that manufacturer was only willing to sell on terms which  
excluded or limited his ordinary liability under the Sale of Goods Act, 1893, and  
that fact was known to the employer and the contractor when they made their H  
contract. For it would be unreasonable to put on the contractor a liability  
for latent defects when the employer had chosen the supplier with knowledge  
that the contractor could not have recourse against him. If the manufacturer's  
disclaimer of liability caused him to supply the goods at a cheaper price, as in  
theory at least it should, the employer ought not to get the benefit of a cheap  
price as well as a warranty from the contractor. A more difficult case would be I  
where the employer and contractor had no reason to suppose, when they made  
their contract, that the manufacturer would refuse to sell subject to a seller's  
ordinary liabilities in respect of the goods which he sells. I need not consider that  
case now, however, because there is no suggestion that Browne's had refused to  
sell except on terms which limited their ordinary liability in respect of latent  
defects in their tiles. No doubt there will be some cases where, although the

(1) [1861-73] All E.R. Rep. 30 at p. 39; (1869), L.R. 4 Q.B. 379 at p. 392.



A contractor had a right of recourse against the manufacturer, he cannot in fact operate that right. The supplier may have become insolvent, or, as in the present case, the action against the contractor may be so delayed that he has no time left in which to sue his supplier. But these cases must be relatively few, and it would seem better that the contractor should occasionally have to suffer than that the employer should very seldom have any remedy at all. It therefore seems to me that general principles point strongly to there being an implied warranty of quality in this case.

B There is little assistance to be got from the earlier authorities. The first which must be examined is *G. H. Myers & Co. v. Brent Cross Service Co.* (2). There Myers engaged Brent Cross to repair their motor car. It was necessary to fit new connecting rods and Brent Cross obtained them from the makers of the car. One C had a latent defect so that when the car was used again it broke and caused extensive damage. After reviewing the authorities DU PARCQ, J., said (3):

"... I think that the true view is that a person contracting to do work and supply materials warrants that the materials which he uses will be of good quality and reasonably fit for the purpose for which he is using them, unless the circumstances of the contract are such as to exclude any such warranty."

D The only addition which I would make is that there are really two warranties, one as to quality and one as to reasonable fitness for the job, and the fact that the latter is excluded, as it is in this case, does not affect the warranty of quality. But I do not think that the example which follows that statement of principle is happily chosen. Whatever may have been the case in 1933, today cases must E be rare where the car owner can reasonably suppose that spare parts can be obtained from any other source than the makers of the car; and it may well be that the owner ought at least to suspect that the makers will refuse to supply spare parts without limiting their liability for damage caused by latent defects. So it may well be that this is a case where the circumstances do exclude any F warranty by the garage of the quality of the spare parts fitted in repairing the car. It appears to me that less cogent circumstances may be sufficient to exclude an implied warranty of quality where the use of spare parts is only incidental to what is in essence a repairing operation where the customer's main reliance is on the skill of the tradesman, than in a case where the main element is the supply of an article, the installation being merely incidental.

G I have had in mind in formulating my opinion the circumstances in *Gloucestershire County Council v. Richardson* (4) and the arguments addressed to your lordships in that case. I do not think it necessary to examine in detail any of the other authorities which have been cited. In the present case one must sympathise with the appellants because, through no fault of their own, they have lost their right of ultimate recourse against the makers of these tiles. But, putting that aside because the existence or non-existence of the warranty must be determined as at H the date of the contract, this appears to me to be a clear case in which a warranty of quality must be implied. I would, therefore, dismiss this appeal.

I LORD PEARCE: My Lords, the Somerset 13 tiles supplied by the third party in pursuance of their contract to supply and fix Somerset 13 tiles were admittedly defective in quality. The defect was latent and the failure to detect it does not reflect on the skill or care of the tilers. Unless, therefore, they were responsible for the merchantability or the proper quality of the tiles, they are not liable.

Had this been a sale of tiles, the third party would have been liable for breach of condition as to merchantability under s. 14 (2) of the Sale of Goods Act, 1893, and could in turn (in the normal course) have recovered from those who had sold

(2) [1933] All E.R. Rep. 9; [1934] 1 K.B. 46.

(3) [1933] All E.R. Rep. at pp. 13, 14; [1934] 1 K.B. at p. 55.

(4) Post, p. 1181.

to them. They would not, however, have been liable under the more searching condition of fitness for the purpose which is implied by s. 14 (1), since the employers chose and ordered the tiles under their trade name of Somerset 13. A

It is argued, however, that there is a clear distinction between a sale of goods and a contract for work done and materials supplied and that, either no responsibility for the materials arises under the latter form of contract or, all responsibility is excluded when materials of a particular sort, for which there is only one manufacturer, are chosen by the employer. Where the defect in materials is patent, the problem does not arise; for in such a case the obligation to use skill and care would be broken by the use of materials which had patent faults, and the employer could recover on that ground. But where the fault is latent, the point is not covered by the duty to use care and skill, since care and skill could not have prevented the trouble. B

If the appellants' argument is correct, an employer has no redress for loss arising out of the use of material with latent defects if he has ordered a particular kind of material, for it was not the employer but the contractor who bought from the manufacturer. The employer therefore cannot sue the manufacturer unless it is possible to extend *Donaghue v. Stevenson* (5) further than it has gone up to the present. C

I see great difficulty in extending to an ultimate consumer a right to sue the manufacturer in tort in respect of goods which create no peril or accident but simply result in sub-standard work under a contract which is unknown to the original manufacturer, and if originally, as a term of his contract, the manufacturer limited his liability for defects, there seems no reason (where there is no peril or accident) why a third party should have better rights than the original purchaser; and if his rights are the same, there is no need to introduce a rule which would cause various confusions and difficulties since the same result can be achieved in the normal case by third party procedure. If, however, the employer can sue the contractor in respect of the faulty materials, then the contractor can in turn recover from the manufacturer with whom the ultimate blame lies. This would follow the normal chain of liability which attaches to sales and sub-sales of goods. D

The question here is whether goods sold drop out of the normal chain of liability as soon as they become goods supplied pursuant to a contract under which their supply is accompanied by a large or small proportion of labour done. The tiles start their economic journey (from the manufacturer to their ultimate destination) as goods sold in the normal course since the manufacturer sells them to the contractor. When the contractor in turn "supplies" the tiles to the employer under a contract for work done and materials supplied, he normally adds a reasonable profit to the price which he has paid to the manufacturer. Had he *re-sold* them to the employer he would have been responsible to the employer for their merchantability. Does the fact that he has "supplied" them (at a price which may or may not be separately itemised in the bill) make so great a difference that it exempts him from all liability for their merchantability? On broad principle there seems no adequate reason why this should be so. Nor does the general commercial benefit of the community seem to favour it. E

The cases which preceded and crystallised in the Sale of Goods Act, 1893, do not, as far as conditions or warranties are concerned, seem to show any clear consciousness of a difference in principle between a sale of goods and a contract for labour and materials. (See e.g., *Francis v. Cockrell* (6); *Randall v. Newsom* (7) and *Jones v. Just* (8).) F

It is frequent for builders to fit baths, sanitary equipment, central heating and the like, encouraging their clients to choose from the wholesalers' display rooms G

(5) [1932] All E.R. Rep. 1; [1933] A.C. 562.

(6) (1870), L.R. 5 Q.B. 501.

(7) (1877), 2 Q.B.D. 102.

(8) (1868), L.R. 3 Q.B. 197 at p. 202. H

A the bath or sanitary fitting which they prefer. It would, I think, surprise the average householder if it were suggested that simply by exercising a choice he had lost all right of recourse in respect of the quality of the fittings against the builder who normally has a better knowledge of these matters. Of course if a builder warned him against a particular fitting or manufacturer and he persisted in his choice, he would obviously be doing so at his own risk; and a builder can always make it clear that he is not prepared to take responsibility for a particular kind of fitting or material. The general rule, however, is that laid down by DU PARCQ, J., in *Myers v. Brent Cross Service Co.* (9) that

B “... a person contracting to do work and supply materials warrants that the materials which he uses will be of good quality and reasonably fit for the purpose for which he is using them, unless the circumstances of the contract are such as to exclude any such warranty.”

C I do not, however, accept the instance which he gave of circumstances which would exclude a warranty. If it is known to both parties that the manufacturer gives no warranty to the contractor, that fact is a strong indication that no warranty is being given by the contractor. So, too, if a contractor advises against a particular material; but the circumstances of contracts are so various that it must be a question of fact and degree whether the circumstances of a particular case suffice to exclude a warranty which the general rule implies.

D In the present case the employer's choice of Somerset 13 tiles, which were manufactured by only one firm, is not in itself sufficient to exclude the warranty of quality. It is an unfortunate coincidence for the tilers that the statute of limitation prevented their recourse to the manufacturers; but that fact cannot alter their liability which in normal and less unfortunate circumstances would be handed on to the manufacturer.

E I would, therefore, dismiss the appeal.

LORD UPJOHN: My Lords, the sole though important question in this appeal is as to the extent of the implied warranty (if any) imposed by law on a contractor who agrees to do work and supply materials. The appellants, experienced in supplying and laying roofing materials, were employed by the respondents on a contract admittedly for work and materials to supply and lay Somerset No. 13 red tiles to the roofs of certain houses being built on an estate at Gerrards Cross. Did they thereby impliedly make any warranty that the tiles supplied by them were (a) of good quality and (b) reasonably fit for the purpose for which they were supplied?

G Had the contract been one for sale of goods then it is not in dispute that s. 14 (2) of the Sale of Goods Act, 1893, would have applied and entitled the respondents to succeed in their claim for breach of warranty that the tiles were of good quality, for it was common ground that, though Somerset No. 13 tiles are in general a high grade tile of good quality fit for the purpose for which they were supplied, this particular batch were deficient, though the deficiency was latent and not discernible on reasonable examination by a person of skill and experience, as was agreed before the learned official referee.

H Your lordships were properly referred to authorities in the nineteenth century, for s. 14 (2) only put the common law as it had been established into a statutory code. The departure of the common law in relation to sale of goods from the old principle of “caveat emptor” (which still applies fundamentally to sale of real estate) was recognised as long ago as 1815 by LORD ELLENBOROUGH, C.J., in *Gardiner v. Gray* (10). He stated the principle (11) that where there was a sale by description the purchaser has a right to expect a saleable article answering to the description in the contract and that is an implied term in every such contract. Where there was no opportunity to inspect, the principle of caveat emptor did

(9) [1933] All E.R. Rep. at pp. 13, 14; [1934] 1 K.B. at p. 55.

(10) (1815), 4 Camp. 144.

(11) (1815), 4 Camp. at p. 145.



not apply. Your lordships need not consider any question of an opportunity to inspect, because, as PARK, J., in effect recognised much later in *Jones v. Bright* (12), in the case of latent defects (with which alone your lordships are concerned) there cannot be an opportunity to inspect. There are many later cases developing LORD ELLENBOROUGH's principle (13) until we find BEST, C.J., in *Jones v. Bright* (14) saying: "If a man sells an article he thereby warrants it is merchantable." Curiously enough, however, there is no equal body of decision at common law in the nineteenth century to support, in express terms, a similar implied warranty in the case of contracts for work and materials. But that a man who supplies his labour or his labour and materials is subject to the same basic obligation cannot be doubted. In *Duncan v. Blundell* (15), BAYLEY, J., in his usual direct language said of a case where the defendant had undertaken to supply and fit a stove (16):

"Where a person is employed in a work of skill, the employer buys both his labour and his judgment; he ought not to undertake the work if it cannot succeed, and he should know whether it will or not; of course it is otherwise if the party employing him choose to supersede the workman's judgment by using his own."

The distinction between a contract for the sale of goods and a contract for the provision of work and materials is one which depends on the particular nature of each individual contract, as CROMPTON, J., said as long ago as 1861 in *Lee v. Griffin* (17), and it is frequently a question of fine distinction. It would be most unsatisfactory, illogical, and indeed a severe blow to any idea of a coherent system of common law, if the existence of an implied obligation depended on such a distinction. That there are distinctions between the two types of contracts is undoubted; questions of pleading (in the old days), passing of property, and so on. The real distinction however, on which so many decisions were focussed depended on the fact that for 277 years until 1954 a contract of sale above a small value required evidence in writing to be enforceable whereas a contract for work and materials did not. In such cases the question whether any terms should be implied in the case of the one type of contract rather than the other seldom arose. The exception, however, did arise in *Samuels v. Davis* (18) where a dentist sued for a denture which he had made and supplied, for which his patient refused to pay because it did not fit his gums. The county court judge held that the denture was not reasonably fit for the purpose for which it was supplied. In the leading case of *Lee v. Griffin* (19) it had been held that such a contract was one of sale. As DU PARCQ, L.J., said in *Samuels v. Davis* (20):

"... in *Lee v. Griffin* (19) the court was not directing its attention to the question whether there were any incidents in the case of a contract for the sale of a denture which were different from those in the case of a contract for the work and labour expended on the making of a denture. I have no doubt that, if the question had arisen for decision, whether it made any difference whether the contract was described as one of sale or one of work and labour, the answer for the present purpose would have been: 'None whatever'."

In the same case, delivering the first judgment of the Court of Appeal, SCOTT, L.J., had said (21) that it was a matter of legal indifference whether the contract was one for the supply of goods, or one of service to do work and supply materials.

So I cannot see any logical distinction between the obligations which ought in general to be implied with regard to quality and fitness between a sale of goods

(12) (1829), 5 Bing. 533 at p. 548.

(14) (1829), 5 Bing. at p. 544.

(16) (1820), 3 Stark at p. 7.

(17) [1861-73] All E.R. Rep. 191 at p. 192; (1861), 30 L.J.Q.B. 252 at p. 253.

(18) [1943] 2 All E.R. 3; [1943] 1 K.B. 526.

(19) [1861-73] All E.R. Rep. 191; (1861), 1 B. & S. 272.

(20) [1943] 1 K.B. at p. 529; [1943] 2 All E.R. at p. 5.

(21) [1943] 2 All E.R. at p. 4; [1943] 1 K.B. at p. 527.

(13) (1815), 4 Camp. at p. 145.

(15) (1820), 3 Stark. 6.

A and a contract for work and materials. Indeed, for my part I think that, as a matter of common sense and justice, one who contracts to do work and supply materials ought to be under at least as high if not a higher degree of obligation with regard to the goods he supplies and the work that he does than a seller who may be a mere middleman or wholesaler. GREER, L.J., took this view in the Court of Appeal in *Cammell Laird & Co., Ltd. v. Manganese Bronze and Brass Co., Ltd.* (22).

B It is not in doubt that at common law (*Randall v. Newsom* (23)) and now under s. 14 (2) of the Sale of Goods Act, 1893, a vendor is under an implied obligation to warrant to his purchaser the quality of his goods against latent as well as patent defects. It was argued that at all events the contractor of labour and materials should be under no such obligation in relation to latent defects. For the reasons already given I am unable to accept this argument (unsupported as it is by any authority) which is, in my opinion, untenable in principle.

C My lords, I think that the true view is that stated by DU PARCQ, J., in *G. H. Myers & Co. v. Brent Cross Service Co.* (24):

D " . . . the true view is that a person contracting to do work and supply materials warrants that the materials which he uses will be of good quality and reasonably fit for the purpose for which he is using them, unless the circumstances of the contract are such as to exclude any such warranty."

That statement, I have no doubt, involves two warranties though, as in this case, it very frequently happens that for any relevant purpose there is no difference between the two.

E Judged by this test the appellants were instructed to supply a particular type of tile which inherently was of high grade quality and well fitted for its purpose and so the implied warranty would apply unless the circumstances were sufficient to exclude it. In my opinion, the fact that the appellants were instructed to supply in terms a Somerset No. 13 red tile is not sufficient to exclude such implied warranty, which must be judged as at the time of the contract. This is not a case analogous to those cases where the employer may have ordered the contractor to supply certain particular goods which are found to be inherently unsuitable for the purpose. Such cases may give rise to many difficult factual and legal problems. The truth is that the appellants through no fault of their own had the misfortune to supply a particular batch of tiles which failed to conform to the proper standard of quality and fitness. I can see no reason why they should be absolved from their implied obligations.

G Unfortunately having correctly stated, as I think, the proper principles, DU PARCQ, J., gave an illustration (25): "Repair my car; get the parts from the makers of the car and fit them" as being sufficient to exclude the implied warranty. In common with, I believe, all of your lordships and of the members of the Court of Appeal (26), I regard this as an inaccurate illustration of the principle which the learned judge had so lucidly and correctly just stated; but for this illustration I do not doubt that the official referee would have reached a different and correct conclusion.

H Under our principles of jurisprudence, apart from a so far scarcely charted sea of the law of torts in this area, the practical business effect and just solution to this type of breach of contract is that each vendor or contractor of labour and materials should warrant his supply of materials against patent and latent defects so that by the well-known chain of third party procedures the ultimate culprit, the manufacturer, may be made liable for his defective manufacture. For reasons which your lordships need not discuss that chain was broken in this case.

(22) [1933] 2 K.B. 141 at p. 195.

(23) (1877), 2 Q.B.D. 102.

(24) [1933] All E.R. Rep. at pp. 13, 14; [1934] 1 K.B. at p. 55.

(25) [1933] All E.R. Rep. at p. 14; [1934] 1 K.B. at p. 55.

(26) [1967] 3 All E.R. 451.

My lords, had this been a sale of goods, s. 14 (1) of the Sale of Goods Act, 1893, A  
would not have applied; first, because the contractors were ordered to supply  
the tiles by their trade name and, secondly, because on the facts of this case  
there was clearly no reliance on the contractors' skill or judgment; but DU  
PARCQ, J., in his statement of the law (27) rightly, as I think, imposed a higher  
obligation on the contractor who supplies work and materials. But such obliga-  
tions are, however, conditioned by the proviso that the circumstances of the B  
contract may be such as to exclude them. I have already expressed my opinion  
that there are no such circumstances in this case but it is a matter of crucial  
importance in the appeal which your lordships are about to consider.

For these reasons I would dismiss this appeal.

**LORD WILBERFORCE:** My Lords, the question is whether, under a C  
contract to supply and fix roofing tiles described under a brand name (Somerset  
13), the suppliers, the appellants, are liable for damages in respect of latent defects  
which, in effect, made the tiles useless. The particular brand of tiles was selected  
by the respondents (more exactly by a Mr. Saunders who was accepted on the  
pleadings their have been acting as their agent) and was a brand only manufactured  
by one particular company.

The Court of Appeal (28) approached the case on the basis that the contract D  
was one for "work and materials" and considered the question for decision  
to be whether, in such a contract, a condition or warranty should be implied  
similar to that which arises in relation to a sale of goods under s. 14 (2) of the  
Sale of Goods Act, 1893. Since Mr. Saunders was himself a builder of experience  
comparable with that of the appellants' representative, no question could arise E  
of reliance on the skill and judgment of the latter, so as to attract the provisions  
of s. 14 (1) of the Act of 1893.

The expression "a contract for work and materials", engraved on the lips  
of every legal practitioner, is one of considerable imprecision. It had its usefulness  
when it was necessary to devise an explanation why certain contracts should be  
exempted from the requirements as to sales or agreements for sale of the Statute  
of Frauds, 1677 and later, the Sale of Goods Act, 1893, of embodiment in writing: F  
it has its relevance in connexion with the technicalities of pleading (see *Atkinson*  
*v. Bell* (29)); but in the present context, of an inquiry whether there should be  
implied any condition, or warranty, as to fitness or quality, the expression is not  
of great assistance, because the contracts which may plausibly be covered by  
it are of too great a diversity. On the one hand there is a wide range or spectrum G  
of cases between, at one extreme, those where the predominant interest of the  
"purchaser" is in the production of a result, the contribution of the materials  
being subsidiary and left to the judgment of the "seller" and those where the  
main element lies in the materials, the work being of a subsidiary character. Such  
contracts as for the colouring of hair, for the supply of a denture, for the printing of  
a book, for a mink cape, may lie at different points along the scale, and as regards H  
any materials involved in the contract, different warranties may and indeed  
must be appropriate. On the other hand, the expression may be used to convey a  
difference between a contract for the sale of an article, and a contract for the  
supply and fixing of an article: there will be "price" in one case, "consideration"  
in the other and the property may pass at different times. Yet this difference  
would seem to have little relevance to any question of condition or warranty. I  
Why should the obligation of a supplier of a bath, or any other article needing  
to be installed, be different according to whether he does or does not also undertake  
to instal it?

Authority apart, it would seem reasonable that, the larger the element of  
supply of particular goods in the contract, the closer should be the similarity

(27) [1933] All E.R. Rep. at pp. 13, 14; [1933] 1 K.B. at p. 55.

(28) [1967] 3 All E.R. 451.

(29) (1828), 8 B. & C. 277.



A of warranties to be implied with those arising on a sale. In many cases there would be no logical reason for not importing a condition or warranty identical with that arising under s. 14 (2), or possibly under s. 14 (1) of the Act of 1893. On the other hand, if the acquisition of an identifiable object is of minimal, or no interest to the "purchaser" then, if any warranty is to be implied, it should properly relate either to the quality of the work to be done or to the use of suitable, and non-injurious, materials.

B I do not think that much citation of authority is required to show that, in fact, the law has developed in just this way. Before the Sale of Goods Act, 1893, the courts had to consider questions of implied warranty under the common law and they did so, both in relation to sales, *proprio sensu*, and to analogous contracts, not strictly or at least not purely sales, in precisely the same way. Their conclusions as to sales were taken into the Act of 1893, but the pre-existing principles remained and continued to be applied. For an illustrative pre-1893 decision I take *Randall v. Newsom* (30). The order was for a pole and splinter-bar to be made and fitted to the plaintiffs' phaeton carriage and it was claimed that the pole so made and fitted was of (latently) defective wood. The court, following in this respect the well-known decision in *Jones v. Bright* (31), in which the common law rules as to "merchantability" and "particular purpose" were laid down very much in the form which they have since continued to bear, held the plaintiff entitled to recover. The generality of the supplier's obligation cannot be better stated than in the words of BRETT, J.A., delivering the judgment of the court (32):

E "I have cited these cases, and the principles laid down in them, in order clearly to ascertain what is the primary or ultimate rule from which the rules which have been applied to *contracts of purchase and sale of somewhat different kinds* have been deduced. Those different rules, as applied to such different contracts, are carefully enumerated and recognised in *Jones v. Just* (33). In some contracts the undertaking of the seller is said to be only that the article shall be merchantable; in others, that it shall be reasonably fit for the purpose to which it is to be applied. In all, it seems to us, it is either assumed or expressly stated, that the fundamental undertaking is, that the article offered or delivered shall answer the description of it contained in the contract. That rule comprises all the others; they are adaptations of it to particular kinds of contracts of purchase and sale. You must, therefore, first determine from the words used, or the circumstances, what, in or according to the contract, is the real mercantile or business description of the thing which is the subject-matter of the bargain of purchase or sale, or, in other words, the contract. If that subject-matter be merely the commercial article or commodity, the undertaking is, that the thing offered or delivered shall answer that description, that is to say, shall be that article or commodity, saleable or merchantable. If the subject-matter be an article or commodity to be used for a particular purpose, the thing offered or delivered must answer that description, that is to say, it must be that article or commodity, and reasonably fit for the particular purpose."

H Since the Sale of Goods Act, 1893, it has been fully accepted by the courts that suitable warranties, adapted to the nature of the contract, ought to be implied in contracts where there are mixed elements of supply of goods and work to be done. I do not think it necessary to enumerate those cases, some of which are inadequately reported, but confine myself to one illustration. In *Samuels v. Davis* (34) the Court of Appeal had to consider a contract for a denture—the same contract which before the Sale of Goods Act, 1893, had been the subject of the leading case of *Lee v. Griffin* (35). The court found an implied condition of

(30) (1877), 2 Q.B.D. 102.

(32) (1877), 2 Q.B.D. at p. 109.

(33) (1868), L.R. 3 Q.B. 197.

(34) [1943] 2 All E.R. 3; [1943] 1 K.B. 526.

(35) [1861-73] All E.R. Rep. 191; (1861), 1 B. & S. 272.

(31) (1829), 5 Bing. 533.

reasonable fitness for the purpose without finding it necessary to decide the precise nature of the contract. SCOTT, L.J., said in *Samuels v. Davis* (36): A

"In my view it is a matter of legal indifference whether the contract was one for the supply of goods or one of service to do work and supply materials ..."

and DU PARCQ, L.J., agreed. B

The principle of this, and of other cases, was in fact stated in *G. H. Myers & Co. v. Brent Cross Service Co.* (37), where DU PARCQ, J., reviewed the authorities preceding the Sale of Goods Act, 1893, and summed up the law in the following proposition (38):

"... the true view is that a person contracting to do work and supply materials warrants that the materials which he uses will be of good quality and reasonably fit for the purpose for which he is using them, unless the circumstances of the contract are such as to exclude any such warranty." C

The learned judge, later in the same passage, gives some illustrations with which one may not wholly agree, and the distinction is perhaps somewhat blurred between warranties as to fitness for a purpose and warranties of quality and the separate ways in which they may be excluded, but as a concise statement of the law I find the passage acceptable so long as it is understood (as I think it has been) as requiring consideration to be given to the nature of each contract in order to see what prominence is given in it to the respective elements of "goods" and "work", and to see whether and to what degree the element of reliance on the supplier's skill and judgment is present or absent. D

In the present case, the contract was in the composite form "supply and fix" so that it was not strictly a contract of sale. It was indeed contended by the respondents that the appellants are bound by an admission in the pleadings that the contract was one of sale. I regard this point as of no importance since neither analysis nor authority supports the suggestion that, other circumstances apart, the conditions or warranties to be implied should be any different from those which would have arisen had this contract been for sale simpliciter. A significant circumstance undoubtedly is that the "purchaser" selected the type of goods to be supplied and, by implication, since only one firm made them, nominated the sub-supplier. By this, he took on himself the responsibility of selecting tiles suitable for his purpose, and so negatived any implied warranty from his supplier that the goods were suitable for that purpose; but I cannot attribute any further effect to the nomination. The supplier was a person dealing in goods of the description ordered, because in the ordinary course of his business he would accept orders, as previously he had for "Redland 40" and as in substitution he did, without demur, for "Somerset 13". He thus assumed responsibility for delivering goods "of merchantable quality". That means, in this context, goods of the minimum quality to be expected of goods of the description. Is there any reason why this warranty should not be implied against him? To impose on him liability for latent defects makes him, so far, an insurer in respect of the defects which he could not prevent and of which he did not know; but it is well settled that the implied condition as to fitness extends to latent defects (*Randall v. Newsom* (39)). That this should be so in the case of the manufacturer needs no justification: and where the supplier is a dealer, such as a wholesaler, or retailer, the justification for imposing liability on him is that it is open to him, and is consequently his responsibility, to obtain a similar warranty from his own supplier so that ultimately responsibility can be traced back to where it should lie, i.e., with the manufacturer, or whoever else has brought the defect about. It is an unfortunate feature of the present case that by lapse of time the normal right of recourse is E  
F  
G  
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(36) [1943] 2 All E.R. at p. 4; [1943] 1 K.B. at p. 527.

(37) [1933] All E.R. Rep. 9; [1934] 1 K.B. 46.

(38) [1933] All E.R. Rep. at pp. 13, 14; [1934] 1 K.B. at p. 55.

(39) (1877), 2 Q.B.D. 102.

A denied to the supplier but this cannot affect the contractual position between him and the person to whom he supplied the goods.

I find, therefore, every reason why the warranty should apply and no reason why it should not, and consequently the appellants were correctly held liable to the respondents for the defective tiles. The appeal must be dismissed.

B **LORD PEARSON:** My Lords, I have had the advantage of reading the opinion of my noble and learned friend, LORD PEARCE, and I agree with it and would, therefore, dismiss the appeal.

*Appeal dismissed.*

Solicitors: *Prestons* (for the appellants); *Watkins, Pulley and Ellis* (for the respondents.)

C [Reported by S. A. HATTEEA, Esq., Barrister-at-Law.]

## GLOUCESTERSHIRE COUNTY COUNCIL v. RICHARDSON.

D [HOUSE OF LORDS (Lord Reid, Lord Pearce, Lord Upjohn, Lord Wilberforce and Lord Pearson), May 13, 14, 15, 16, July 10, 1968.]

*Building—Contract—Sub-contractors—Nominated suppliers—Alleged wrongful repudiation by building contractor—Defective materials supplied—Undetectable defect—Whether main contractor warrants impliedly the fitness of materials supplied by nominated supplier—Building contract—Architect—Instructions—Notice to determine contract on ground of delay exceeding one month—Notice given by contractor—Whether contractor in breach of contract or whether notice valid—R.I.B.A. form of contract, conditions, cl. 18 (v), cl. 20.*

E A contractor contracted with employers to erect an extension to a technical college. The agreement incorporated the R.I.B.A. form\* of contract. The tender allowed a prime cost of £7,000 for concrete columns to be supplied by nominated suppliers. In accepting the contractor's tender the employers nominated, by their architect, suppliers (not those named in the tender) at a price of about £4,941. The authorised quotation of the suppliers, which the contractor was thus bound to accept, included a term limiting liability for defective goods and excluding liability for consequential loss or damage.

G The columns had defects which were undetectable when they were supplied, but which appeared after some columns had been used in the construction. Because of this the constructing engineer on behalf of the architect orally instructed the contractor on or before Aug. 21, 1961, to stop all work connected with the columns. On Aug. 21 the contractor wrote to the architect, who replied on Aug. 23, the terms of this correspondence constituting (as held by the Court of Appeal and the majority of the House of Lords) architect's instructions for the purposes of cl. 18 (v) of the conditions of the building contract. The contractor completed all work other than that which he had been told to stop. No instructions were issued to him to re-start work. His solicitors, by letters dated Oct. 23 and Nov. 6, gave notice of the determination of the contract on the ground, which cl. 20† taken with cl. 18† of the conditions of the building contract provided, that the whole or substantially the whole of the work had been delayed for more than one month by reason of causes mentioned in cl. 18, viz., by reason of architect's instructions. Clause 21 of the conditions of the building contract dealt with nominated sub-contractors, and provided that no nominated sub-

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\* Relevant extracts from clauses of this form are at p. 1183, letter B, to p. 1184, letter B, post.

† For these see p. 1183, letters F and G, post.



contractor should be employed against whom the contractor made reasonable objection or who would not contract to indemnify the contractor; but cl. 22, which dealt with nominated suppliers, contained no such provision for the protection of the contractor. Clause 22 provided that all specialists who had been nominated to supply materials or goods were suppliers to the contractor. It was conceded in the course of the proceedings that the contractor would not be entitled to determine the building contract under cl. 18 (v) if the architect's instructions resulted from a breach of contract by the contractor.

**Held:** (i) (LORD PEARSON dissenting) in view of the terms of the building contract, in particular (LORD UPJOHN, however, not relying on this ground) the contrast between cl. 20 and cl. 21 of the conditions of the building contract, and in view of the circumstances that the design, materials, specification, quality and price of the concrete columns was fixed by the employers and the suppliers without reference to the contractor, and in view of the restriction of the extent of the remedy against the suppliers contained in the contract with them that the contractor was obliged to accept, any warranty by the contractor of the quality or fitness of the columns supplied by the suppliers was excluded (see p. 1184, letter H, p. 1185, letter H, p. 1186, letter D, p. 1189, letter G, p. 1190, letters G and I, p. 1192, letter H, and p. 1193, letter D, post); accordingly the contractor's concession made in the course of the action did not exclude him from relying on cl. 20 and cl. 18 (v) of the conditions of the building contract.

(ii) (LORD PEARSON not deciding on this) on the facts there had been architect's instructions for the purposes of cl. 18 (v) of the conditions of the building contract, which instructions caused the delay within cl. 20 notwithstanding that the root cause was discovery of the defect in the columns, and the contractor was entitled, therefore, to give notice to determine the contract (see p. 1184, letter H, p. 1187, letters C and E, p. 1188, letter G, and p. 1191, letter D, post).

Decision of the COURT OF APPEAL ([1967] 3 All E.R. 458) affirmed.

[As to implied conditions in building contracts for work and materials, see 3 HALSBURY'S LAWS (3rd Edn.) 435, para. 818, and p. 442, para. 837; as to the absence of privity of contract between a sub-contractor and the employer of the main contractor, see *ibid.*, p. 512, para. 1019, and as to orders in writing by architects, see *ibid.*, pp. 481, 482, para. 939; and for cases on the subject, see 7 DIGEST (Repl.) 439-441, 393-403, 346, 39, 378, 173.]

Cases referred to:

*Luxor (Eastbourne), Ltd. v. Cooper*, [1941] 1 All E.R. 33; [1941] A.C. 108; 110 L.J.K.B. 131; 164 L.T. 313; 46 Com. Cas. 120; 1 Digest (Repl.) 587, 1881.

*Moorcock, The*, [1886-90] All E.R. Rep. 530; (1889), 14 P.D. 64; 58 L.J.P. 73; 60 L.T. 654; 12 Digest (Repl.) 686, 5274.

*Myers (G. H.) & Co. v. Brent Cross Service Co.*, [1933] All E.R. Rep. 9; [1934] 1 K.B. 46; 103 L.J.K.B. 123; 150 L.T. 96; 3 Digest (Repl.) 102, 285.

*Young and Marten, Ltd. v. McManus Childs, Ltd.*, [1967] 3 All E.R. 451; and ante p. 1169.

### Appeal.

This was an appeal by the appellants, Gloucestershire County Council ("the employers") against the judgment, dated June 23, 1967, of the Court of Appeal (SELLERS, DAVIES and RUSSELL, L.J.J.) and reported [1967] 3 All E.R. 458, allowing the appeal of the respondent, Henry William Richardson (trading as W. J. Richardson & Son), a building contractor, from the judgment dated July 28, 1966, of His Honour NORMAN RICHARDS, Q.C., an official referee, holding the contractor liable in damages to the employers under a building contract in the standard R.I.B.A. form (1939 Edn., 1957 revision) dated Nov. 21, 1960, for the

A building of extensions to the Stroud and District Technical College at Stroud, Gloucestershire. The architect under the contract was the employers' county architect, and the employers appointed a firm of consulting engineers, Hajnal & Myers, on the recommendation of the architect. The method of construction provided by the contract required the use of pre-cast pre-stressed concrete columns as the main bearing members of the building.

B The contract included the following relevant clauses among its annexed conditions—

“1. The contractor shall carry out and complete the works in accordance with this contract in every respect in accordance with the directions and to the reasonable satisfaction of the architect... the architect may... from time to time issue... written instructions, ... (all of which are in these conditions collectively referred to as ‘architect’s instructions’) in regard to: (a) the variation or modification of the design... of the works or... omission or substitution of any work... (e) the postponement of any work to be executed under the provisions of this contract...”

“If any verbal instructions... involving a variation are given to the contractor or his foreman on the works by the architect or by the clerk of works appointed by [the employers], such instructions... shall be confirmed in writing by the contractor to the architect within seven days, and if not dissented from in writing by the architect to the contractor within a further seven days shall be deemed to be architect’s instructions. The contractor shall forthwith comply with all architect’s instructions...”

E If compliance with architect’s instructions involves the contractor in loss or expense beyond that provided for in or reasonably contemplated by this contract, then, unless such instructions were issued by reason of some breach of contract by the contractor, the amount of such loss or expense shall be... added to the contract sum.

“18. If in the opinion of the architect the works be delayed... (v) by reason of architect’s instructions given in pursuance of cl. 1 of these conditions or (vi) because the contractor has not received in due time necessary instructions from the architect for which he shall have specifically applied in writing, ... then in any such case the architect shall make a fair and reasonable extension of time for completion of the works...”

G “20. ... if the whole or substantially the whole of the works... is delayed for [one month] by one or more of the causes... which are named in cl. 18 of these conditions, the contractor may, without prejudice to any other rights or remedies thereupon by notice by registered post to [the employers] or architect determine the employment of the contractor under this contract.

H “21. Where prime cost... sums are included in the bills of quantities for persons to be nominated or selected by the architect to supply and fix materials or to execute work on the site, (a) ... all specialists... who have been nominated or selected by the architect are hereby declared to be sub-contractors employed by the contractor and are referred to in these conditions as ‘nominated sub-contractors’. Provided that no nominated sub-contractor shall be employed... in connexion with the works against whom the contractor shall make reasonable objection or... who will not enter into a sub-contract providing—(i) that the nominated sub-contractor shall indemnify the contractor against the same obligations in respect of the sub-contract as those for which the contractor is liable in respect of this contract; (ii) that the nominated sub-contractor should indemnify the contractor against claims in respect of any negligence by such sub-contractor...”

I “22. Where prime cost... sums are included in the bills of quantities in respect of any materials or goods to be fixed by the contractor, (a) ...

[this para. (a) contained no proviso corresponding to that in cl. 21 (a) against nominated sub-contractors being employed who would not provide for indemnity] . . . (b) all specialists . . . who have been nominated or selected by the architect to supply such materials or goods are hereby declared to be suppliers to the contractors and are referred to in these conditions as 'nominated suppliers'. All payments by the contractor for such materials or goods shall be in full and shall be paid within thirty days of the end of the month during which delivery is made less only a cash discount . . . if so paid . . ."

The bills of quantities provided a sum of £7,000 for pre-cast pre-stressed concrete columns to be supplied by a nominated supplier and delivered to the site, and allowed profit to be added of 2½ per cent. (£175). The bills of quantities further provided that these materials should be fixed by the contractor. By letter to the contractor dated Sept. 21, 1960, the architect nominated Cawood Wharton & Co., Ltd. (hereinafter called "Cawoods") as suppliers of concrete units and enclosed a copy of Cawoods' price quotation dated July 25, 1960, and authorised and requested the contractor to accept it and place his order with Cawoods. The contractor accepted it by letter dated Sept. 27, 1960. The quotation given by Cawoods was subject to their standard conditions which included restriction on their liability in respect of defects in goods supplied by them and by their letter of Oct. 5, 1960, Cawoods informed the contractor that his order was accepted subject to their standard conditions of sale. Concrete columns were delivered by Cawoods and were inspected on delivery by representatives of the consulting engineers, by the clerk of the works, and by the employers' divisional architect. No defects were discovered. The columns were erected between March and June, 1961. No defects were apparent. In July, 1961, cracks were seen in some of the columns and in August, 1961, the clerk of the works was instructed by the consulting engineers to tell the contractor to stop all work on the perimeter columns. By letter dated Sept. 23, 1961, to the architect's department of the employers, the contractor notified them that all his men had ceased to work and that they awaited instructions as to recommencing work. By letters dated Oct. 23 and Nov. 6 and 8, 1961, of the contractor's solicitors to the employers the contractor gave formal notice to determine the building contract on the ground of delay exceeding one month, citing cl. 18 (i), (v) and (vii) of the building contract. The employers brought an action against the contractor claiming damages for wrongful determination of the building contract. The question for decision on the appeal was whether the contractor was entitled to give notice of determination. The root cause of the delay was the defect in the concrete columns. Certain relevant matters in regard to the tender for the building contract are set out in the opinion of LORD WILBERFORCE at p. 1192, letters B to F, post.

*D. A. Grant, Q.C., and David Kemp* for the employers.  
*Donald Keating and P. N. Garland* for the contractor.

**LORD REID:** My Lords, I agree with the majority of your lordships that this appeal should be dismissed.

**LORD PEARCE:** My Lords, the contractor in any particular field of business, when he engages to do certain work and supply materials, impliedly warrants that the materials will be of good quality, unless the particular circumstances of the case show that the parties intended otherwise. To find the intention one must consider the express terms of the contract and any admissible surrounding circumstances.

Here the parties entered into a Royal Institute of British Architects contract, a complicated and sophisticated document. There is no express acceptance by either party of liability for the quality of the nominated materials. The contractor must comply with the instructions of the architect. He must accept



- A the architect's nomination in respect of certain sub-contractors and nominated suppliers. No nominated sub-contractor, however, can be employed (cl. 21) if the contractor makes reasonable objection to him or if, *inter alia*, the sub-contractor will not enter into a sub-contract indemnifying the contractor against claims for negligence of the sub-contractor and "against the same obligations in respect of the sub-contract as those for which the contractor is liable in respect of this contract". These words seem to make it clear that the contractor is accepting liability in respect of work done by the nominated sub-contractor.

The situation with regard to nominated suppliers, however, is noticeably different. The clause (22) which deals with nominated suppliers follows directly on that which deals with nominated sub-contractors. It provides no veto on the ground of the contractor's reasonable objection, nor on the ground of the nominated supplier refusing to indemnify the contractor. This omission cannot, I think, be unintentional. It seems, in contrast to cl. 21, to point to an intention that the contractor is not undertaking liability for materials provided by a nominated supplier: otherwise he must surely have been given, in the case of a nominated sub-contractor, an opportunity of making reasonable objections, and a right to insist on an indemnity from the supplier.

- D It would not be unreasonable for the parties to intend that an employer should take the responsibility for materials provided by nominated suppliers. They have been selected, without giving the contractor any right to express views, by the employer's own expert architect, who has decided that the nominated goods are suitable for the purpose and who has made the preliminary arrangements with the suppliers either before or during the main contract.
- E The contractor is simply instructed to obtain his supplies from the nominated supplier. It is the employer who, through his architect, alone arranges the price, which is liable to be reflected in the quality and who alone can insist on tests and checks of quality. All the circumstances of the nomination appear actually to exclude any reliance on the contractor's skill and judgment; and though the contractor receives a profit on the nominated supply, it is a controlled profit and he has certain duties to perform such as co-ordinating the delivery with the work and doing his best to see that there are no delays (see cl. 18 (vii)).

- F On the other hand, if the contractor is not liable for materials provided by nominated suppliers, the employer is left without a remedy for faulty materials; for the contract, by cl. 22 indicates clearly that the nominated supplier is in contractual relation with the contractor only and, although the employer is paying for the nominated materials, he pays the contractor for them and the contractor pays the nominated supplier. Thus to hold that the contractor is not liable for nominated supplies is to go against one of the important reasons for the general rule that there is a warranty of good quality in materials supplied under a contract for labour and materials, namely that the employer should have a remedy against the contractor who can in turn enforce it against the supplier
- G with whom the fault lies.

- H Yet in spite of this important fact I think that the contrast between the wording of c. 21 and that of cl. 22 persuades one to the view that the contract shows an intention to exclude a warranty by the contractor in respect of nominated supplies. And the particular circumstances of the case fortify this view. The employers (or their architect) employed a skilled engineer to advise in respect of the columns in question. The engineer, without any consultation with the contractor, prepared detailed designs of the columns, chose out Cawood Wharton & Co., Ltd. ("Cawoods") as suitable suppliers, and gave them such instructions as he considered were necessary to specify the composition of the columns. The architects obtained a quotation from Cawoods which was lower than the amount quoted by another firm and also substantially lower than the prime cost item, and which contained a substantial limitation of the purchaser's right of recourse in the event of the columns being defective. The architect
- I

presumably was satisfied with this and, without discussing the matter with the contractor, instructed him to accept the quotation. A

The employers, through their architect, having directed the contractor to buy from a manufacturer who had substantially limited his own liability, it would not be reasonable to suppose that the parties were intending the contractor to accept an unlimited liability, which might have been very great, for these columns over whose manufacture he had no control whatsoever. It is suggested in argument by the appellants that one should assume some implied intention that there will be liability on the contractor limited to the curtailed right of recourse provided under Cawoods' quotation. If so, one would have to imply in respect of each nominated supplier that there is a liability limited to the right of recourse provided in each particular sub-contract of supply; but I see no ground for such a complicated implication which, if it existed, must surely have been embodied in express terms in cl. 22. In my opinion, the limitation of recourse against the nominated supplier and the other particular circumstances in respect of the supply of the columns provide confirmation of the intention indicated by the contract itself, namely, that any warranty by the contractor in respect of the quality of the nominated supplies was to be excluded. B C

The defect in the columns was not, therefore, a matter for which the contractor was liable or at fault. Consequently he can rely on cl. 18 (v) and claim that the works were delayed "by reason of the architect's instructions given in pursuance of cl. 1 of these conditions". D

I cannot, with respect, accept the finding of the learned official referee "that the cause for the suspension of the work and consequent delay was the discovery of the defects in the columns and not the result of any instruction given" or that "the continuance . . . of the delay was occasioned by the parties pursuing the agreed course". I think also that he placed too much weight on the contractor's admission that he would have suspended operations of his own volition. I naturally hesitate to differ from so careful and experienced an official referee; but I see the problem from a somewhat different angle, and that difference is a question of law turning on the meaning of the word "cause" and on the construction of the words (in cl. 20) "is delayed for the period named in the appendix to these conditions by one or more of the causes . . . which are named in cl. 18 of these conditions" and the words (in cl. 18) "If . . . the works be delayed . . . (v) by reason of architect's instructions . . ." E F

To construe the words one has to consider the framework of the two clauses. Clause 18 provides that in certain cases of delay "the architect shall make a fair and reasonable extension of time for completion of the works", so that the contractor shall not be unfairly penalised for not being able to complete his work within the contract time. There are eight kinds of delay which may give rise to a contractor's right to a fair extension: bad weather, a fire, delay of others, force majeure and so forth. The sub-cl. (v) with which we are dealing is concerned with delay by reason of the architect's instructions. This more often arises when the employer wants variations which make the contract more lengthy to perform, but it is equally applicable where, as here, the architect puts a "stop order" on the work. When the delays which would entitle a contractor to an extension of time exceed a certain period (in this case a month was stipulated) the contractor is entitled (under cl. 20) to determine the contract. G H

In order to ascertain whether the contractor was entitled to determine this contract under cl. 20, one has to ascertain whether "the whole or substantially the whole of the works" was delayed "for a month by one or more of the causes" which would have entitled the contractor to an extension of time. It follows that one is not trying to look under cl. 18 (v) for the real or ultimate cause of the delay which perhaps in this case one could say was faulty columns. In this context the words "by reason of architect's instructions" meant little more than "by obedience to architect's instructions". Otherwise a contractor might often be unfairly deprived of any extension under cl. 18 (v). Suppose owing to I

- A latent defects discovered in the subsoil during work, it is obvious that the foundations must be substantially strengthened and varied. The architect orders the necessary variations. The contractor has to carry them out. In one sense the work is not delayed by reason of the architect's instructions, since the ultimate cause of the delay was the faulty subsoil and the architect's instructions were the inevitable consequence. But this is not the sense which the contract intends.
- B Moreover, suppose that the builder agrees that the instructions were inevitable and adds that, even had there been no architect, he himself as a competent builder must have varied and strengthened the foundations. In such a case, in my opinion, the contractor would still have been entitled to an extension on the ground that the delay was by reason of instructions of the architect. The fact that (as here) some outside cause compelled the architect to give the instructions
- C is irrelevant. So, too, is the fact that (as here) the contractor agreed with the instructions and would have felt bound to act in a like sense on his own account. Otherwise it would seem that whenever the architect's variations were sensible and commanded the approval of the builder, he could never obtain an extension of time. This, in my opinion, was never intended by cl. 18; and cl. 18 is the key to the relief under cl. 20.
- D The contractor acquiesced in the stoppage ordered by the architect and indeed he could hardly have done otherwise. The architect and his assistants were in command of the situation. There is no evidence which could support an agreement between builder and architect which prevented the operation of cl. 18 (v) and cl. 20.

- E For these reasons I think that the delay caused by the instructions of the architect exceeded one month and entitled the contractor to serve notice of determination.

I would therefore dismiss the appeal.

- LORD UPJOHN: My Lords, on Sept. 21, 1960, the appellant council ("the employers") by letter accepted the fixed price tender by the respondent ("the contractor") to erect an extension to a technical college at Stroud for approximately £115,000. By the same letter the employers authorised the contractor to accept the tender already made to the employers by a specialist company Cawood Wharton & Co., Ltd. ("Cawoods") for forty pre-cast pre-stressed reinforced concrete columns whose function was to support the upper floors of the building. The contractor submitted an order to Cawoods, who accepted it on Oct. 5, 1960, on the terms of their standard conditions of sale.
- G The formal contract between the employer and the contractor was signed on Nov. 21, 1960, and was in the familiar R.I.B.A. contract form as specially adapted for the use of local authorities. It was faintly argued before your lordships, for the first time as I understood it, that, as the contract was not signed until Nov. 21, 1960, the contractor was a free agent to make terms with Cawoods when ordering the columns; but on the pleadings and having regard to the general course of the action before the learned official referee and on appeal I do not think that this point is open to the employers. It seems to me clear that from the date of the letter accepting the contractor's tender both parties proceeded on the footing that the contractor was not merely authorised but bound to accept Cawoods tender and on the terms of their standard conditions of sale.
- H
- I Work proceeded and the columns were duly delivered. Some of them were erected and then defects in the construction of these vitally important parts became apparent. On Aug. 21, 1961, a representative of the employers orally instructed the contractor to stop all work connected with the columns, a course which the contractor himself would have followed in any event. The contractor in writing acknowledged this instruction and this in turn was acknowledged by the architect. There was other work which the contractor could do, but this gradually came to an end. The architect gave no further instructions with regard to the defective columns. On Sept. 23 the contractor notified the



architect that all his men had ceased work and that they awaited instructions as to re-commencing work. There were great delays, not due in any way to the contractor, in discovering the cause of the defects in the columns, and on Nov. 8, 1961, he gave notice to the employers terminating his employment under the contract. Ultimately, after the abandonment of the work, the defects were diagnosed as a failure by Cawoods to manufacture them in accordance with the specification.

My lords, in these circumstances two questions arise for decision:

(i) was the contractor entitled to give notice to terminate the contract under the provisions of the contract? This depends on the true construction of cl. 18 and cl. 20 of the conditions annexed to the contract, and

(ii) if so, was the contractor debarred from giving an effective notice because at law he can be held responsible for Cawoods' defective manufacture?—in other words, does the term normally implied in a contract for work and materials, as your lordships have just held in *Young and Marten, Ltd. v. McManus Childs, Ltd.* (1), apply or is it excluded having regard to the circumstances of the case? Rightly or wrongly it has been conceded throughout that if the contractor was in law responsible for Cawoods' defective work he could not rely on cl. 18 of the conditions.

On the first point, I must refer briefly to cl. 18 and cl. 20 of the conditions:

“ 18. If in the opinion of the architect the work be delayed . . .

“ (v) by reason of architect's instructions given in pursuance of cl. 1 of these conditions, or

“ (vi) because the contractor has not received in due time necessary instructions from the architect for which he shall have specifically applied in writing ”

then the time for the execution of the works may be extended.

Then cl. 20 gave to the contractor the right to determine his employment under the contract if the whole or substantially the whole of the works were delayed for one month by one or more “ of the causes . . . which are named in cl. 18 of the conditions ”.

My lords, the learned official referee came to the conclusion that the correspondence of August, 1961, which I have briefly summarised, did not amount to “ architect's instructions ” for the purposes of cl. 18 (v). Every member of the Court of Appeal reached a contrary conclusion, and I agree with them. So subject to two points, which I must mention in a moment, I think it is clear that the contractor was entitled to give notice, after one month, to determine the contract.

I am also of opinion, though this matter was not decided in the Court of Appeal, that on the facts of this case the contractor did not receive instructions in “ due time ” under cl. 18 (vi) as to the recommencement of the work for which he had applied in writing. It is quite true that he was acquiescent in the delay but it was for the architect to make up his mind as to what was to be done and to give instructions accordingly. He cannot expect a contractor to keep together his men indefinitely and pay them to be idle on the site while he (the architect) waits supinely (as I think) on some report from an expert who in the end refuses to report to him. The learned official referee, however, expressed the conclusion that the “ cause ” for the purposes of cl. 20 was not the instructions of the architect but the discovery of the defects in the columns; he regarded the admission of the contractor in the witness box that he would in any event have suspended operations as conclusive. With all respect, I regard the admission of the contractor as quite irrelevant: he was only stating what any competent contractor would have done in similar circumstances. It had nothing to do with the cause. No doubt the root cause of, or reason for, the delay was the discovery of the defect, but that does not preclude the application of cl. 20.

- A So to hold would make cl. 18 and cl. 20 inapplicable to many cases to which the parties must be presumed that it was intended to apply. It is when there is a delay caused by the discovery of the defect that the architect must give directions as to what is to happen. Is the contractor to stop work, or proceed, or is he to be given an instruction to vary or modify the works under cl. 1 (2) of the conditions? Here he merely received instructions to stop work and that, for the purposes of cl. 18 and cl. 20 was the cause of the delay.

- Then His Honour held that there was a cessation of work by agreement so that the contractor could not rely on the terms of the contract and particularly on condition 18 (vi). My lords, I agree with the majority of the Court of Appeal in thinking that there was no evidence on which the official referee could reach that conclusion. As I have already pointed out, no competent contractor would carry on when faced with a crisis of this magnitude; he must allow the architect a breathing space to consider all the implications that arise. That is what happened in this case, but that provides no evidence whatever that the employers and the contractor were mutually agreeing to vary their rights and obligations under the conditions of the contract, for the finding must go as far as that to be valid. In the absence of clear and cogent evidence that the contractor was for good consideration, waiving his rights under the contract (nowhere pleaded, as SELLERS, L.J., pointed out (2)) and there is none, I can see no ground upon which this finding of His Honour can be supported.

- So that, unless precluded by the second point to which I must now turn, I am of opinion that the contractor was entitled to give a notice in November, 1961, to determine his employment. The general rule, then, is not in doubt; the contractor who performs work and supplies materials warrants that the goods which he supplies will be of good quality and reasonably fit for the purpose for which he is using them, unless the circumstances of the contract are such as to exclude any such warranty.

- Your lordships heard some argument on the question whether having regard to the great contrast between condition 21 of the R.I.B.A. contract making provision for the contractor's dealings with "nominated sub-contractors" and condition 22 making provision for the contractor's dealings with "nominated suppliers" the contract showed an intention to exclude the implied warranty in regard to "nominated suppliers". With all respect to those of your lordships who take a different view, I cannot accept this. The truth is that this complex agreement, in my opinion, made no provision for the parties' intentions in this matter at all. It was quite unnecessary that the contract should do so, for this was not a matter that had to be dealt with once and for all at that stage unless the parties chose to do so. If the point ever occurred to them, which is unlikely, they did not provide for it in their contract. That contract provided for the nomination of sub-contractors and for suppliers by the architect. The precise terms and conditions as between the employers and the contractor on which each such person is nominated must depend on the terms of the nomination at the time, whether expressed or properly to be implied in the circumstances of the case. Normally it seems to me that the usual rule of implied warranty must apply to the goods to be supplied by the contractor through the nominated supplier. Thus if the architect merely nominated Cawoods to provide the forty columns without more, for my part I can see no reason why there should not be implied in that nomination the usual obligation that the contractor warrants the quality and fitness of the columns. But if the architect nominated Cawoods to provide the columns on the terms, which he instructed the contractor to accept, that Cawoods should not be liable for any delays, defects or deficiencies whatever (no doubt a fanciful and purely theoretical example), it is difficult to see how in law or as a matter of common sense or justice the contractor could be held liable on some implied obligation for the failure of Cawoods to deliver the goods.

The truth is that every implied term (and I now quote HALSBURY'S LAWS OF A  
ENGLAND (3rd Edn.) vol. 8, p. 121, para. 212 summarising as I think quite  
accurately the effect of the leading decisions of *The Moorcock* (3) and *Luxor*  
(*Eastbourne*) *Ltd. v. Cooper* (4):

"... must in all cases be founded on the presumed intention of the parties  
and upon reason and will only be made when it is necessary in order to give  
the transaction that efficacy that both parties must have intended it to have,  
and to prevent such a failure of consideration as could not have been within  
the contemplation of the parties."

In the ordinary case there must be such an implication for otherwise the person  
to whom the contractor agrees to supply labour and materials would be left  
without any remedy on a failure of the goods to conform as to quality or fitness.  
But in the second, if fanciful, case that I have mentioned there would seem no  
reason whatever for implying any obligation as to quality or fitness on the  
contractor who has no remedy whatever against the supplier, because he com-  
plied with the employer's instructions when contracting with the supplier.  
Nor can the employer in such circumstances reasonably be presumed to have  
intended that he should have any such implied rights against the contractor.  
So I must look at the offer and acceptance which in September, 1960, the con-  
tractor was "authorised" to execute with Cawoods but which, as a matter of  
commercial practice and of law, as I think, the contractor was in fact bound to  
execute. The terms on which Cawoods accepted, admittedly binding on the  
contractor and the employers, contained this clause:

"4. No complaint of any kind can be entertained (except in special  
circumstances justifying delay) unless it is made in writing within twenty-  
four hours after the time of supply of the materials or goods of which com-  
plaint is made. Although we make every effort to supply materials or goods  
strictly to accord with the quality or specification ordered, if any materials  
or goods supplied by us should be defective or not of the correct quality or  
specification ordered our liability shall be limited to free replacement of any  
materials or goods shown to be unsatisfactory. We are not under any  
circumstances to be liable for any consequential loss or damage caused or  
arising by reason of late supply or any fault, failure or defect in any materials  
or goods supplied by us or by reason of the same not being of the quality  
or specification ordered or by reason of any other matter whatsoever."

If that was a term of the contract between the contractor and Cawoods which,  
as I think, the contractor was by the terms of his contract with the employers  
bound to accept, I, for my part, cannot see how it is possible to imply a term that  
the contractor warranted to the employers the quality or fitness of the goods  
to be supplied by Cawoods.

Counsel for the appellants recognised his difficulty and argued that the con-  
tractor's implied obligation was limited to an obligation to observe the per-  
formance of cl. 4. This indeed might well have been made a matter of express  
agreement, for example as part of the instructions of the employers' letter of  
Sept. 21, 1960, but I cannot see how the law can imply such a term.

On the facts of this case I am of opinion that in respect of the contract with  
Cawoods, and I am dealing only with that, the circumstances are such that the  
implied warranty of quality and fitness is displaced.

My lords, for these reasons I would dismiss this appeal.

**LORD WILBERFORCE:** My Lords, the main question of law involved  
in this appeal is similar to that considered by this House in the appeal of *Young*  
and *Marten, Ltd. v. McManus Childs, Ltd.* (5). A number of other issues arise

(3) [1886-90] All E.R. Rep. 530; (1889), 14 P.D. 64.

(4) [1941] All E.R. 33; [1941] A.C. 108.

(5) Ante p. 1169.



A in the present case and the facts on which the main question has to be decided are more complicated than those in the earlier appeal. What has to be decided is whether the contractor, as building contractor, was entitled on Oct. 23, 1961, to give notice of determination of his building contract with the appellant council ("the employers"). It was held by the official referee that he was not and consequently that the employers were entitled to damages, but this decision was

B reversed by the Court of Appeal.

The contractor's claim to determine his contract arose under a clause in the then current Royal Institute of British Architects building contract. Reliance has at one time or another been placed on various of the sub-clauses of the relevant clause, but I find it necessary to consider only one, on which, indeed, principal reliance was placed. That is cl. 18 (v) which, as incorporated into

C cl. 20, enables notice of determination to be given if the whole, or substantially the whole, of the work is delayed for one month by one or more of the causes named, which include that by reason of architect's instructions given under cl. 1. The initial dispute was whether, after defects had been found in certain concrete columns, the work was delayed by reason of these defects, or whether it was delayed by instructions given by the architect.

D In the first place, I have no doubt that architect's instructions, within the meaning of the contract, were given. What happened was that oral instructions were given on Aug. 21, 1961, after which, on the same date, the contractor wrote to the employers a letter in which he referred to the instructions and put on record that delay would result. On Aug. 23, 1961, the employers wrote back acknowledging the contractor's letter and stating that the contents were noted.

E This communication, in the circumstances, clearly amounts to written instructions. Then were these instructions the cause of the delay? The contractor relied, in order to show this, on minutes of various site meetings, attended by representatives of both sides, following the instructions, and on correspondence. He established to my satisfaction that the delay was caused by the instructions, initial and continuing, given on behalf of the architect and continued by the

F employers' representatives. It was said, against this, that the contractor agreed to the course taken, that he was an interested party and that the delay was continued in the mutual interest of both sides. I can find no trace of any binding agreement, but it can be accepted that the contractor acquiesced in the course taken. No doubt, too, as this litigation proves, he was in a sense an interested party, but the evidence proves that it was the employers who in this

G matter made all the decisions, positive and negative, as to taking tests of the cement, and as regards action, or inaction, vis-à-vis the suppliers of the columns. The contractor, if a participant in these matters, was a passive participant, ground between the millstones of council procedure and suppliers' evasion. In my opinion, the majority in the Court of Appeal were right in their view that the finding of the official referee in this matter could not be supported. I need

H not, on this point, add to what has been said by my noble and learned friend, LORD PEARCE.

That brings me to what I have called the main question in the appeal. It arises by reason of a concession made by the contractor that he could not claim the benefit of cl. 18 (v) if he was himself in breach of his obligations under the contract. On this concession, it becomes necessary to decide whether he, as

I contractor, was liable to the employers in damages for defects in the concrete columns. That he may be so liable appears from the decision in the appeal in *Young and Marten, Ltd. v. McManus Childs, Ltd.* (6), for here, as in that case, he agreed to supply and instal identifiable goods; but whether he is so liable depends on the circumstances and nature of his contract with the employers.

The precise contractual mechanism between the contractor and the employers is not easy to determine or to state. But it is common ground on the pleadings

and on the argument that there was a binding contract between the parties constituted by the Articles of Agreement dated Nov. 21, 1960, incorporating with modifications the then current Royal Institute of British Architects conditions, and a nomination by the employers, dated Sept. 21, 1960, of Cawood Wharton & Co., Ltd. ("Cawoods") as suppliers of the pre-cast concrete columns. On the basis of this nomination, Cawoods became nominated suppliers to the contractor under the terms of the contract.

In order to understand the nature of the obligations assumed by the contractor, as regards the columns, it is necessary to state certain facts in greater detail. In the estimate prepared by the architect in July, 1960, on the basis of which tenders were invited, reference was made to a prime cost sum of £7,000 to be provided by the contractor in respect of the columns to be supplied by a nominated supplier, and it was stated that the columns would be supplied by The Bath & Portland Stone Firms, Ltd. However, it appears that the consulting engineers made contact with Cawoods, of which they had a favourable opinion. The company was supplied with detailed drawings and specifications and in due course, on July 25, 1960, submitted a quotation to supply the columns, and some beams, for £4,941 2s. 2d.—a considerable reduction on the existing figure of £7,000. With their quotation they enclosed their printed standard conditions of sale. One of these (cl. 4) was important. It set a time limit for the reception of complaints and limited liability for defective goods, or goods not of correct quality or specification, to free replacement of any goods shown to be unsatisfactory. Liability for consequential loss or damage was excluded. On Sept. 21, 1960, in their letter accepting the contractor's tender for the whole work the employers, through their architect, nominated Cawoods as suppliers of the columns, and enclosed that company's quotation "which you are authorised to accept in the sum of £4,941 2s. 2d.". On the same day, it appears, the employers rubber-stamped Cawoods' letter of quotation "Accepted through the main contractor, who will pay the account". On Sept. 27, 1960, the contractor wrote to Cawoods "we have been instructed by the architect to accept your quotation". The word "instructed" is significant.

The situation thus created was one of a special and complex character, differing greatly from that which arose in *Young and Marten, Ltd. v. McManus Childs, Ltd.* (7). There the employer nominated a brand article to be supplied by the manufacturer with no limitation on the contractor's freedom to contract with the manufacturer as he thought fit. The contractor could, and it would be the expectation that he would, or at least it would be his responsibility if he did not, deal with the manufacturer on terms attracting the normal conditions or warranties as to quality or fitness. But here, the design, materials, specification, quality and price were fixed between the employer and the sub-supplier without any reference to the contractor, and so far from being expected to secure conditions or warranties from the sub-supplier, he had imposed on him special conditions which severely restricted the extent of his remedy. Moreover, as reference to the main contract shows, he had no right to object to the nominated supplier, though, by contrast, the contract does provide a right to object to a nominated sub-contractor if the latter does not agree to indemnify him against his liability under the contract.

In these circumstances, so far from there being a good reason to imply in the contract (which throughout its elaborate twenty-seven clauses makes no express provision as regards this matter) a condition or warranty binding the contractor in respect of latently defective goods, the indications, drawn from the conduct of the contracting parties, are strongly against any such thing. It would, indeed, be most unjust if when the employer has (possibly to his own advantage as reflected in the price) limited the contractor's right of recourse as severely as he has (since consequential damage or loss in such cases as this may be very great and

A much in excess of the cost of replacement) he should be given by implication an unlimited right to recover damages from the contractor.

The suggestion was made that, even though a full warranty of fitness was not to be implied against the contractor, he should at least be liable to the employer to the same reduced extent as the sub-suppliers were to him. I cannot accept this suggestion. It is one thing to imply against a contractor the well-known conditions or warranties existing at common law, or under the Sale of Goods Act, 1893, which are general enough to fit all types of contract, but quite another to introduce, by implication, the terms of a special condition devised by a sub-supplier-manufacturer for his protection. Such a term, calling for specific replacement of defective goods, would without adaptation be quite inappropriate against a contractor—more especially where, as has actually happened here, the manufacturer has failed; and any process of adaptation would go far beyond what the courts are willing or able to do by way of implication. To refuse the implication does not leave the employers without remedy, since the provisions in the contract for architect's instructions give ample power as regards removal and replacement of defective work and could be used so as to obtain replacement from the sub-supplier.

D In my opinion, the contractor in this case, by virtue of the special terms of his contract and of the circumstances in which the sub-contract was made, was relieved from any liability for the defective columns and was, therefore, not disabled from invoking cl. 20 and cl. 18 (v) of the contract. He was thus entitled to determine it. The appeal should, in my opinion, be dismissed.

E LORD PEARSON: My Lords, the contractor by a letter from his solicitors dated Nov. 8, 1961, determined his contract with the appellant council (the "employers"). It was a building contract and made in a form issued under the sanction of the Royal Institute of British Architects. The employers in their statement of claim treated the determination as wrongful and claimed damages for the contractor's failure to complete the works under the contract. The contractor in his amended defence and counterclaim alleged that the determination was justified under cl. 20 (1) and cl. 18 (v) or (vi) of the conditions of the contract, and he counterclaimed for the payments which on that basis would be due to him under cl. 20 (2) (b) of the conditions of the contract and for certain other sums. Clause 20 (1) contains this provision:

G "... if the whole or substantially the whole of the works . . . is delayed for the period named in the appendix to these conditions by one or more of the causes . . . which are named in cl. 18 of these conditions, the contractor may, without prejudice to any other rights or remedies, thereupon by notice by registered post to the employer or architect determine the employment of the contractor under this contract."

H Clause 18 provides for extension of the time for completion of the works if in the opinion of the architect the works be delayed by certain named causes, and these causes include:

"(v) by reason of architect's instructions given in pursuance of cl. 1 of these conditions, or  
 I "(vi) because the contractor has not received in due time necessary instructions from the architect for which he shall have specifically applied in writing."

The period named in the appendix, referred to in cl. 20 (1), was one month.

It has been conceded on behalf of the contractor that he would not be entitled to determine the contract for the cause named in cl. 18 (v), if the architect's instructions resulted from a breach of contract by the contractor. No similar concession was made with regard to the cause named in cl. 18 (vi). Therefore, the point is open only in relation to the cause named in cl. 18 (vi) and I will consider it only in relation to that cause. It is to be noted that cl. 1, in providing for



additions to the contract sum for loss or expense caused to the contractor by compliance with architect's instructions, has the express exception "unless such instructions were issued by reason of some breach of this contract by the contractor", but there is no similar express exception in cl. 18 or cl. 20. Moreover, it is not necessary, in order to give business efficacy to cl. 18 (vi) whether for the purposes of cl. 18 or for the purposes of cl. 20, to imply any similar exception. The contractor is likely to suffer very severe loss if his carrying out of the works is delayed by lack of necessary instructions, and the architect ought to give the necessary instructions in due time, however the situation calling for instructions to be given may have arisen. In my opinion, the contractor would be entitled to determine the contract for the cause named in cl. 18 (vi), even if the situation calling for instructions to be given resulted from a breach of contract by the contractor.

It is convenient to consider next whether there was a breach of contract by the contractor. The relevant facts are not now in dispute, and it is sufficient to say that in the concrete columns delivered by the suppliers nominated by the employers there were latent defects. There was no contract between the nominated suppliers and the employers. The contractor ordered the columns from the nominated suppliers, and the columns were included in the materials to be supplied and used by the contractor under his contract with the employers. Was there in that contract an implied term that these concrete columns should be of good quality?

Normally such a term is to be implied in a contract for work and materials, whether or not there may be also an implied term that the materials are fit for some particular purpose for which they are required. In *G. H. Myers & Co. v. Brent Cross Service Co.* (8) DU PARCQ, J., said (9):

"... it would not be true to say that wherever you find a contract to do work and supply materials it necessarily follows, even apart from special conditions, that the person supplying the materials is liable if some of them are defective by reason of latent defect. That depends upon the terms of the contract, and I think that the true view is that a person contracting to do work and supply materials warrants that the materials which he uses will be of good quality and reasonably fit for the purpose for which he is using them, unless the circumstances of the contract are such as to exclude any such warranty"

The principle as there stated by DU PARCQ, J., is founded on the presumed intention of the parties. Normally the intention to be inferred is that the person contracting to supply materials assumes an obligation to supply materials of good quality (which may be equated with normal or reasonable or adequate or merchantable quality), but there may, in a particular case, be special circumstances showing that such an intention is not to be inferred. There is no uncertainty as to the principle, but there is difficulty in deciding on its application to the facts of the present case.

Broadly, I think that there are in this case three special circumstances or factors to be taken into account in deciding whether, according to the presumable intention of the parties, the contractor assumed an obligation to supply concrete columns of good quality under his contract with the employers.

1. The suppliers from whom the concrete columns were to be, and were in fact, obtained by the contractor, were nominated by the employers. This fact is not in itself sufficient to exclude the contractor's normal obligation to supply materials of good quality. The obligation is needed in order to afford to the employers a remedy, and to impose on the nominated suppliers an effective liability, for the bad quality of these materials. In the absence of such an obligation the employers could not recover any damages from the contractor, and the

(8) [1933] All E.R. Rep. 9; [1934] 1 K.B. 46.

(9) [1933] All E.R. Rep. at pp. 13, 14; [1934] 1 K.B. at p. 55.

A contractor not being himself liable could not recover more than nominal damages from the nominated suppliers.

2. The architect on behalf of the employers wrote to the contractor a letter authorising him to accept a quotation from the nominated suppliers, which severely restricted their liability in respect of defective materials, and the contractor accepted the quotation accordingly. The architect's letter, or at any rate the part of it authorising acceptance of the quotation, must, in my view, be regarded as forming part of the contract between the contractor and the employers. These circumstances ought to affect the contractor's responsibility. It seems to me, however, that they are apt to diminish, rather than wholly to exclude, his responsibility. As the contractor was authorised to obtain the concrete columns on terms restricting his right of redress against the nominated suppliers in respect of defects in the columns supplied, the employers' right of redress against the contractor in respect of the same defects ought to be similarly restricted. A term to that effect is, in my opinion, properly and necessarily to be implied in order to give effect to the presumed intention of the parties. There would be obvious injustice if such a term were not implied. I do not think that it is lacking in precision: for instance, in the present case both the nominated suppliers' liability to the contractor and the contractor's liability to the employers would be limited to replacing the defective columns or paying by way of damages the cost of such replacement.

3. There is the contrast between cl. 21 and cl. 22. Clause 21 deals with nominated sub-contractors, and it contains a provision that no nominated sub-contractor shall be employed against whom the contractor shall make reasonable objection or (save where the architect and the contractor shall otherwise agree) who will not enter into a contract of indemnity in favour of the contractor. Clause 22 deals with nominated suppliers and has no such provision for the protection of the contractor. On the other hand, just as cl. 21 provides that "all specialists or others who have been nominated or selected by the architect are hereby declared to be sub-contractors employed by the contractor", so cl. 22 provides that all specialists or others "who have been nominated or selected by the architect to supply such materials or goods are hereby declared to be suppliers to the contractor". If that form of words used in cl. 21 has the effect (as I think it must) of imposing on the contractor responsibility for the quality of work done by nominated sub-contractors, the very similar form of words used in cl. 22 would naturally have the similar effect of imposing on the contractor responsibility for the quality of materials supplied by nominated suppliers.

The special circumstances of this contract do not seem to me to be sufficient to exclude the usual obligation of a contractor to supply materials of good quality. As *SELLERS, L.J.*, said (10):

"As I see it, the contractual obligation will only work satisfactorily if the risk of the nominated supplier failing to fulfil his contract falls on the contractor, and that seems to me to be the intention of the parties as revealed by the contract."

It would be a most unbusinesslike arrangement, if the nominated suppliers could with virtual impunity supply materials of bad quality and the employers would have no remedy.

Then, if (as I think) the contractor had the obligation to supply materials of good quality, the supply of concrete columns which were defective (though the defects were latent) constituted a breach of it, and the architect's instructions to cease work on the concrete columns resulted from that breach. Then by virtue of the concession referred to above the contractor must be considered not to be entitled to rely on cl. 18 (v) as justifying his determination of the contract under cl. 20.

He is, however, not prevented by his breach of contract from relying for this purpose on cl. 18 (vi), the words of which are "because the contractor has not received in due time necessary instructions from the architect for which he shall have specifically applied in writing". But in relation to cl. 18 (vi) the learned official referee made a finding as follows:

"In my judgment neither the initial cessation of work nor the delay which followed were caused for the reasons covered by cl. 18 (vi). 'Due time' referred to in that sub-clause was when the architect was required to give the contractor the necessary instructions after they had ascertained what was the cause of the defect and the extent to which replacement would be required. In other words, the delay, after the initial cessation, was caused by the parties pursuing the course agreed to by all of them to which I have referred before."

Prima facie this is a finding of fact by the official referee, and so not subject to appeal and conclusive on the point with which it deals. It has been suggested that there is involved an error of law inasmuch as there was no evidence of the supposed agreement. One has to consider in this connexion the documentary evidence, consisting mainly of letters and minutes of site meetings, and also the oral evidence of several witnesses. Having considered the evidence, although a different conclusion would have been possible, I am unable to say there was no evidence to support the finding. Therefore, in my opinion, the finding must be upheld, and the contractor fails on this point under cl. 18 (vi), as well as on the point under cl. 18 (v) which I have considered above. The contractor has not established his claim that he was entitled to determine the contract.

Accordingly, in my opinion, the appeal should be allowed and the decision of the official referee should be restored. But as my noble and learned friends hold the contrary opinion, the appeal will be dismissed.

*Appeal dismissed.*

Solicitors: *Field, Roscoe & Co.* (for the employers); *Masons* (for the contractor).

[*Reported by S. A. HATTEEA, Esq., Barrister-at-Law.*]

## OSGERBY v. RUSHTON.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Sachs, L.J., and Bridge, J.), June 20, 1968.]

*Intoxicating Liquor—Offences—Drunk and disorderly in a public place—Whether enactment creating the offence was repealed before the replacing enactment in s. 91 of the Criminal Justice Act 1967 was brought into operation—Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 12 (1)—Criminal Justice Act 1967 (c. 80) s. 91 (5), s. 103 (2), Sch. 7, Pt. 1—Criminal Justice Act 1967 (Commencement No. 1) Order 1967 (S.I. 1967 No. 1234), art. 1, Sch. 1 and Appendix thereto.*

The respondent was charged with disorderly conduct in a public place while drunk, contrary to s. 12\* of the Licensing Act, 1872. He was acquitted of the offence on the submission that the relevant provisions of s. 12 had been repealed. By s. 106 (5) the Act of 1967 was to come into force on days appointed by order, different days being able to be appointed for different purposes. By s. 103 (2)† the enactments specified in Sch. 7 to the Act of 1967, which included the essential words of s. 12 of the Licensing Act, 1872, were repealed. The Criminal Justice Act 1967 (Commencement No. 1) Order 1967 brought into force certain provisions of the Act of 1967 on various

\* Section 12, so far as material, provides "... Every person who in any highway or public place ... is guilty while drunk of riotous or disorderly behaviour ... may be apprehended and shall be liable to a penalty ..."

† Section 103 (2), so far as material, is set out at p. 1197, letter I, post.



A dates, of which the relevant date was Oct. 1, 1967. On this date (by Sch. 1 to the Order of 1967) s. 103 of the Act of 1967 and so much of Sch. 7 to that Act as was set out in the appendix to Sch. 1 of the Order of 1967 was brought into force. The appendix did not specify s. 12 of the Act of 1872.

B **Held:** on the true construction of the Order of 1967 the repeals to be effected by s. 103 of the Criminal Justice Act 1967 had been brought into operation only to the extent specified in the appendix to Sch. 1 to the Order, with the consequence that s. 12 of the Act of 1872 was not repealed on Oct. 1, 1967; accordingly the case would be remitted to the justices to continue the hearing (see p. 1198, letters F and I, post).

Appeal allowed.

C [As to drunkenness in a public place, see 22 HALSBURY'S LAWS (3rd Edn.) 691, para. 1479; and for cases on the subject, see 30 DIGEST (Repl.) 112, 817-819.

For the Licensing Act, 1872, s. 12, see 13 HALSBURY'S STATUTES (2nd Edn.) 158.

For the Criminal Justice Act 1967 s. 91, s. 103, s. 106 (5), Sch. 7, Pt. 1, see 47 HALSBURY'S STATUTES (2nd Edn.) 424, 433, 435, 486.]

D **Case Stated.**

This was a Case Stated by justices for the parts of Holland in the county of Lincoln acting for the petty sessional division of Boston in respect of their adjudication in the magistrates' court at Boston on Mar. 22 and Apr. 19, 1968. On Feb. 21, 1968, at Boston the respondent, Jack Rushton, was arrested on a charge that he had on that day in a certain place, namely Beltons Caravan Site, Marsh Lane, Boston, been guilty whilst drunk of disorderly behaviour contrary to s. 12 of the Licensing Act, 1872, and the Penalties for Drunkenness Act, 1962. On Mar. 20, 1968, an information charging the offence was laid by the appellant, John William Osgerby. The hearing of the information was adjourned on Mar. 22 to Apr. 19, 1968, when no evidence was called. The respondent pleaded not guilty, and it was submitted on his behalf that, by the combined effect of s. 103 and s. 91 of the Criminal Justice Act 1967 and the Criminal Justice Act 1967 (Commencement No. 1) Order 1967, s. 12 of the Licensing Act, 1872, had been repealed on Oct. 1, 1967, and that s. 91 of the Act of 1967, which created a new offence to replace the offence formerly subsisting under s. 12 of the Act of 1872, had not been brought into force, with the consequence that the offence with which the respondent was charged did not exist. The justices were of the opinion that the respondent's contention was sound. They dismissed the information. The appellant now appealed.

*Charles McCullough* for the appellant.

The respondent did not appear and was not represented.

H **LORD PARKER, C.J.:** The respondent having pleaded not guilty, a submission was made by his legal representative that he was in fact being charged with an offence unknown to the law in that the relevant words in s. 12 of the Licensing Act, 1872, had been repealed by the Criminal Justice Act 1967. What gave rise to this suggestion was the fact that by the Criminal Justice Act 1967 (Commencement No. 1) Order 1967 (1), it was provided that the provisions set out in the schedules to the order should come into force on the dates mentioned in the headings and Sch. 1, specifying provisions coming into force on Oct. 1, 1967, included s. 103 of the Act of 1967. Section 103 (2) of the Act of 1967 provided that

"The enactments specified in Sch. 7 to this Act . . . are hereby repealed to the extent specified in the third column of that schedule."

Turning to Sch. 7 of the Criminal Justice Act 1967, and Pt. 1 thereof, there is to be found as a repeal applying to England and Wales, the words from "who

in any highway " down to " behaviour or " in s. 12 of the Licensing Act, 1872—a A  
 repeal of the very words creating the offence with which this man was charged.

It is quite plain, if one looks at the Criminal Justice Act 1967, that the reason B  
 why those words in s. 12 of the Licensing Act, 1872, were being repealed was  
 because by s. 91 a new offence was created. Section 91 (1) provides:

" Any person who in any public place is guilty, while drunk, of disorderly C  
 behaviour may be arrested without warrant by any person and shall be  
 liable on summary conviction to a fine not exceeding £50."

That increases the financial penalty for the offence but cuts out what had D  
 previously been a penalty of imprisonment. Section 91 (5) provides:

" An order under s. 106 of this Act appointing a day for the coming into E  
 force of the foregoing provisions of this section shall not be made unless  
 the Secretary of State is satisfied that sufficient suitable accommodation is  
 available for the care and treatment of persons convicted of being drunk  
 and disorderly."

The idea underlying these enactments was that there should no longer be imprison- F  
 ment for drunks but that suitable accommodation should be provided for their  
 treatment. Needless to say, the provisions have not yet come into force because  
 the suitable accommodation has not been found. The justices no doubt appre-  
 ciated that difficulty but they felt that the words of the statutory instrument  
 bringing s. 103 into force on Oct. 1 were so plain that, despite the fact that s. 91  
 had not come into force, the offence of disorderly behaviour while drunk had  
 gone completely. In my judgment the justices were clearly wrong in that if  
 they had gone on to consider Sch. 1 to the Order of 1967 they would have found  
 as a final entry, " So much of Pt. 1 of Sch. 7 [that is Sch. 7 to the Act of 1967]  
 as is set out in the appendix hereto ". Thereafter in the appendix is set out  
 a number of the repeals which appear in Sch. 7 to the Act of 1967 but not, and very  
 naturally not s. 12 of the Licensing Act, 1872. It is quite clear that while s. 103  
 was being brought into force, as it had to be if certain of the repeals were to be  
 treated as immediate repeals, the appendix limited the effect of s. 103 to those  
 repeals which are set out in that appendix.

I would only add that we are told that the justices may have been misled by G  
 certain notes which appear in the current edition of *PATERSON LICENSING ACTS*  
 (76th Edn., 1968) where at p. 262 is to be found s. 12 of the Act of 1872 set out  
 as it will be when s. 91 of the Criminal Justice Act 1967 comes into force. Where  
 the words which will be repealed occur there are dots and there is a reference to  
 note (e), which says, on p. 265, " Words omitted relating to riotous and dis-  
 orderly behaviour were repealed by the Criminal Justice Act 1967, Sch. 7 ".  
 Again, at p. 284 of the current edition a number of offences are set out which  
 appeared in Sch. 1 to the *Inebriates Act, 1898*, and the second of those, which  
 appears in italics, is s. 12, and the note at the foot of the page says:

" Although the schedule has not been amended, the passages printed in H  
 italics are no longer effective because of repeals by the Criminal Justice Act  
 1967 Sch. 7."

In my judgment the editors jumped the gun in those two passages and, as I I  
 have said, the justices may thereby have been misled. In my judgment this  
 appeal succeeds and this case should go back to the justices to continue the  
 hearing.

**SACHS, L.J.:** I entirely agree.

**BRIDGE, J.:** I also agree.

*Appeal allowed. Case remitted.*

Solicitors: *Lee, Bolton & Lee*, agents for *Roythorne & Co.*, Boston (for the  
 appellants).

[*Reported by N. P. METCALFE, ESQ., Barrister-at-Law.*]

A

# WESTMINSTER BANK LTD. v. BEVERLEY BOROUGH COUNCIL AND ANOTHER.

[COURT OF APPEAL, CIVIL DIVISION (Danckwerts, Diplock and Salmon, L.JJ.), May 28, 29, 30, 1968.]

B

*Town and Country Planning—Development Permission for development—Refusal of permission—Alternative to exercising statutory power under Highways Act, 1959, s. 72, to prescribe improvement line with a view to road widening—Exercise of power under s. 72 would carry right to compensation, but refusal of development permission might not or might carry less compensation—Dismissal by Minister of appeal from refusal of permission—Whether Minister's decision valid—Highways Act, 1959 (7 & 8 Eliz. 2 c. 25), s. 72—Town and Country Planning Act, 1962 (10 & 11 Eliz. 2 c. 38), s. 17, s. 23.*

C

A county council was both highway authority for county roads and planning authority. A bank applied to the borough council (to which planning powers were delegated) for planning permission for an extension at the rear of its premises. This was refused, and, after a local inquiry (which was subsequently re-opened), the bank's appeal to the Minister was dismissed. The reason for the dismissal of the appeal, as also for the refusal of planning permission, was that as a result of a local planning scheme for the town centre generally, the street behind the bank would become a main internal traffic road and would require to be widened. The scheme was not incorporated in the development plan, but was approved by the county council, and the proposed road widening was approved by it as highway authority. No improvement line had been prescribed under the relevant statutory power for road widening, viz., s. 72 of the Highway Act, 1959. Under that enactment a person whose land was injuriously affected by the prescribing of an improvement line would become entitled to compensation. Under the course adopted, viz., the refusal of planning permission, a right to compensation might not arise or compensation might be less.

D

E

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**Held (SALMON, L.J., dissenting):** the proposed future use of land as a highway was something to which the planning authority were entitled under the general planning legislation to have regard in determining whether or not to grant planning permission to build on the land, notwithstanding that the Highways Act, 1959, contained specific provisions enabling the highway authority to control building within an improvement line to which a highway was to be widened (see p. 1202, letter E, p. 1204, letter A, p. 1205, letter A, and p. 1207, letter I, post); accordingly the planning authority had not misused its statutory power over the grant of planning permission for an object for which Parliament did not intend it to be used, and the Minister's decision was not ultra vires (see p. 1202, letter G, and p. 1205, letter G, post).

G

H

Decision of DONALDSON, J., (ante, p. 104) reversed.

[As to the discretionary power to grant planning permission and considerations material thereto, see 37 HALSBURY'S LAWS (3rd Edn.) 301, 302, para. 413.

As to the presumption against interference by statute with private rights, see 36 HALSBURY'S LAWS (3rd Edn.) 413, para. 627, and for cases on the subject, see 44 DIGEST (Repl.) 294-298, 1236-1283.

I

For the Highways Act, 1959, s. 72, s. 73, see 39 HALSBURY'S STATUTES (2nd Edn.) 491, 494.

For the Town and Country Planning Act, 1962, s. 13, s. 17, s. 23, s. 176 (3), s. 179, see 42 HALSBURY'S STATUTES (2nd Edn.) 977, 985, 991, 1142, 1145.]

Cases referred to:

*Associated Provincial Picture Houses, Ltd. v. Wednesbury Corpn.*, [1947] 2 All E.R. 680; [1948] 1 K.B. 223; [1948] L.J.R. 190; 177 L.T. 641; 112 J.P. 55; 45 Digest (Repl.) 215, 189.



- Colonial Sugar Refining Co., Ltd. v. Melbourne Harbour Trust Comrs.*, [1927] A.C. 343; 96 L.J.P.C. 74; 136 L.T. 709; 44 Digest (Repl.) 297, 1276. **A**
- Fawcett Properties, Ltd. v. Buckingham County Council*, [1960] 3 All E.R. 503; [1961] A.C. 636; [1960] 3 W.L.R. 831; 125 J.P. 8; 45 Digest (Repl.) 342, 60.
- Gloucester (Bishop) v. Cunningham*, [1943] 1 All E.R. 61; [1943] K.B. 101; 112 L.J.K.B. 151; 168 L.T. 68; 31 Digest (Repl.) 642, 7492. **B**
- Hall & Co., Ltd. v. Shoreham-by-Sea Urban District Council*, [1964] 1 All E.R. 1; [1964] 1 W.L.R. 240; 128 J.P. 120; 45 Digest (Repl.) 342, 61.
- Mixnam's Properties, Ltd. v. Chertsey Urban District Council*, [1963] 2 All E.R. 787; [1964] 1 Q.B. 214; [1963] 3 W.L.R. 38; *affd.*, H.L., sub nom. *Chertsey Urban District Council v. Mixnam's Properties, Ltd.*, [1964] 2 All E.R. 627; [1967] A.C. 735; [1964] 2 W.L.R. 1210; 128 J.P. 405; 45 Digest (Repl.) 359, 126. **C**
- Pyx Granite Co., Ltd. v. Ministry of Housing and Local Government*, [1958] 1 All E.R. 625; [1958] 1 Q.B. 554; [1958] 2 W.L.R. 371; *reversd.* H.L., [1959] 3 All E.R. 1; [1960] A.C. 260; [1959] 3 W.L.R. 346; 123 J.P. 429; 45 Digest (Repl.) 336, 37.

### Appeal.

This was an appeal by the Minister of Housing and Local Government from a decision of DONALDSON, J., dated Feb. 29, 1968, and reported ante p. 104, whereby he quashed a decision of the appellant dated Jan. 31, 1967, dismissing an appeal by Westminster Bank, Ltd. against the refusal of Beverley Borough Council to grant planning permission for alterations and extensions at the bank's premises at Beverley. The facts are set out in the decision of DONALDSON, J., and summarised in the judgment of DANCKWERTS, L.J. **E**

*S. C. Silkin, Q.C.*, and *G. Slynn* for the Minister.

*D. P. Kerrigan, Q.C.* and *A. B. Dawson* for the bank.

The Beverley Borough Council did not appeal and were not represented.

**DANCKWERTS, L.J.:** The title of this appeal in the cause list is somewhat misleading because this is an appeal of the Minister of Housing and Local Government against a decision of DONALDSON, J. (1) in favour of the Westminster Bank, Ltd., dated Feb. 29, 1968. The Borough Council of Beverley was also a party before the judge, but the borough council does not appear on this appeal. The case concerns the powers of a planning authority under the Town and Country Planning Act, 1962, and is just the kind of case which is liable to arise in the overgoverned state in which the citizens of this country live. DONALDSON, J., was oppressed by the deprivation of property rights which the statute appeared to produce, and that is a view with which I sympathise completely. The question, however, really is whether the arbitrary results which modern legislation has produced admit of any protection by the courts in their function of guarding the rights of a subject against oppression by the executive. It is true that the subject in the present case is a bank, but even a bank is entitled to protection against unlawful deprivation of the bank's lawful rights. **F**

In this case the County Council of the East Riding of Yorkshire is both the highway authority in respect of county roads, and is also the planning authority, but the county council have delegated some of its planning functions to the Borough Council of Beverley in the East Riding of Yorkshire. **G**

The site concerned is the back portion of the property of the bank which abuts on a narrow road in Beverley called Laigate. On this portion of their property the bank wish to build a strong room, a manager's office, and a waiting room, and wish to alter the lavatory accommodation. For this planning permission is required, and this the bank have been refused by the borough council **H**

\* See ante pp. 106-109

(1) Ante p. 104. **I**

A acting under the powers delegated to them. Putting the position generally, the grievance of the bank is that the permission has been refused because the borough council has produced a development plan and a map for this part of Beverley which will involve the widening of Laigate from its present width of sixteen feet, including pavements, to forty feet with a twenty-four feet roadway. The plan has now been approved by the borough council, but has not yet been brought before the Minister for his approval. The bank's case is that provisions for the widening of roads are properly the subject of the fixing of "improvement lines" or "building lines" under s. 72 and s. 73 of the Highways Act, 1959, which would involve present payments of compensation for injurious affection, and should not be dealt with under planning legislation which might produce reduced compensation (if any). One of the objections raised on behalf of the bank is that the matter of this development has been under discussion for twenty years, and even now there is no real prospect of the development being carried out within ten years or any other certain period in the future. This is a point which is not without force because refusal of planning permission might sterilise development of the banks' land for an indefinite period.

D The history of the case and dates are as follows: the first refusal of planning permission by the Beverley Borough Council was in April 1962. A second refusal occurred in April, 1964, and the bank then appealed to the Minister. In March, 1965 there was an inquiry by Mr. R. W. Deans, whose report, dated Apr. 22, 1965, did not receive a favourable reception by the Minister. On Mar. 10, 1966, the Minister's decision was adverse to the bank, but a further inquiry was offered by the Minister and accordingly on Nov. 1, 1966, a further inquiry took place before Mr. J. P. Jackson. His report dated Nov. 23, 1966, was received with more approval by the Minister, and, on Jan. 21, 1967, the Minister gave his decision by letter again against the bank's application. I do not regard this history with any admiration. DONALDSON, J. (2) has quashed the decision of the Minister. At the hearing before DONALDSON, J., the bank's case was essentially based on two contentions: (i) if the local planning authority or the Minister refused permission for development for no other reason than that of thereby avoiding the creation of an improvement or building line for highway purposes, the refusal is ultra vires. The basis of this argument, as I understand it, was that the proper way to deal with such an intention was by invoking the provisions of either s. 72 or s. 73 of the Highways Act, 1959, with the resulting effects in regard to compensation. (ii) The Minister, being under an admitted obligation to give sufficient reasons for his decisions, failed to give reasons for his decisions, and the bank's interests have been substantially prejudiced thereby.

In regard to the first point, we were referred to the often quoted statement by LORD WARRINGTON OF CLYFFE in *Colonial Sugar Refining Co., Ltd. v. Melbourne Harbour Trust Comrs.* (3):

H "A statute should not be held to take away private rights of property without compensation unless the intention to do so is expressed in clear and unambiguous terms."

This is a well recognised and excellent principle, but unfortunately the Town and Country Planning Act, 1962, contains numerous provisions interfering with rights of property of a subject, sometimes on terms of compensation and sometimes without such terms. In such a situation the statement by LORD WARRINGTON is either excluded or is satisfied, according to the manner in which it is viewed. Consequently this point must fail, I fear.

I As regards the second point, it is plain, in my opinion, that in his decision the Minister made clear, expressly or by implication, the reasons which induced him to reach his decision. This appears from two paragraphs in the Minister's letter of decision:

(2) Ante p. 104.

(3) [1927] A.C. 343 at p. 359.

"The Minister has considered the reports of the Inspectors, Mr. R. W. Deans . . . who held a local inquiry on Mar. 30, 1965, and Mr. J. P. Jackson . . . who re-opened the inquiry on Nov. 1, 1966. Copies of both reports are enclosed. The local planning authority's reason for refusing planning permission, as given in the notice of their decision, was that 'the proposed development might prejudice the possible future widening of Lairgate', and the question of whether this is a proper or sufficient reason for refusing the planning permission sought is the only matter in dispute in the appeal."

Moreover, in para. 7 of the case for the bank, the following statement appears:

"It is significant that the machinery of the Highways Act has not been invoked. If the road widening is a necessary and viable step in the interests of road efficiency, action under s. 73 of the Act is the only proper means of achieving the objective. It is a misuse of the powers under the planning Act to whittle away an owner's rights of compensation by refusing permission which would otherwise be appropriate, under the pretext of safeguarding a scheme which has no statutory standing, so as to protect, in the eventuality, the public purse at the expense of individuals."

The case of *Hall & Co., Ltd. v. Shoreham-by-Sea Urban District Council* (4) was referred to—which is a different case and indeed was only quoted for a dictum taken out of the judgment.

So the point made by the bank was plainly brought to the attention of the Minister and was plainly rejected by him. Reference to the Town and Country Planning Act, 1962, shows that the Minister was entitled to take into consideration highway matters. See s. 17 (1), which requires a planning authority to have regard to the provisions of the development plan so far as material to the application for planning permission, and to any other material considerations. The widening of Lairgate was certainly material, and, perhaps vital, to the scheme which was to be carried out by the material plan. Indeed the grounds for the refusal of the bank's application for planning permission were, in my opinion, reasonable and a matter of common sense. If Lairgate needed to be widened in order to carry the traffic anticipated under the planning authority's scheme, it would be absurd and wasteful to allow buildings to be erected on Lairgate, which would have to be removed and destroyed when the scheme was carried out. Moreover, it may be that the provisions of s. 72 or s. 73 of the Highways Act, 1959, might be employed at a later date. I do not think that the Minister's decision was *ultra vires*. For these reasons, in my view, the judge reached the wrong conclusion and result in quashing the Minister's order, and the appeal must be allowed.

**DIPLOCK, L.J.:** Westminster Bank, Ltd., was minded to build a new strong room at the rear of their premises in the non-county Borough of Beverley where they abutted into Lairgate, a county road for which the East Riding County Council is the highway authority. This would constitute "development" under s. 12 of the Town and Country Planning Act, 1962, for which planning permission was required under s. 13. The local planning authority was the county council, which had delegated to the borough council its powers under s. 17 of the Act of 1962 as to determining applications for planning permission in respect of land in the borough.

Planning permission was refused on the ground that the proposed development might prejudice the future widening of Lairgate from its existing width of some sixteen feet to twenty feet to an intended overall width of forty feet. After a number of vicissitudes into which it is irrelevant to enter, the Minister, on appeal under s. 23 of the Act of 1962, upheld the borough's refusal on the same ground. An appeal from the Minister's decision was brought to the High Court under



A s. 179 of the Act of 1962. It was allowed by DONALDSON, J., (5), and comes to this court on appeal from his judgment. He held that the decision of the Minister was not within the powers of the Act of 1962. The naked question for us is whether on an application for planning permission for development which involves the carrying out of building operations a local planning authority is entitled to take into consideration as a ground for refusing permission the fact  
 B that the proposed building would encroach on land which the planning authority propose should be used for widening an existing highway.

The relevant facts are that the planning authority have prepared a scheme for redevelopment of the town centre of Beverley which would involve Lairgate's becoming a main traffic route and necessitate its widening to a width of about forty feet. If so widened, it would include part of the bank's land on which they  
 C proposed to build the strong-room. The redevelopment scheme has now reached a stage at which it has been delineated on a town map. The town map does not form part of a "development plan" submitted to the Minister under Part 2 of the Act of 1962, nor is it the present intention of the planning authority that it should be incorporated in a "development plan". It is a local scheme which has been published by the planning authority and discloses the manner  
 D in which they propose that the land in the town centre of Beverley should be used in the future. The scheme as delineated on the map has been officially approved by the county council as planning authority and the widening of Lairgate which forms part of the scheme has been approved by it as highway authority.

One further preliminary matter should be mentioned. The question whether the bank would be entitled to recover any, and if so any particular measure of,  
 E compensation on refusal of planning permission does not arise directly in this appeal. That would be a matter, not for the planning authority or the Minister, but for the Lands Tribunal. The facts disclosed in the documents before us do not enable us to say whether or not the bank would be entitled, as they claim that they would, to recover compensation for refusal of planning permission under s. 123 of the Act of 1962 or to require the authority to purchase their interest in  
 F the land under s. 138 and s. 139 of the Act of 1962. I say this because the judge cited as the starting point of the bank's argument, which he accepted—I quote from the judgment (6):

"... the principle of law formulated by LORD WARRINGTON OF CLYFFE in *Colonial Sugar Refining Co., Ltd. v. Melbourne Harbour Trust Comrs.* (7) that 'a statute should not be held to take away private rights of property  
 G without compensation unless the intention to do so is expressed in clear and unambiguous terms'."

With great respect, I do not think that this assists in the determination of the present case. The whole purpose of planning control under Part 3 of the Act of 1962 is to take away private rights of property. Any refusal of planning permission does just this. Parts 6 and 7 of the Act of 1962, which extend to forty-one sections,  
 H contain elaborate provisions as to the circumstances in which compensation is payable to the subject for losses incurred by him as a result of the exercise of planning powers; and Part 8, comprising another twenty-four sections, deals with other compensatory remedies available to the subject. In my view the Act of 1962 expresses in clear and unambiguous terms the intention of Parliament that  
 I compensation for deprivation of private rights of property as a result of the exercise of planning powers was to be recoverable in the circumstances and in the measure provided in the statute and not otherwise.

The learned judge purported to decide in favour of the bank on two grounds. The first, based on the maxim *generalia specialibus non derogant*, (see *Bishop of Gloucester v. Cunningham* (8) and *Mirman's Properties, Ltd. v. Chertsey Urban District Council* (9)) was that since the Highways Act, 1959, contains detailed

(5) Ante p. 104.

(6) Ante pp. 109, 110.

(7) [1927] A.C. at p. 359.

(8) [1943] 1 All E.R. 61; [1943] K.B. 101.

(9) [1963] 2 All E.R. 787; [1964] 1 Q.B. 214.

provisions enabling a highway authority to control building within an "improvement line" to which it proposes that a highway should be widened, the general provisions of the Town and Country Planning Act, 1962, should not be construed as empowering a local planning authority to control this particular kind of development. A

The alternative ground was that, even if the erection of a building within the line to which it was proposed a highway should be widened required planning permission, it was ultra vires the planning authority to refuse such permission for the sole reason that the building proposed to be erected would be within such line. B

The first ground if it was really intended to differ from the alternative ground, can be disposed of shortly. Any building operation which does not fall within s. 12 (2) of the Act of 1962 clearly requires planning permission under s. 13, whether or not it would be within the line to which it is proposed that a highway should be widened. It is not suggested that the planning authority could not refuse planning permission on some other ground, such as the use to which it is to be put or aesthetic grounds. Furthermore, it appears to me to be as plain as can be from many of the provisions of the Act of 1962, that the use in the future of land as a highway, whatever may be its existing use, is a matter which the local planning authority is entitled to control in the exercise of the powers conferred on it by the Act of 1962. The site of new and widened highways may be indicated and defined on development plans under s. 4. See, in particular, s. 4 (3), which provides: C

"(3) Subject to the provisions of any regulations made under this Act for regulating the form and content of development plans, any such plan shall include such maps and such descriptive matter as may be necessary to illustrate the proposals in question with such degree of particularity as may be appropriate to different parts of the areas; and any such plan may in particular—(a) define the sites of proposed roads . . ." E

Moreover, where they are so indicated, the planning authority is required by s. 17 to have regard to them in dealing with any application for planning permission under that section. That the carrying out of work on highways is development within the meaning of s. 12 is plain from s. 12 (2) (b). Section 14 (7) and (8) of the Act of 1962 give to the Minister of Housing and Local Government overriding powers in the event of any conflict between the powers of highway authorities under the sections of the Highways Act, 1959, which are relevant to the present appeal, and the powers of planning authorities under the Act of 1962. Even where the local planning authority is itself the highway authority, it requires planning permission (in this case from the Minister) under s. 42 to enlarge a highway unless it obtains deemed planning permission from the Minister of Transport under s. 41. Section 138 (1) (c) of the Act of 1962 refers expressly to land which F

"is land indicated in a development plan (otherwise than by being allocated or defined as mentioned in the last preceding paragraph) as land on which a highway is proposed to be constructed or land to be included in a highway as proposed to be improved or altered." G

All this in my view makes it clear beyond peradventure that the powers of a local planning authority extend to defining what land in their area is proposed for use as a highway in the future, including land proposed to be incorporated in an existing highway when widened. They may do this formally in a development plan prepared under Part 2 of the Act of 1962, in which case they are bound to have regard to that proposed use in determining whether or not to grant permission to build on that land. They are not, however, bound to define it in a development plan. If they do not do so, but deal with it less formally as part of a detailed scheme approved by them for a particular area, the proposed future H I

- A use of land as a highway is in my view *prima facie* at any rate a material consideration to which they are entitled to have regard in determining whether or not to grant planning permission to build on the land.

This brings me to DONALDSON, J.'s second ground, which is that because of the provisions of s. 72 of the Highways Act, 1959, it was *ultra vires* the Minister, in determining whether or not to grant planning permission, to take into consideration the fact that the proposed building would be erected on land proposed to be used as part of a highway. This kind of *ultra vires* is sometimes referred to as unreasonable exercise of a power. The term is misleading, however, unless the limited meaning of the expression "unreasonable" is firmly borne in mind. It has been defined in two ways, viz., by LORD DENNING in *Pyx Granite Co., Ltd. v. Ministry of Housing and Local Government* (10), where he said this:

- C "The principles to be applied are not, I think, in doubt. Although the planning authorities are given very wide powers to impose 'such conditions as they think fit', nevertheless the law says that those conditions, to be valid, must fairly and reasonably relate to the permitted development. The planning authority are not at liberty to use their powers for an ulterior object, however desirable that object may seem to them in the public interest."

Moreover, LORD GREENE, M.R., in *Associated Provincial Picture Houses, Ltd. v. Wednesbury Corpn.* (11) expressed it thus, that in considering whether an authority having so unlimited power has acted unreasonably

- E "... the court is entitled to investigate the action of the local authority with a view to seeing whether it has taken into account matters which it ought not to take into account, or, conversely, has refused to take into account or neglected to take into account matters which it ought to take into account ... The power of the court to interfere ... is not that of an appellate authority to override a decision of the local authority, but is that of a judicial authority which is concerned, and concerned only, to see whether the local authority has contravened the law by acting in excess of the powers which Parliament has confided in it."

- These two ways of stating the matter were cited with approval by LORD JENKINS in *Fawcett Properties, Ltd. v. Buckingham County Council* (12). *Hall & Co., Ltd. v. Shoreham-by-Sea Urban District Council* (13) was not a case of refusal of planning permission, i.e., the prevention of development which is the express purpose of s. 12 and s. 13, but an attempt to achieve by the imposition of conditions the construction of a highway by the applicant on his own land at his own expense.

Both ways of putting it appear to me really to amount to this: it is a misuse of a power granted by statute for one object to use it in order to achieve a different object for which Parliament did not intend it to be used.

- H It is contended that the object of preventing building within the line to which it is proposed that an existing highway should be widened was intended by Parliament to be achieved by the exercise of powers conferred on *highway authorities* under s. 72 of, and Sch. 9 to, the Highways Act, 1959, and not by the method of control of building operations conferred on *planning authorities* by s. 12 and s. 13 of the Town and Country Planning Act, 1962.

- I The first thing to be noted is that it is purely coincidental that Lairgate was a county road for which the planning authority happened to be also the highway authority. The argument if valid must apply equally to highways for which under s. 1 (2) of the Highways Act, 1959, a borough or urban district council, which is not a planning authority, is the highway authority. The relevant power of the highway authority is to be found in s. 72 of the Act of 1959, which re-enacted

(10) [1958] 1 All E.R. 625 at p. 633; [1958] 1 Q.B. 554 at p. 572.

(11) [1947] 2 All E.R. 680 at p. 685; [1948] 1 K.B. 223 at pp. 233, 234.

(12) [1960] 3 All E.R. 503 at p. 522; [1961] A.C. 636 at p. 685.

(13) [1964] 1 All E.R. 1.



with some modifications the provisions of s. 5 of the Road Improvement Act, 1925, and s. 33 of the Public Health Act, 1925. I will read the relevant part of s. 72:

"(1) Where in the opinion of a highway authority—(a) a street, being a highway maintainable at the public expense by them, is narrow or inconvenient, or without any sufficiently regular boundary line, or (b) it is necessary or desirable that such a street should be widened, the authority may prescribe in relation to either one side or both sides of the street, or at or within a distance of fifteen yards from any street corner, a line to which the street is to be widened (in this section referred to as an 'improvement line')."

"(2) Where an improvement line prescribed under this section in relation to any street is in force, then, subject to the next following subsection, no new building shall be erected, and no permanent excavation below the level of the street shall be made, nearer to the centre line of the street than the improvement line, except with the consent of the authority who prescribed the line, and the authority may give a consent for such period and subject to such conditions as they may deem expedient . . ."

"(3) Where an authority have prescribed an improvement line under this section, a person aggrieved by the decision to prescribe the line or by the refusal of consent under the last foregoing subsection or by the period for which the consent is given or any conditions attached thereto may appeal to a court of quarter sessions."

"(6) Where in the opinion of a highway authority an improvement line prescribed by them under this section, or any part of such a line, is no longer necessary or desirable and should be revoked, they may revoke the line or that part thereof."

"(8) Any person whose property is injuriously affected by the prescribing of an improvement line under this section, shall, subject to the following provisions thereof, be entitled to recover from the authority who prescribed the line compensation for the injury sustained."

It is to be observed that neither the planning authority as such nor it in its capacity as county council has any power to require a highway authority to prescribe an improvement line for any non-county road or to refrain from revoking one, or to dictate whether or not consent to building within the improvement line shall be granted in any particular case. The ultimate control both as to the prescription of the line and as to consent to building within lies with quarter sessions on appeal; and this is so even where the county council is itself the highway authority. If the argument accepted by the learned judge is right, then even if the planning authority, not being itself the highway authority, had defined in its statutory development plan the proposed future width of the highway, the highway authority could either prescribe no improvement line, or prescribe a different improvement line, or revoke a line already prescribed, or consent to building within it, without any control by the planning authority or the Minister and subject only to control by quarter sessions. If no improvement line were prescribed by the highway authority, or their decision to prescribe a line were overruled on appeal to quarter sessions, and the planning authority had no power to refuse planning permission for building operations on the ground that the proposed building was within the line to which it was proposed by the planning authority an existing borough or urban district highway should be widened, there would be no way of preventing frontagers building up to the limits of the existing highway buildings which would have to be demolished as soon as the time came to widen the highway and recovering compensation for the value of the buildings demolished. Apart from the economic waste inevitably involved, this might well make the eventual widening of the highway impracticable and with it the whole scheme of related development of which the widening of the highway was an integral part. For

A my part, I cannot ascribe to Parliament so bizarre an intention of removing from the control of local planning authorities and the Minister of Housing and Local Government so important an aspect of planning the future use to be made of land in this overcrowded and over-vehicled kingdom.

The judge reached the contrary conclusion on the grounds that where an improvement line is prescribed by a highway authority all frontagers whose land is affected thereby are entitled to immediate compensation for injurious affection, whereas there is no right to compensation, on the same basis at any rate, when planning permission is refused on grounds that the proposed building would be within the line to which it was proposed by the planning authority that the highway should be widened. He expressed the principle which he accepted in these terms (14):

C "The complexity of modern society necessitates a multiplicity of controls whereby the interests of the individuals are subordinated to those of the community. We remain, however, members of a free society. In such a society a reasonable man faced with the need to restrict the freedom of the individual for the benefit of the community and faced with two possible courses of action, only one of which involves compensating the individual, must surely adopt that course. The Minister, or more accurately the lady who was his alter ego for the purposes of this appeal, has adopted the other course."

This is tantamount to saying that wherever Parliament has provided two alternative ways of achieving the public weal it is ultra vires to make use of the cheaper one.

E Read literally, it would suggest that in considering an application for planning permission, the planning authority and the Minister on an appeal would have to enquire whether the particular applicant would be likely to recover more compensation under the Act of 1962 if his application were refused than he would have recovered if a corresponding improvement line had been prescribed by the highway authority under s. 72 of the Act of 1959 and building permission refused under that Act. Conversely, also, a highway authority and quarter sessions on appeal would have to make a similar enquiry presumably as respects all the individual frontagers before determining whether to prescribe an improvement line. For, as I have pointed out, compensation on refusal of planning permission may be payable to the applicant under the Act of 1962, as the bank claims that it would be payable to them in the present case under s. 123 of, and Sch. 3 to, the Act of 1962, or possibly under other provisions of that Act relating to compensation.

I cannot think that the judge intended that; but if he did not, I think that one is driven back to the wider argument that the Highways Act, 1959, was intended by Parliament to provide the only method by which building within the line to which it was intended to be widened should be controlled, and that the Act of 1962, being a general Act, must not be construed as providing an alternative method of control by a different authority (viz., a planning authority rather than a highway authority) over that special subject-matter. For the reasons which I have indicated I agree with DANCKWERTS, L.J., that he was wrong.

I In my view the fact that the operation proposed would involve building within the line to which it was proposed by the planning authority that the existing highway should be widened was a material consideration to which the local planning authority and the Minister were entitled to have regard. Indeed I would go further and say that if they did not have regard to it, it might, under the words of LORD GREENE, M.R., in *Associated Provincial Picture Houses, Ltd. v. Wednesbury Corpn.* (15) be said that they had disregarded matters which ought to be taken into account. I agree that this appeal should be allowed.

(14) Ante p. 114.

(15) [1947] 2 All E.R. at p. 685; [1948] 1 K.B. at pp. 233, 234.

**SALMON, L.J.:** At common law a man was entitled to do what he liked with his own, providing that in doing so he did not injure his neighbour. The complexity of modern society has made it necessary to introduce a multiplicity of statutory controls which have largely eroded this principle, some think unfortunately. These controls deal in detail with circumstances in which it has been thought that the exercise of private rights might injure the community. The power to operate many of these controls has been left in the hands of local authorities, subject to an appeal to the Minister concerned. The Minister himself has, of course, no time to deal personally with the multifarious matters that arise in this way. His powers are necessarily delegated to civil servants of his department. It is with them that the ultimate power in reality resides. The courts, quite rightly, have no power to interfere with policy or administrative decisions merely because they do not agree with them. Policy and administrative decisions are clearly within the sphere of the executive alone. Accordingly the courts are powerless to intervene to protect the private citizen unless the Ministries concerned have exceeded the wide powers conferred on them by Parliament or have abused those powers, for example, by a wholly unreasonable exercise of discretion. As the learned judge observed (16), however, we still live in a free society. We shall continue to do so only so long as the courts continue, as they always have done, to exercise the power which they still possess of restraining any bureaucratic invasion of private rights which is not authorised by law.

The Highways Act, 1959, contains a complete code in relation to highways, their maintenance, improvement and construction. It is quite true that the highway authorities who are primarily responsible for carrying out the duties under the Act of 1959 are subject to control by the planning authorities, and, should there be a clash between the two—which perhaps does not often occur—planning control prevails. It is plain that Parliament, when it enacted the Highways Act, 1959, and the Acts which it replaced, clearly contemplated that highway improvement schemes might take a number of years to implement. The highway authority might be minded to widen a street at some time or other, but might not intend to do so for many years. It may be that the property owners whose land adjoined the highway had not built right up to the line of the street as it then existed, or that if they had, they were planning to demolish the property and rebuild. Clearly if between the time when the scheme to widen the highway was formulated and the time when it was carried out, the property owners did either of the things to which I have alluded, the cost to the highway authority of carrying out the scheme in the future would be very much increased. Building or rebuilding on the land to be compulsorily acquired would increase its value and add to the compensation and demolition costs for which the highway authorities would be liable. In order to protect highway authorities against this increased liability, s. 72 of the Act of 1959 and its statutory predecessors were passed. These gave the highway authority the power to prescribe an improvement line, that is to say, to put a line on a map showing the proposed extent to which the highway was to be widened. Once this improvement line was prescribed, no property owner could build on the highway side of the line without the consent of the highway authority. This was a sensible measure to protect the highway authority. On the other hand, it was obvious to Parliament that once an improvement line was prescribed, this would sterilise the adjoining land and might injuriously affect its value. How much it might injuriously affect the value of the land would depend on whether there was any real prospect of it being built on or any reconstruction taking place on it but for the improvement line. Clearly Parliament considered that it was only fair that if this measure was to be introduced to save possibly vast sums of money to the highway authority in future, private individuals should recover fair and reasonable compensation for the injurious effect caused to their property by the improvement line. This compensation was payable on the improvement line being prescribed.



- A Reference has been made to the possibility of differences of opinion between the planning authority and the highway authority and to the possibility that even if they agreed and a line were prescribed by the highway authority, the adjoining owners might successfully appeal to quarter sessions. DIPLOCK, L.J., has pointed out that town and country planning is intimately concerned, amongst other things, with the lay-out of highways, and therefore in exercising the powers
- B conferred under s. 17 of the Town and Country Planning Act, 1962, one of the material considerations to take into account is highways. I respectfully agree. I can imagine cases in which it would be a reasonable exercise of the power under s. 17 to refuse planning permission if, for example, quarter sessions had allowed an appeal in respect of an improvement line prescribed by the highway authority and approved by the planning authority. It seems to me, however,
- C that this is rather unlikely to occur; it would be a capricious decision of quarter sessions, and, on a case stated, would be unlikely to survive. Again, it is possible, although unlikely, that there might be a dispute between the planning authority and the highway authority. The planning authority might decide on a road widening scheme to which the highway authority would not agree and for which it would refuse to prescribe an improvement line. No doubt, in such a case, the
- D matter would be referred to the Ministries concerned. In the still more unlikely event of the Ministries failing to agree what the line of the new road should be, the planning authority might properly refuse planning permission to erect any building which projected beyond the line of their proposed road widening in spite of the fact that no improvement line had been prescribed by the highway authority. We are not, however, in this case dealing with circumstances even
- E remotely resembling such as these. The Lairgate road widening scheme had evidently been decided on by the Ministry of Transport and the highway authority. The question here is whether it is a proper exercise of the power conferred on the planning authority under s. 17 to refuse planning permission solely in order to save the highway authority money. Put in a slightly different way, is the planning authority entitled by a side wind to prescribe an improvement line so as to deprive
- F the individual property owner of compensation for the damage which he thereby suffers and which Parliament in the Highways Acts clearly intended him to recover?

In this case, as I hope to demonstrate, it seems to me that there is not the slightest doubt but that the only reason why planning permission was refused was to save the highway authority the expense of prescribing an improvement

- G line. Incidentally, the planning authority is here the same body as the highway authority. LORD DENNING, in the case (17) to which DIPLOCK, L.J., has referred, has said that it is an improper use or abuse of power if a power given by Parliament for one object is used for an object for which it is not intended to be used, i.e., if the power is used for some ulterior motive. I do not think that Parliament gave the planning authority power under the Town and Country Planning Acts
- H to enable the planning authority to save the highway authority money by depriving the citizen of the compensation accorded him by the Highways Acts.

The other way in which the point was put was by LORD GREENE, M.R., in *Associated Provincial Picture Houses, Ltd. v. Wednesbury Corpn.* (18). He said:

- I "... it may still be possible to say that the local authority . . . have come to a conclusion so unreasonable that no reasonable authority could ever come to it. In such a case, again, I think the court can interfere."

In my view if a local authority decides to refuse permission under s. 17 of the Town and Country Planning Act, 1962, in order to save the highway authority money by depriving the citizen of compensation which Parliament intends him to have, that conclusion is so unreasonable that no reasonable authority ought to come to it.

(17) *Pigg Granite Co., Ltd. v. Minister of Housing and Local Government*, [1958] 1 All E.R. at p. 633; [1958] 1 Q.B. at p. 572.

(18) [1947] 2 All E.R. at p. 685; [1948] 1 K.B. at p. 234.

The first time the bank made an application for permission to build its strong room on its land which abutted on Lairgate was on Apr. 1, 1962, and that was refused on these grounds: A

“ The proposed development might prejudice the possible future widening of Lairgate which it is intended should have an ultimate overall width of forty feet.” B

The bank then went away and thought whether it could build its strong room on some other part of its premises. It came to the conclusion that this could not be done effectively or economically. So it renewed its application in March, 1964. That application was again refused by the planning authority, and the bank accordingly appealed to the Minister. The Minister instructed an inspector, Mr. Deans, to carry out an inquiry, which he did in March of 1965; and he reported on Apr. 22, 1965. He recommended that the bank's appeal should be allowed, and his conclusion was that for “ twenty years the council have, through planning control, protected a scheme for the widening of Lairgate along its eastern side ”; he concluded that it was quite uncertain whether or when Lairgate would be widened. Whilst that finding stood, it would I suppose have been quite impossible for any civil servant in the Ministry of Housing to dismiss the appeal and refuse to accept the report of the inspector. C D

I pause here to observe that for twenty years the land abutting the eastern line of Lairgate had been sterilised under the Town and Country Planning Acts. After that report, there was complete silence for very nearly one whole year. This, however, does not mean that nothing was occurring. There were clearly consultations going on between the civil servants in the Ministry of Housing and in the Ministry of Transport. This appears from the decision letter to the bank dated Mar. 10, 1966. After referring to the inspector's report, as to which the bank had had no information at all for eleven months, the letter states: E

“ The Minister [the Minister of Housing] has however been advised by the Minister of Transport that—the future widening of Lairgate is a firm proposal which is part of a long-term road improvement scheme essential for the relief of traffic congestion in Beverley. The appeal site will definitely be required for the widening of Lairgate and whilst there are no plans for the immediate implementation of this proposal it is essential that it should not be prejudiced by the development of land which will be needed for the road widening ’.” F

This means that the decision to widen Lairgate was the decision of the highways authority approved by the Ministry of Transport. The letter then goes on to say that the Minister of Housing does not propose to allow the appeal, but, if the bank desire it, he will re-open the inquiry before coming to a final decision. G

It is not difficult to imagine the consternation that must have prevailed amongst those employed in the Ministry of Transport when the report of Mr. Deans was drawn to their attention. If the report were allowed to stand, clearly there was a real danger that the scheme, which had been devised in 1954 and which had worked well since, for depriving property owners of the compensation provided for them by the Highways Acts might go awry. It was no doubt appreciated that unless the highway authority used their statutory powers to prescribe an improvement line (which they had avoided doing for years) and paid some compensation to the property owners for the damage they had suffered thereby, it might be that the land beyond the line would be developed and that accordingly when, if ever, the road came to be widened, the expense would be greatly increased. H I

The judge drew attention to a circular (19) which had been issued by the Ministry of Transport in 1954, No. 696, which appeared to him, and I must say appears to me, to be significant. Paragraph 8 is in these terms:

- A "Prescription of Building and Improvement Lines. In view of the powers now available to local authorities as planning authorities for the control of development it is no longer necessary for councils to safeguard future road improvement scheme by using their powers under s. 5 of the Road Improvement Act, 1925, or s. 33 of the Public Health Act, 1925 [these are the pre-cursors of s. 72 of the Act of 1959] to prescribe building and improvement
- B lines. Accordingly the Minister will no longer entertain applications for grants in respect of expenditure incurred by councils in meeting claims for compensation payable in consequence of the prescription of building and improvement lines."

- C That seems to me to be saying quite plainly, although in a style not unfamiliar to such documents: "You would be very stupid to prescribe an improvement line under the Highways Acts, because that will involve you in paying the compensation to property owners which Parliament has given them for the damage which they may suffer by such a line being prescribed. In the past, of course, you have been able to rely on getting the money back, or a large part of it, from the central government; but you can by-pass the Highways Acts and treat them as a
- D dead letter, because you can rely on the planning authority in fact to impose an improvement line by refusing planning permission; that will deprive the property owners of any of their rights to compensation, and you are just throwing money away which you will not get back from us if you prescribe the line under the Highways Acts." Ever since that circular was published it appears that, perhaps not unnaturally, improvement lines have not been prescribed under the
- E Highways Acts, and planning powers have been used to sterilise land for road widening purposes without paying the property owners any compensation.

- The bank said that it would like the inquiry re-opened, and it was; but the Ministry did not select the same inspector who was familiar with the case and had taken all the evidence previously given. He may not have been available: one does not know. Another inspector was selected, and he held an inquiry, the
- F second inquiry, in November, 1966. The borough council, in the evidence which it filed, said:

- "In recent years any proposals for development within the improvement line have been resisted. Consequently several building proposals have not been carried out and others have been amended so as to stand behind the improvement line."

- G Now, this had been going on apparently for twenty years, and it is quite obvious from what the borough council have said themselves that in their capacity of planning authority, they did impose an improvement line; and it is equally obvious, if you correlate the evidence which they gave with the circular of the Ministry to which I have referred, that this was done with the sole purpose of
- H saving themselves money as the highway authority and depriving private citizens of compensation.

Mr. Jackson, who was the second inspector, eventually made a report, and the final conclusion he came to was this:

- "It seems possible that, following the realisation of other road proposals in the central area, the increased use of Lairgate would then make it
- I essential for the widening to be carried out within the foreseeable future."

I draw attention to the words "It seems possible", not "likely" or "probable", but "possible"—that it might be necessary to widen Lairgate after the other work had been done. When? "In the foreseeable future." That is a very nebulous term. It might mean three, ten, twenty, thirty, forty years. Who knows? Apparently from the evidence more than twenty years ago planning permission had been refused because of the possible widening of Lairgate at some indefinite future time. Following on that second inspector's report, a decision



letter was written to the bank on Jan. 31, 1967—the relevant parts of which have been read, and which I need not repeat—dismissing the appeal. A

Parliament has clearly manifested its intention in the Highways Acts that if a highway authority is to protect itself from having to pay an enhanced value for land subsequently to be taken over for a road widening, it should do so by prescribing an improvement line so as to prevent the land being developed meanwhile, but that if it does so, it should do what would seem to the ordinary man to be fair and reasonable, namely, compensate the individuals who own the property concerned against the damage that their property will suffer as a result of that line having been prescribed. I for my part deplore the practice that appears to have grown up of using planning powers—the necessarily wide planning powers that were conferred by the Town and Country Planning Acts—for the purpose of defeating the manifest intention of Parliament expressed in the Highways Acts. The Highways Acts seem to me to prescribe the regular method to be adopted by the highway authorities if they wish to protect themselves against the extra expense to which I have referred. In this connexion I would cite two short passages from the judgments in *Hall & Co., Ltd. v. Shoreham-by-Sea Urban District Council* (20). The facts in that case were no doubt very different. That was a case where planning permission was granted under s. 14 of the Town and Country Planning Act, 1947, which was the precursor of s. 17 of the Act of 1962, on condition that the applicants constructed a road. No one doubts that from a planning point of view the construction of this road was quite excellent, and under s. 14, just as under s. 17, there were the widest powers to grant permission on conditions. From a planning point of view the condition imposed could not have been better; but, for the reasons explained in the judgment, the imposition of this condition was extremely hard on the applicants and the planning authority could have provided for the building of the road in a regular way under the statute without imposing any hardship on the applicants. E  
WILLMER, L.J., speaking about the condition, said (21):

“The defendants would thus obtain the benefit of having the road constructed for them at the plaintiffs’ expense, on the plaintiffs’ land, and without the necessity for paying any compensation in respect thereof. Bearing in mind that another and more regular course is open to the defendants it seems to me that this result would be utterly unreasonable and such as Parliament cannot possibly have intended.” F

PEARSON, L.J., said (22):

“I should, however, be inclined to say that the element of ultra vires is to be found in the conflict with the general law relating to highways. The general words of s. 14 (1) of the Town and Country Planning Act, 1947, should not be interpreted as authorising a radical departure from the general law relating to highways.” G

It seems to me that those passages are particularly applicable in the present case. In my judgment the general words of s. 17 should not be applied so as radically to depart from the procedure which is laid down in the law applicable to highways under s. 72 of the Highways Act, 1959. The judge came to the conclusion—and I entirely agree with him—that the reason for adopting these methods was purely economic. To adopt the regular method of prescribing an improvement line would not prejudice the construction of the road in any sense except that it would cost the highway authority more money than this radical departure from the general law relating to highways, namely, it would cost them the price of paying the landowners compensation for the damage which they might suffer by reason of the imposition or prescription of the improvement line. I do not think it matters much which way it is put, whether one says that what was done amounted to a use or abuse of power to which no reasonable authority should be a party, H I

(20) [1964] 1 All E.R. 1.

(21) [1964] 1 All E.R. at p. 9.

(22) [1964] 1 All E.R. at p. 17.

- A or whether it is said, in LORD DENNING's phrase, that it was done for an ulterior motive, or whether it is described as an entire departure from the regular practice laid down under the Highways Act, 1959: it seems to me that it is quite unjustifiable in law. It was done solely to save the highway authority money by depriving the citizen of his statutory rights to compensation. I do not believe the powers under the Town and Country Planning Acts were ever designed to be used for that purpose.

B For my part, I unhesitatingly agree with the decision of the judge (23) and I would accordingly dismiss the appeal.

*Appeal allowed. Leave to appeal to the House of Lords granted.*

- Solicitors: *Solicitor, Ministry of Housing and Local Government; Baylis, Pearce, McMillan & Mott (for the bank).*

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

## PRACTICE DIRECTION.

### D OFFICIAL REFEREES.

*Practice—Reference to referee—Procedure—Hearing of first summons—Delivery of pleadings—Solicitors to be ready to state nature of claim and defence—Directions and orders by referee—Date for trial of action—Expert evidence.*

- E 1. At the time of the issue of the first summons before the Official Referee, a copy of all the pleadings, including particulars, already served should be lodged with his clerk so that they can be considered by the Official Referee before the hearing of the summons. Such copy of the pleadings may be collected from the clerk to the Official Referee for the purpose of preparing a bound copy of the pleadings for use at the trial.

- F 2. At the hearing of the first summons before the Official Referee, the solicitors of the parties or their London agents should be in the position to state the nature of the claim and of the defence. Failure in this respect may result in unnecessary adjournments with attendant costs.

- G 3. At the hearing of the first summons before him, the Official Referee will give the necessary directions and make the necessary orders regarding the steps in the action to be taken by the parties. It is of the utmost importance that these steps should be taken within the time-limits set by the direction or order, so that the practice of giving a fixed date for the trial may be continued.

- H 4. Once an action has been given a fixed date for trial, no alteration will be granted except with the leave of the Official Referee which will be granted only in exceptional circumstances. If a fixed date for trial is vacated, the fresh date for trial may not be a fixed date.

- I 5. Where a party intends to adduce expert evidence, he should produce to the other party his expert's statement of proposed evidence, together with any reports, plans, models, calculations, etc., relevant to it, for agreement if possible. Failing such agreement, the other party should deliver to the first party a written statement setting out particulars of the matters not agreed. Where both parties intend to adduce expert evidence, each should follow this procedure. Failure by any party to follow this procedure may result in a special order as to costs.

WALKER CARTER,  
Senior Official Referee.

July 8, 1968.

## CHAPMAN v. EARL. CHAPMAN v. WEEKES.

R. v. BRISTOL RENT ASSESSMENT COMMITTEE, *Ex parte* EARL.  
SAME v. WEEKES.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Waller and Fisher, J.J.), May 17, 30, 1968.]

*Rent Restriction—Rent—Regulated tenancy—Determination of fair rent—Application—Failure to specify amount of rent sought to be registered—Whether fatal defect rendering application a nullity—Rent Act 1965 (c. 75) s. 26 (5), Sch. 3, para. 2—Rent Regulation (Forms, etc.) (England and Wales) Regulations 1965, S.I. 1965 No. 1976, reg. 7, Sch. 3, Form 4, para. 9.*

Failure by an applicant for registration of a rent for a dwelling-house under s. 26 of, and Sch. 3 to, the Rent Act 1965 to specify in his application the rent which it is sought to register is a fatal defect, having the consequence that the application and subsequent proceedings on it are a nullity and that certiorari lies to quash the determination of the rent pursuant to such an application; for the requirement in para. 2\* of Sch. 3 to the Act of 1965 that the application "must" contain the prescribed particulars in addition to the rent which it is sought to register is, on the true construction of that Schedule, an imperative requirement (see p. 1218, letter I, and p. 1219, letter H, post).

Principle of construction stated by LORD PENZANCE in *Howard v. Bodington* ((1877), 2 P.D. at pp. 210, 211) applied.

*Vickers, Sons & Co. v. Siddell* ((1890), 15 App. Cas. 496) and *Francis Jackson Developments, Ltd. v. Hall* ([1951] 2 All E.R. 74) distinguished.

Accordingly, where a tenant made application for registration of a rent for the ground floor flat of which he was tenant and, instead of stating in para. 9 of the prescribed form of application the amount of the rent sought to be registered, stated "rent officer to determine fair rent", the subsequent determination of a fair rent by the rent assessment committee, on the landlord's objection to the rent officer's determination, was quashed on application for certiorari; though the remedy of certiorari, being discretionary, was granted as a matter of the court's discretion in view of special circumstances of the particular case (*Chapman v. Earl*, see p. 1220, letter I, to p. 1221, letter B, post).

[As to applications for registration of fair rent under the Rent Act 1965, see SUPPLEMENT to 23 HALSBURY'S LAWS (3rd Edn.) para. 1571B, 3; and for a case on the subject, see 31 DIGEST (Repl.) 676, 7702.]

For the Rent Act 1965 s. 26 (5), Sch. 3, paras. 1, 2, 5 to 8, see 45 HALSBURY'S STATUTES (2nd Edn.) 843, 864, 865.]

## Cases referred to:

*Howard v. Bodington*, (1877), 2 P.D. 203; 42 J.P. 6; 44 Digest (Repl.) 304, 1340.

*Jackson (Francis) Developments, Ltd. v. Hall*, [1951] 2 All E.R. 74; [1951] 2 K.B. 488; 115 J.P. 384; Digest (Cont. Vol. A) 1110, 8126a.

*Liverpool Borough Bank v. Turner*, (1860), 2 De G. F. & J. 502; 30 L.J.Ch. 379; 3 L.T. 494; 45 E.R. 715; 5 Digest (Repl.) 832, 7023.

*R. v. Stafford Justices, Ex p. Stafford Corpn.*, [1940] 2 K.B. 33; 109 L.J.K.B. 584; 162 L.T. 393; 104 J.P. 266; 16 Digest (Repl.) 451, 2590.

*Vickers, Sons & Co. v. Siddell*, (1890), 15 App. Cas. 496; 60 L.J.Ch. 105; 63 L.T. 590; 36 Digest (Repl.) 1017, 3627.

## Appeals and applications for certiorari.

These were initially two appeals brought under s. 9 of the Tribunals and Inquiries Act, 1958, as applied by the Tribunal and Inquiries (Rent Assessment Committees) Order 1965, by the appellant, Joseph Henry Chapman, against determinations made by the Bristol Rent Assessment Committee on Nov. 14,

\* Paragraph 2 is set out at p. 1218, letter G, post.



- A 1967, under the Rent Act 1965, in respect of two flats at 13, Davis Street, Avonmouth, Bristol of which the appellant was landlord, and of which the respondents Roger John Earl and Jean P. Weekes were the tenants of the basement\* and first floor flats respectively. The grounds of appeal in each case was the same, viz., that the applications made to the rent officer for the registration of a rent of the respective flats were not made in the manner prescribed, in that contrary to para. 2 of Sch. 3 to the Rent Act 1965, and reg. 7 of the Rent Regulation (Forms, etc.) (England and Wales) Regulations 1965† the applications did not state the amount of the rent which it was sought in each case to register, and that in consequence in the purported determinations of the rent officer the reference to the rent assessment committee and its determination were made without jurisdiction and were nullities. At the hearing of the appeals on May 17, 1968, it appeared to the court that the remedy, if any, was by way of order of certiorari and not by way of appeal. Accordingly, counsel for the appellant was given leave to move for certiorari to quash the decisions of the Bristol Rent Assessment Committee dated Nov. 14, 1967, that (a) in respect of the respondent Earl a fair rent for the ground floor basement flat was £169 per annum excluding rate; and (b) in respect of the respondent Weekes a fair rent for the first floor flat was £156 per annum excluding rates.

The cases noted below‡ were cited during the argument in addition to those referred to in the judgment of the court.

*Hazel Counsell* for the appellant.

*A. C. W. Hordern* for the respondent Earl.

*G. Slynn* as amicus curiae.

- E The respondent Weekes did not appear and was not represented.

*Cur. adv. vult.*

FISHER, J., at the invitation of LORD PARKER, C.J., read the judgment of the court, in which, after stating the nature of the appeals and the granting of leave to move for orders of certiorari he continued:] the relevant facts are these—

- F 1. *Chapman v. Earl*. The respondent became tenant of the basement flat at 13 Davis Street (of which the appellant is the landlord) on Mar. 27, 1967, at a rent of £5 10s. per week inclusive. On Aug. 10, 1967, he completed and submitted to the rent officer an application for registration of fair rent. He states in his affidavit that he filled it in with the help of an assistant to the rent officer. The application was on the prescribed form, but in para. 9 instead of filling in the rent proposed to be registered the respondent simply wrote "Rent Officer to determine Fair Rent". On Aug. 11 the rent officer sent a copy of the application to the appellant with a letter telling him that he was entitled to make representations to him in writing "against the rent specified in para. 8 of the application", and asking for them by Aug. 21. A reply was sent on Aug. 14 by agents of the appellant saying that the respondent in March, 1967, had signed a statement that the rent was reasonable. On Sept. 4 the rent officer invited both appellant and respondent to a discussion with him on Sept. 11 at the premises. This duly took place, although the appellant complains that he was not allowed to say anything at the discussion. Thereafter on Sept. 14, the rent officer made and communicated to the parties a determination that the fair rent was £2 15s. per week exclusive. At no time up till then had the appellant suggested that the application was defective. On Sept. 28 the appellant's agents wrote to the rent officer objecting

\* The flat was described as basement flat in the application for determination of rent and as ground floor flat in the application for certiorari and in the determination of the rent assessment committee.

† The form is Form 4 in Sch. 3 to the regulations of 1965.

‡ *Park Gate Iron Co., Ltd. v. Coates*, (1876), L.R. 5 C.P. 634; *Caldow v. Pixell*, (1877), 2 C.P.D. 562; *Moore v. Gamgee*, (1890), 25 Q.B.D. 244; *Oakley v. Wilson*, [1927] 2 K.B. 279; *Essex County Council v. Essex Incorporated Congregational Church Union*, [1963] 1 All E.R. 326; [1963] A.C. 808.

to his determination, and the rent officer accordingly referred the matter to the rent assessment committee. Written representations were made by both parties; the committee inspected the premises, and at the request of the appellant a hearing took place on Nov. 13. The committee then on Nov. 14 made and communicated to the parties their determination that the fair rent was £169 per annum exclusive. This rent has been registered under the Act of 1965, as the fair rent of the premises. At the hearing before the committee the appellant (who conducted his own case) asked the respondent what rent he had put down on the application form and what he thought was a fair rent, to which the respondent replied that he had not put down any rent but had left the matter to the discretion of the rent officer; the appellant did not suggest that he had been prejudiced, or suggest that the committee should not proceed with the reference, but he says that he did not appreciate that an objection to the jurisdiction should be made at the start of the hearing, that he had intended to make an objection at the conclusion of the evidence, but that he was not then given any opportunity to say anything.

2. *Chapman v. Weekes*. The respondent became tenant of the first floor flat at 13, Davis Street on Apr. 3, 1967, at a rent of £5 per week inclusive. Her application was dated Aug. 19, and what she wrote in para. 9 of the form was "£5 per week appears to be excessive, but cannot suggest rent as rates not known". A copy of this application was sent to the appellant, with an invitation to make representations, but none having been made the rent officer on Sept. 18 made and communicated to the parties a determination that the fair rent was £2 10s. per week exclusive. Objection was made on behalf of the appellant and the matter was referred to the rent assessment committee. Written representations were made, the premises were inspected and on Nov. 13 there was a hearing, following which the committee determined the fair rent at £156 per annum exclusive. There is no evidence that any point as to jurisdiction was taken by the appellant at any stage. Paragraph 2 of Sch. 3 to the Act of 1965 provides that an application for the registration of a rent for a dwelling-house *must* be in the prescribed form and contain the prescribed particulars in addition to the rent which it is sought to register. There is no doubt that these applications did not contain the rent which it was sought to register. What is the consequence of that omission? Does it render the application and the subsequent proceedings void? Can the requirements that the proposed rent should be stated be waived by the other party? If it can, then it seems to the court that the failure by the appellant to make an objection as soon as he received copies of the applications, and his subsequent participation in the proceedings, might possibly amount to a waiver. If, however, the requirement is mandatory, and goes to the jurisdiction, it cannot be waived and the omission is fatal to the validity of the proceedings.

The question whether procedural requirements are mandatory, or are merely directory and open to waiver, has arisen many times under different statutes dealing with a variety of subjects. Counsel for the respondent Earl cited a number of cases, and many more on both sides of the line are referred to in MAXWELL (1). The true position is that stated by LORD PENZANCE in *Howard v. Bodington* (2). He said this:

"Now the distinction between matters that are directory and matters that are imperative is well known to us all in the common language of the courts at Westminster . . . Since the matter was argued I have been very carefully through [these cases], but upon reading them all the conclusion at which I am constrained to arrive is, that you cannot glean a great deal that is very decisive from a perusal of [the cases]. They are on all sorts of subjects. It is very difficult to group them together, and the tendency of my mind, after reading them, is to come to the conclusion which was expressed by

(1) See footnote † p. 1215, ante; and MAXWELL'S INTERPRETATION OF STATUTES (11th Edn.) pp. 375-379.

(2) (1877), 2 P.D. 203 at pp. 210, 211.

- A LORD CAMPBELL in the case of the *Liverpool Borough Bank v. Turner* (3). LORD CAMPBELL was then sitting as Lord Chancellor. In an appeal from the Vice-Chancellor, and in giving judgment, his lordship said this (4): 'No universal rule can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or obligatory, with an implied nullification for disobedience. It is the duty of courts of justice
- B to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed'."

Part 2 of the Act of 1965 provides for the appointment of rent officers pursuant to schemes made by the Minister for registration areas, and for the constitution of rent assessment committees. Section 26 of the Act provides:

- C " (1) The rent officer for any area shall prepare and keep up to date a register for the purposes of this Act and shall make the register available for inspection in such place or places and in such manner as may be provided by the scheme made for the area under this Part of this Act or, in Scotland, as the Secretary of State may direct. (2) The register shall contain, in addition to the rent payable under a regulated tenancy of a dwelling-house—
- D (a) the prescribed particulars with regard to the tenancy; and (b) a specification of the dwelling-house."

Subsection (3) provides for copies of an entry in the register certified under the hand of the rent officer or any person duly authorised by him to be receivable in evidence. Subsection (4) provides for persons to be entitled to obtain copies on payment of a fee, and sub-s. (5) reads as follows:

- E " Schedule 3 to this Act shall have effect with respect to applications for the registration of rents and the procedure to be followed on such applications and Sch. 4 to this Act shall have effect with respect to certificates of fair rent."

Section 27 and s. 28 deal respectively with the determination of fair rent and the amount to be registered as rent, but the only provisions which deal with the question how a fair rent is to be determined, as a preliminary to registration,

F are to be found in Sch. 3. The registration of a rent has an important effect on the rights of the parties, since by virtue of s. 3 and s. 7 of the Act of 1965, whatever the contractual rent may be, any excess over the registered rent is irrecoverable from the tenant. We propose to look first at paras. 5 to 8 of Sch. 3. They read as follows:

- G " 5. Where the application is made by the landlord alone the rent officer shall serve on the tenant, and where it is made by the tenant alone he shall serve on the landlord, a notice informing him of the application and specifying a period, not less than seven days from the service of the notice, during which representations in writing may be made to the rent officer against the registration of the rent specified in the application.

- H " 6. Where—(a) the application is made jointly by the landlord and the tenant, or (b) no representations are made as mentioned in the preceding paragraph, and it appears to the rent officer, after making such inquiry, if any, as he thinks fit and considering any information supplied to him in pursuance of para. 4 of this Schedule, that the rent specified in the application is a fair rent, he may register that rent without further proceedings, and if he does so he shall notify the landlord and the tenant accordingly.

- I " 7. Where representations are made as mentioned in para. 5 of this schedule or the rent officer is not satisfied that the rent specified in the application is a fair rent (or that the rent for the time being registered is no longer a fair rent) he shall serve a notice on the landlord and on the tenant informing him that he proposes, at a time (which shall not be earlier than seven days after the service of the notice) and place specified in the

(3) (1860), 2 De G.F. & J. 502.

(4) (1860), 2 De G.F. & J. at pp. 507, 508.



notice to consider in consultation with the landlord and the tenant, or such of them as may appear at that time and place, what rent ought to be registered for the dwelling-house or, as the case may be, whether a different rent ought to be registered; and at any such consultation the landlord and tenant may each be represented by a person authorised by him in that behalf, whether or not that person is of counsel or a solicitor.

"8. After considering, in accordance with the preceding paragraph, what rent ought to be registered or, as the case may be, whether a different rent ought to be registered, the rent officer shall, as the case may require—  
(a) determine a fair rent and register it as the rent for the dwelling-house; or  
(b) confirm the rent for the time being registered and note the confirmation in the register . . ."

Then there is provision for notification of his determination and for reference to a rent assessment committee if either party has any objection.

The jurisdiction of the rent officer to deal with applications and to determine and register rents is conferred by these paragraphs, and is limited to the jurisdiction thereby conferred. It is in our judgment clear from these paragraphs that he is empowered only to deal with applications in which a proposed rent is specified, and that his power to determine and to register can be exercised only in reference to such an application. The procedure set out in paras. 5 to 8 could not be operated in relation to an application which did not contain a proposed rent. Look first at para. 5. The notice which has to be given is to offer an opportunity to make representations against the registration of the rent specified in the application. Then para. 6. The power of the rent officer to register without more ado if no representations are made could not be exercised if no rent was specified. The consideration in consultation provided for by para. 7 can take place only if representations are made as mentioned in para. 5 (that is against the rent specified in the application), or if the rent officer is not satisfied that the rent specified in the application is a fair rent. The power to determine and register a rent under para. 8 can be exercised only after consideration in accordance with para. 7. In the light of these provisions we turn back to paras. 1 and 2 of Sch. 3 which reads as follows:

"1. An application for the registration of a rent for a dwelling-house may be made to the rent officer by the landlord or the tenant, or jointly by the landlord and the tenant, under a regulated tenancy of the dwelling-house.

"2. Any such application must be in the prescribed form and contain the prescribed particulars in addition to the rent which it is sought to register."

It seems to us that the specification in the application of a particular rent is fundamental to the whole scheme of Sch. 3. Paragraph 2 does not merely treat the proposed rent as one of the prescribed particulars (although it is in fact included among the particulars prescribed by the Rent Regulation (Forms, etc.) (England and Wales) Regulations 1965 (5)). The prescribed particulars are to be given "in addition to the rent which it is sought to register". Paragraph 2 is drafted as if this was something which had already been dealt with, and we think that it had. In our judgment, when para. 1 speaks of "an application for the registration of a rent for a dwelling-house", it does not mean an application at large, but an application for the registration of a particular rent. We consider, therefore, that failure to specify a rent in an application under this Schedule is a fatal defect, that the defect cannot be waived and that it renders the application and all subsequent proceedings on it a nullity. It was urged on us that the courts have been reluctant to treat a non-compliance with a procedural requirement as invalidating the whole proceedings and incapable of waiver. There are undoubtedly many instances where such requirements have been treated as merely directory where the word "shall" is used in the statute. Only one case has been brought

A to our attention where this course has been followed when the word in the statute was "must".

In *Vickers Sons and Co. v. Siddell* (6), the question arose under s. 5 of the Patents Designs and Trade Marks Act, 1883, which provided as follows:

B " (1) An application for a patent must be made in the form set forth in Sch. 1 to this Act, or in such other form as may be from time to time prescribed; and must be left at, or sent by post to, the patent office in the prescribed manner. (2) An application must contain a declaration to the effect that the applicant is in possession of an invention . . . (5) A specification, whether provisional or complete, must commence with the title . . . "

In *Vickers, Sons and Co. v. Siddell*, LORD HALSBURY, L.C., said (7):

C "The objection that no distinct claim is made, is one of form only, and I think the legislature did not intend to make the direction, which undoubtedly the Act contains, a condition upon the non-compliance with which the patent should be void. There is no trace of any such intention in the statute, and there does not seem any good reason why it should be inferred from the general policy of the statute. On the contrary, the questions of mere form, I think, were intended to be dealt with under the new machinery provided."

D LORD HERSCHELL, with whom LORD MORRIS concurred, said (8):

E "The last objection taken to the patent is, that the complete specification does not 'end with a distinct statement of the invention claimed', as required by s. 5 (5) of the Act. The Act does not provide that if this requirement is not complied with the patent shall be void, and I think it is impossible to imply any such condition. There is no more warrant for doing so in this case than in the case of non-compliance with any other of the provisions of the section. The provision which immediately precedes that in question requires that a specification should 'commence with the title'. It could hardly be gravely contended that if the comptroller accepted a specification where the title did not occupy the first place the patent granted ought on that account to be held void."

F It was strongly pressed on us by counsel, who appeared on the instructions of the assessment committee to assist the court, that it would be equally absurd and destructive of the intention of Parliament if the omission or misstatement of any one of the prescribed particulars invalidated the whole proceedings; and that, if the word "must" is to be treated as directory in relation to any part of the subject matter of para. 2 of Sch. 3, it must be directory in relation to all parts including the proposed rent. This argument would be stronger if para. 2 stood by itself, and if instead of being specially mentioned the proposed rent were merely one of the prescribed particulars. We consider that para. 1 of the Schedule, read with paras. 2 and 5 to 8, makes the statement of the proposed rent an essential condition to the exercise by the rent officer of his powers. We do not find it necessary to decide whether the omission or misstatement of any of the prescribed particulars would render the application a nullity; but even if the right view were that it would not, that would not invalidate the conclusion which we have reached about the effect of the omission of the proposed rent.

H Counsel further argued that the essential thing is the determination by the rent officer: that, whatever the application may say or not say, nothing can be registered without an independent judgment as to the fair rent being formed by the rent officer; and that the application is merely a non-essential preliminary to this act of judgment. As a description of the procedure that is correct, and it would not have been surprising if Parliament had permitted applications at large and left it to the rent officer to form his own judgment without reference to any

(6) (1890), 15 App. Cas. 496.

(7) (1890), 15 App. Cas. at p. 500.

(8) (1890), 15 App. Cas. at p. 505.

particular figure; but this has not been done. The words of the schedule are too strong to permit of such an interpretation. The power to determine is a conditional one, one of the conditions being an application for a specified rent. One good reason for that is that it gives the other party a target for his representations which he would otherwise lack. In *Francis Jackson Developments, Ltd. v. Hall* (9), the Court of Appeal had to deal with a case under the Landlord and Tenant (Rent Control) Act, 1949. DENNING, L.J., said (10):

"[Counsel for the defendants] put his argument in two ways. The first contention . . . was that on Dec. 13, 1950, Sergeant Perkins was a trespasser. He said that the application by Sergeant Perkins to the rent tribunal on Dec. 7, 1950, was a nullity, because it named Mrs. Hall as the landlord instead of Mrs. Tagg. He said that every tenant who applies to a rent tribunal for security of tenure must, at his peril, comply with all the regulations made by the Minister of Health under the provisions of the Act of 1949, and, in particular, the tenant must specify the name and address of the landlord and all other matters which are set out in the Landlord and Tenant (Rent Control) Regulations, 1949 (11), reg. 3 (2), as amended by the Landlord and Tenant (Rent Control) (Amendment) Regulations, 1950 (12), reg. 2. If the tenant failed to specify in his application any of the matters required by the regulations, as, for instance, if he failed to specify the name of the landlord or his address or specified them wrongly, counsel contended that the application would be a nullity and the tenant would not have the security of tenure given by s. 11 (2) (a) of the Act of 1949. We cannot accept that contention . . . The Act of Parliament does not require an application to a rent tribunal to be in any prescribed form. It contemplates that applications under the Act will often be made by tenants who have no lawyers to advise them and no regulations by their side; and for this very reason it does not prescribe any formalities. It gives the Minister power to make regulations with regard to proceedings before rent tribunals, and that, no doubt, includes power to give directions as to the form which applications should take, but the Minister has no power to impose formal conditions of validity on an application, when Parliament itself has required none. The regulations must, therefore, be construed as directory and not imperative, for otherwise the Minister would be exceeding his powers."

The Act of 1965 is in very different terms from the Act of 1949, and in our judgment Parliament does, at any rate in regard to the proposed rent, require applications to be in a particular form. We have naturally considered the practical consequences of the judgment which we are now giving. We do not believe that practical inconvenience will follow. Rent officers will of course refuse to accept applications in which the proposed rent is not specified. Tenants making applications will be well advised, if they are uncertain what figure to put in, to err on the low side, and landlords on the high.

It remains for us to consider what if any relief to afford to the appellant. We are satisfied that the appeals are misconceived, and that relief cannot be given to him except by way of certiorari. Certiorari is a discretionary remedy, and we are not sure that, applying the principles laid down by LORD GREENE, M.R., in *R. v. Stafford Justices, Ex p. Stafford Corpn.* (13) we ought not to refuse him that relief. The point which he has taken is a technical one and he has been in no way prejudiced. On the other hand he does complain that he was not allowed to speak to the rent officer at the meeting at the time of the inspection on Sept. 11, and he does say he intended to make an objection at the hearing before the committee at the end of the evidence. In view of these special circumstances,

(9) [1951] 2 All E.R. 74; [1951] 2 K.B. 488.

(10) [1951] 2 All E.R. at pp. 77, 78; [1951] 2 K.B. at p. 493.

(11) S.I. 1949 No. 1096.

(12) S.I. 1950 No. 1763.

(13) [1940] 2 K.B. 33.



A although otherwise he has no merits at all, we will grant certiorari. The two appeals will be dismissed and orders of certiorari will go to quash the two determinations by the rent assessment committee.

*Appeals dismissed. Applications for certiorari granted.*

B Solicitors: *Martin, Nicholson & Langhams*, agents for *Burroughs, Day & Blackmore*, Bristol (for the appellant); *Robbins, Olney & Lake*, agents for *Adams, Brown & Co.*, Bristol (for the respondent Earl); *Solicitor Ministry of Housing & Local Government*.

[Reported by N. P. METCALFE, Esq., Barrister-at-Law.]

C

## Re INTRODUCTIONS, LTD.

### INTRODUCTIONS, LTD. v. NATIONAL PROVINCIAL BANK, LTD.

[CHANCERY DIVISION (Buckley, J.), May 10, 13, 14, 1968.]

D Company—Memorandum of association—Object clauses—Construction—Borrowing power declared as an object—Provision that objects were independent objects—Company's business changed and new business *ultra vires*—Money borrowed from bank, to which copy of memorandum was supplied—Whether borrowing power capable of being an independent object—Whether the borrowing from the bank was *ultra vires*.

E The plaintiff company was incorporated in March, 1951, for the purpose of offering services and information to visitors from overseas in connexion with the Festival of Britain and thereafter to visiting business men generally. The company's memorandum of association contained an assembly of diverse objects and powers and ended with a clause declaring that each preceding sub-clause should be construed independently of and should be in no way linked by reference to any other sub-clause, and that the objects set out in each sub-clause were independent objects of the company. Sub-clause (N) enabled the company to borrow or raise money in such manner as it thought fit. From 1951 to 1953 the company provided accommodation and services for visitors from abroad. From 1953 to 1958 its only business was the provision of deckchairs and amusement machines at a south coast resort. F In November, 1958, 398 of the four hundred issued shares changed hands and there was a complete change in the board of directors. In November, 1960, the company began pig-breeding as its only business. In December, 1960, the company borrowed money on the security of debentures from its bankers, the defendant bank, the bank being fully aware that the only business carried on by the company was pig-breeding and that the objects for which the company was formed were those set out in its memorandum of association of which the bank had a copy. At a time when the company was substantially indebted to the bank it was put into compulsory liquidation. On the question whether the borrowing from the bank was *intra vires* the company,

H **Held:** (i) on the true construction of the memorandum and articles of association of the company the carrying on of the business of pig-breeding, as the sole business of the company, was *ultra vires* the company (see p. 1225, letter C, post).

I (ii) on the true construction of sub-cl. (N) of the memorandum of association (which was a sub-clause that was incapable of being a wholly independent object, notwithstanding the final provision in the memorandum declaring all the objects to be independent) the power of borrowing that sub-cl. (N) conferred was the power to borrow for the legitimate purposes of the company, and, as the borrowing from the bank was for a purpose that was *ultra vires*, viz., carrying on the business of pig-breeding, the borrowing

(and thus the creation of the debentures) was ultra vires (see p. 1227, letter H, and p. 1228, letter D, post). A

*Cotman v. Brougham* ([1918-19] All E.R. Rep. 265) considered.

[**Editorial Note.** The present decision should be considered with *Anglo-Overseas Agencies, Ltd. v. Green* ([1960] 3 All E.R. 244).]

As to the construction of the object clauses of a company's memorandum of association, see 6 HALSURY'S LAWS (3rd Edn.) 413, 414, paras. 799, 800; and for cases on the subject, see 9 DIGEST (Repl.) 81-83, 340-353; and for cases on the powers of companies, see 9 DIGEST (Repl.) 646, 647, 4297-4306.] B

Case referred to:

*Cotman v. Brougham*, [1918-19] All E.R. Rep. 265; [1918] A.C. 514; 87 L.J.Ch. 379; 119 L.T. 162; *affg.*, sub nom. *Re Anglo-Cuban Oil, Bitumen and Asphalt Co., Ltd.*, [1917] 1 Ch. 477; 86 L.J.Ch. 264; 116 L.T. 394; 9 Digest (Repl.) 76, 303. C

### Adjourned Summons.

This was an application by originating summons dated Jan. 26, 1968, by the plaintiff, Introductions, Ltd., for the determination by the court of the following questions—(i) whether on the true construction of the memorandum and articles of association of the plaintiff company, the carrying on of the business of pig-breeders as its sole business was intra vires the plaintiff company, and (ii) whether on the true construction of the memorandum and articles of association of the plaintiff company and in the events which happened, the borrowing by the plaintiff company from the defendant National Provincial Bank, Ltd., was intra vires the plaintiff company. The facts are set out in the judgment. D

The cases noted below\* were cited during the argument in addition to the case referred to in the judgment. E

*Allan Heyman* for the liquidator of the plaintiff company.

*L. J. M. Smith* for the defendant bank.

**BUCKLEY, J.:** The plaintiff company, Introductions, Ltd., which is now in liquidation, was incorporated in March, 1951, and the intention of those who formed the company was that it should be used to offer services and information to overseas visitors in connexion with the Festival of Britain, and after the end of the festival that it should be used to give services and information to visiting business men generally. F

From 1951 to 1953 the plaintiff company in fact provided accommodation, goods and services for visitors from abroad during their stay in London or elsewhere in this country. From 1953 to 1958 its only business was the provision of deckchairs and coin-operated amusement machines at a south coast resort. Between 1958 and 1960 the plaintiff company carried on no business. In November, 1958, 398 of the four hundred issued shares of the plaintiff company changed hands and there was a complete change in the personnel composing the board of directors of the company. In November, 1960, the plaintiff company embarked on a new business, and from that time until its liquidation the only business of the plaintiff company was that of pig-farming. The plaintiff company carried on that business under the trade name of "Anglian Pig Breeders" and adopted a rather complicated arrangement into the details of which I need not go, but it was an arrangement under which members of the public were invited to contribute moneys, which were invested, on their behalf, by the plaintiff company in the purchase, for the contributor, of one of the plaintiff company's breeding sows; in due course, the plaintiff company bought back from that G  
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I

\* *Re German Date Coffee Co.*, [1881-85] All E.R. Rep. 372; (1882), 20 Ch.D. 169; *Stephens v. Mysore Reefs (Kangundy) Mining Co., Ltd.*, [1902] 1 Ch. 745; *Sinclair v. Brougham*, [1914-15] All E.R. Rep. 622; [1914] A.C. 398; *Re Jon Beauforte (London), Ltd.*, [1953] 1 All E.R. 634; [1953] Ch. 131; *Anglo-Overseas Agencies, Ltd. v. Green*, [1960] 3 All E.R. 244; [1961] 1 Q.B. 1.

A contributor the progeny of the sow in question. The scheme was not financially successful and, in due course, the plaintiff company was put into liquidation under an order of the court.

In December, 1960, the plaintiff company, through its managing director, approached the defendant bank with a view to opening an account at the bank and, in January, 1961, appropriate resolutions were passed by the board for the opening of such an account. Thereafter, the plaintiff company kept its account with the defendant bank and created certain debentures in favour of the bank for securing its indebtedness to the bank. At the time of the liquidation of the plaintiff company it was indebted to the bank in a substantial sum. The questions raised in this summons are directed to determining whether the loans made by the bank to the plaintiff company are loans which the bank can recover, whether the bank is entitled to enforce its security under the debentures. It is not in dispute that at all material times the bank was fully aware, first, that the only business which the plaintiff company was carrying on was that of pig-breeders and, secondly, that the objects for which the plaintiff company was formed were those set out in its memorandum of association, with a copy of which the bank had been provided. The originating summons asks two questions: (i) whether, on the true construction of the memorandum and articles of association of the plaintiff company, the carrying on of the business of pig breeders as its sole business was *intra vires* the plaintiff company; (ii) whether, on the true construction of the memorandum and articles of association of the plaintiff company and in the events which have happened, the borrowing by the plaintiff company from the bank was *intra vires* the plaintiff company.

E I must, therefore, look at the memorandum of association of the plaintiff company to ascertain on what activities it could, properly, embark within the powers conferred on it by that document. This memorandum of association is framed in accordance with the practice which was very severely criticised in the House of Lords in *Cotman v. Brougham* (1), whereby the draftsman assembles a number of objects or powers about as diverse in their character as the topics of conversation proposed by the walrus to the carpenter (2), but in many a case much more numerous, and then, for good measure, adds, at the end, a clause to the effect that each paragraph of the objects clause shall be construed independently and shall be treated as an independent object of the company.

It is common ground that the main objects of the plaintiff company—if it be right to look for main objects in such a memorandum of association—are to be found in the first four sub-clauses of the objects clause, which are as follows:

H “(A) To promote, organise and provide entertainments and services for overseas and other visitors: to act as secretary to, and to render or supply any services, assistance or accommodation to travellers, merchants, manufacturers, professional men, and others; to receive money and articles for safe custody; and to undertake and execute any agency or agencies, to introduce overseas and other visitors to approved shops, stores and other business houses.

I “(B) To establish and carry on information bureaux at such places as may be thought fit for the collection, tabulation and distribution of information to members and others, and upon such terms as may be thought proper, as to trade, commerce, industry, education, art, science, duties, travel, sport, houses, hotels and restaurants, and other matters and things as may be deemed expedient.

“(C) To carry on either separately or in conjunction with one another all or any of the businesses of hotel and refreshment room proprietors, and licensed victuallers, beer, wine and spirit merchants, cigar and tobacco dealers, grocers, confectionery and sweet dealers, travel agents, theatrical

(1) [1918-19] All E.R. Rep. 265.

(2) See “ALICE THROUGH THE LOOKING-GLASS”, Ch. 4, by LEWIS CARROLL.



and entertainment agents, stationers, printers and publishers; to establish, manage and conduct a club or clubs, and provide accommodation, games and recreations for members and others; to supply food and drinks, both alcoholic and non-alcoholic; and generally to provide such privileges, advantages and accommodation as are usually provided by a club.

"(D) To carry on any other trade or business whatsoever which can in the opinion of the board of directors be advantageously carried on by the company in connexion with or as ancillary to any of the above businesses or the general business of the company."

So far, one can find, in the objects clause, nothing that could justify the plaintiff company in carrying on the business of pig-breeders, unless it was carried on in connexion with or as ancillary to some other business of the company—which was not the present case.

There then follow a number of sub-clauses in much more general terms, some of which are capable of being interpreted as objects upon which the plaintiff company could embark as separate and distinct businesses. For instance, sub-cl. (F) is in these terms:

"To purchase or by other means acquire and protect prolong extend and renew whether in the United Kingdom or elsewhere any copyrights, patents, patent rights, trademarks, designs, rights of production, rights of publication or other rights, brevets d'invention, and licences which may appear likely to be advantageous or useful to the company and to use and turn to account and to manufacture under or grant licences or privileges in respect of the same and to expend money in experimenting upon and testing and in improving or seeking to improve any patents inventions or rights which the company may acquire or propose to acquire."

On the other hand, some of the sub-clauses are in terms which make it plain that what is referred to in the sub-clause could not, taken in isolation, authorise the company to embark on any kind of activity. For instance, sub-cl. (J):

"To manufacture sell treat and deal in all kinds of commodities substances materials articles and things necessary or useful for carrying on any of the businesses of the company or in or for any of the operations of the company."

A paragraph so framed clearly infers that there must be some business of the plaintiff company or some operation of the plaintiff company in existence in connexion with which the commodities sold or dealt with under this sub-clause are to be sold or dealt in. Perhaps the most obvious example of that kind of sub-clause is the last one, which is in the common form, sub-cl. (Y):

"To do all such other things as may be incidental or conducive to the attainment of the above objects or any of them."

That sub-clause necessarily involves supposing that the plaintiff company is engaged on some other activities as well as those which the sub-clause is designed to authorise the plaintiff company to embark on.

The objects clause ends with a paragraph in these words:

"It is hereby expressly declared that each of the preceding sub-clauses shall be construed independently of and shall be in no way limited by reference to any other sub-clause and that the objects set out in each sub-clause are independent objects of the company."

Now sub-cl. (N), which is the one which has to be considered for the present purpose, relates to borrowing and it is in these terms:

"To borrow or raise money in such manner as the company shall think fit and in particular by the issue of debentures or debenture stock perpetual or otherwise and to secure the repayment of any money borrowed or raised by mortgage charge or lien upon the undertaking and the whole or any part of the company's property or assets whether present or future including

- A its uncalled capital and also by a similar mortgage charge or lien to secure and guarantee the performance by the company of any obligation or liability it may undertake."

In these circumstances, the question is whether, on the true construction of the plaintiff company's memorandum of association, the plaintiff company was empowered to carry on the business of pig-breeding as its sole business, and whether, on the true interpretation of the memorandum of association, it had power to borrow the moneys which in fact it did borrow from the defendant bank. I have been taken all through the objects clause with great care by counsel for the liquidator of the plaintiff company and I have been satisfied that one can find, in none of the sub-clauses of the objects clause, any power to carry on such a business as the sole business of the plaintiff company. Moreover, counsel for the defendant bank has conceded that he cannot successfully argue that so carrying on the business of pig-breeding was within the powers of the plaintiff company.

Accordingly, the first question raised by the summons must be answered in the negative. There is little difficulty about that question, but there is more difficulty about the second question.

Where a company incorporated under the Companies Act, 1948, has the power to borrow, that fact must be discovered from its memorandum of association. The power may be one which has to be inferred from the objects of the company, or it may be one that is expressly conferred on the company by the terms of its memorandum. If the power to borrow is one which is inferred, it naturally follows that the borrowing is only within the power of the company in relation to those matters in respect of which the inference arises. Where the memorandum is one in which those sub-clauses of the objects clause, which confer what are truly powers rather than objects, are to be read as subsidiary to the main and real objects of the company, in such a case also the borrowing power must be read as confined to borrowing for the purposes for which the company is formed. Moreover, borrowing for any purpose other than the legitimate activities of the company will be ultra vires, and if the lender is aware of the circumstances which render the borrowing ultra vires he will be unable to recover the moneys as moneys lent.

The question in this case is, what is the combined effect of sub-cl. (N), which relates to borrowing, and the paragraph at the end of the objects clause, which constitutes each sub-clause independent object of the company? I have to read the whole of the objects clause as one for the purpose of discovering how I should interpret that final paragraph of the clause.

This clause does not, as it is sometimes the case, include any words which make the final paragraph subject to an exception where the context otherwise requires, but it seems to me that, reading the objects clause as a whole, the final paragraph must be read, by inference, as subject to such an exception, for, as I have pointed out, there are some sub-clauses which are incapable of constituting independent objects of the plaintiff company, if that expression means that the contents of a particular sub-clause are to be regarded as authorising something which the company can carry on as its sole activity. For there are sub-clauses which, by their express terms, require that the plaintiff company shall have other activities in addition to those carried on under the particular sub-clause.

The first part of the final paragraph of the objects clause relates purely to interpretation. It provides that each sub-clause shall be construed independently of the other clauses, and that none of them shall be limited by reference to any of the others. That goes purely to interpretation of the language of each sub-clause. Then the paragraph goes on to say that the objects set out in each sub-clause are independent objects of the plaintiff company. It would seem that those words, unless they are tautologous, must be intended to add

something to what has gone before and are not merely directed to ensuring that the sub-clauses shall, for the purposes of construction only, be read without reference to one another. It is, in my judgment, an attempt on the part of the draftsman to set up each of the sub-clauses as stating an object which the plaintiff company could, properly, carry on without its embarking on any other object at all. If I read this final paragraph as being subject to an implied exception in the case of any clause where the internal context of the sub-clause itself makes it impossible to read the subject-matter of that sub-clause as being an independent object in the sense that I stated, then it is possible to give these final words of the closing paragraph some sensible operation. For instance, it would make it clear that the plaintiff company can, properly, under sub-cl. (F), which I have read, embark on the business of exploiting some copyright or patent, or other similar right, as a separate business by itself and not as an ancillary business associated with some other business of the company.

There are other sub-clauses which are framed in general language which would also be capable of being used by the company as a means of justifying their embarking on various types of business. For instance, sub-cl. (C) authorises the plaintiff company 'To build, construct, maintain, alter, enlarge, pull down and remove . . . ' and so on, "... buildings, shops . . ." of various kinds and erections or machines "... and to work, manage and control . . ." and, under that sub-clause, if it is treated as an independent object of the plaintiff company, the company could embark on kinds of business which had nothing whatever to do with the objects to be found in sub-cll. (A) to (D) of the memorandum. If I am to interpret the final paragraph of the objects clause in this way, it is said that the effect of so doing, in relation to sub-cl. (N), is that borrowing by itself is an authorised activity of the plaintiff company irrespective of the purposes for which the moneys are borrowed.

Counsel for the defendant bank who, if I may say so, has presented what I think is a difficult argument in an admirably clear way, has said that if the canon of construction, which requires general clauses in a memorandum to be construed in the light of the main objects of the company and restricted to activities associated with those main objects, is excluded, as it clearly can be excluded by appropriate language (see the decision in *Cotman v. Brougham* (3)) and if, as he said, it is excluded here, then the construction of each sub-clause must depend on the wording of that clause read alone. Moreover, if the propriety of some particular transaction embarked on by the plaintiff company is questioned, one has only to consider, so he contends, whether it falls within the language of any of the sub-clauses so construed. He said also that to borrow or raise money on security is clearly authorised by sub-cl. (N) and that the operation of borrowing money on security is one which is to be regarded as an independent object, that is to say, as an activity which the plaintiff company is authorised to embark on, irrespective of how the money is to be used. If, in fact, the money is used for ultra vires purposes, the shareholders may well be able to complain and, indeed, would be able to complain of the application of the money in that way. Counsel for the defendant bank contends, however, that the lender is not concerned with that at all; he is merely required to look at the plaintiff company's memorandum of association, and seeing that borrowing or raising money on security is one of the independent objects of the company he need not look any further into the matter. This, says counsel for the defendant bank, would facilitate commercial dealings and coincide with commercial convenience and, in that connexion, he relies on observations made by LORD PARKER OF WADDINGTON in the course of his speech in *Cotman v. Brougham* (4), where he said:

"The question whether or not a company can be wound up for failure of

(3) [1918-19] All E.R. Rep. 265; [1918] A.C. 514.

(4) [1918-19] All E.R. Rep. at p. 268; [1918] A.C. at p. 520.



A substratum is a question of equity between a company and its shareholders. The question whether or not a transaction is ultra vires is a question of law between the company and a third party. The truth is that the statement of a company's objects in its memorandum is intended to serve a double purpose. In the first place it gives protection to subscribers, who learn from it the purposes to which their money can be applied. In the second place

B it gives protection to persons who deal with the company, and who can infer from it the extent of the company's powers. The narrower the objects expressed in the memorandum the less is the subscriber's risk, but the wider such objects the greater is the security of those who transact business with the company."

C Later, LORD PARKER said (5):

"For the purpose of determining whether a company's substratum be gone, it may be necessary to distinguish between power and object and to determine what is the main or paramount object of the company, but I do not think this is necessary where a transaction is impeached as ultra vires. A person who deals with a company is entitled to assume that a company

D can do everything which it is expressly authorised to do by its memorandum of association, and need not investigate the equities between the company and its shareholders."

The question is, in my judgment, whether it is legitimate to interpret sub-cl. (N) in conjunction with the concluding paragraph of the objects clause in that way.

Now to borrow money, by itself, without intending to use the money for any

E purpose, would be a senseless operation. If the company were to borrow money and, like the servant in the parable (6), were to bury it in the ground until the creditor returned and demanded repayment, then to disinter it and pay it back again, the whole procedure would be senseless. Borrowing is only a sensible activity if it is associated with some use to which the borrowed money is proposed and intended to be put, and if one were to treat sub-cl. (N) as conferring on the

F plaintiff company the power to do something in isolation from any other activities at all as its sole activity, sub-cl. (N) becomes an irrational clause. Although one does not find, in this sub-clause of the memorandum, any words expressly referring to any other businesses or activities of the plaintiff company, the very nature of the transaction contemplated by sub-cl. (N) infers, I think, that the company must have in view purposes to which the money shall be applied. That

G is to say, that the power to borrow or raise money is a power to borrow or raise money for the purposes of the plaintiff company. If that be the right way in which to construe the sub-clause, then it does not authorise borrowing or raising money for any purpose which is not a legitimate activity of the plaintiff company. Moreover, notwithstanding the provision in the concluding paragraph of the objects clause—that sub-cl. (N) is to be treated as an independent object of

H the plaintiff company—I think that, on the true construction of that sub-clause, it is apparent that it is one of the sub-clauses which falls into the category of sub-clauses which relate to matters incapable of being read as independent objects in the sense that they authorise the plaintiff company to undertake some activity as its sole activity.

If I am right in thinking that this sub-clause only authorises borrowing or

I raising money for the legitimate purposes of the plaintiff company, that really concludes the argument, in my judgment, for the moneys that were borrowed from the bank were not borrowed for legitimate purposes of the company; they were borrowed for ultra vires activities in which the plaintiff company was engaged. Accordingly, it seems to me, on analysis, that sub-cl. (N) must be construed in such a way that it is incapable of being an independent object and, accordingly, the power it confers on the plaintiff company falls to be determined

(5) [1918-19] All E.R. Rep. at p. 269; [1918] A.C. at p. 521.

(6) St. Matthew, Ch. 25, v. 25.

in accordance with the ordinary principles applicable to such a clause in the objects clause of a company where there is no such declaration as is contained in the final paragraph in the present case.

In arriving at this conclusion, I am construing sub-cl. (N) without regard to anything that is found in any of the other clauses of the objects clause, and I am relying solely on the contents and language of that particular sub-clause. I think I am, to some extent, reinforced in the view I have taken by the final words of sub-cl. (N), which relate to guaranteeing the performance by the plaintiff company of any obligation or liability it may undertake. That part of the sub-clause clearly refers to obligations and liabilities arising outside sub-cl. (N) and as the result of other activities of the plaintiff company, and although that circumstance by itself would not be sufficient to control the interpretation of the earlier part of sub-cl. (N), the fact that this provision at the end of the sub-clause infers other activities on the part of the plaintiff company, I think reinforces my view that the earlier part of the sub-clause is also properly to be read as inferring other activities of the plaintiff company. So, in my judgment, the whole clause must be interpreted as relating to borrowing on security for the purposes, that is to say, legitimate purposes, of the plaintiff company and guaranteeing obligations and liabilities arising out of other legitimate obligations of the plaintiff company.

Consequently, in my judgment, the second question in the summons should also be answered in the negative (7). Accordingly, I will make a declaration on both clauses in those terms.

Solicitors: *Simmons & Simmons* (for the liquidator of the plaintiff company); *Wilde, Sapte & Co.* (for the defendant bank).

[Reported by JENIFER SANDELL, Barrister-at-Law.]

## LLOYD v. BRASSEY.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., James and Bridge, J.J.), June 26, 1968.]

*Employment—Redundancy—Dismissal by reason of redundancy—Owner farmer sold farm by public auction, and subsequently, by another public auction the live and dead stock—Incoming farmer bought only part of live and dead stock—Employee farm worker was re-employed by new owner without any break in employment and continued in similar work—Whether change of ownership of business—Whether employee entitled to redundancy payment from vendor farmer—Redundancy Payments Act 1965 (c. 62) s. 13 (1) (a).*

On Mar. 10, 1958, the appellant a general farm worker, entered the employment of the respondent, a farmer. On Oct. 28, 1966, the respondent, as a result of a sale at a public auction, entered into a contract to sell the farm land and buildings to one B., the date of completion being March, 1967. On Mar. 11, 1967, a dispersal sale was held of the live and dead stock of the farm. B. bought fourteen out of the 129 lots of dead stock and twenty out of the forty-six lots of live stock. The appellant's employment by the respondent ended on the same day, Mar. 11, when the appellant entered the employment of B., receiving from B. an extra £1 weekly and free living, and continuing to do for B. much the same work as the appellant had done for the respondent. On appeal from dismissal of an application by the appellant for a redundancy payment,

**Held:** having regard to the separate sales of land and of the live and dead stock, and to the fact that not all the assets of the farm were purchased by B., there was not a change in the ownership of the farm business within

(7) For the second question, see p. 1222, letter D, ante.

A s. 13 (1)\* of the Redundancy Payments Act 1965 but only a transfer of assets of the farming business; accordingly s. 13 (1) did not apply, with the consequence that the appellant was deemed by virtue of s. 1 (2)† of the Act of 1965 to be dismissed by reason of redundancy and was entitled to a redundancy payment from the respondent (see p. 1231, letter G, and p. 1232, letter E, post).

B Appeal allowed.

[ **Editorial Note.** In considering the present decision with that in *Bandey v. Penn* ([1968] 1 All E.R. 1187) it is to be observed that in the present case there was no express dismissal of the appellant by his employer, the respondent, at the time of the sale of assets of the farm and no express termination of the employment by either of them. So far as express arrangement between the C appellant and the respondent is concerned, the only express arrangement seems to have been between the appellant and the incoming farmer for the continuance in employment, or re-employment, of the appellant by the incoming farmer. Termination of employment is deemed dismissal in certain circumstances by s. 3 (1) and by s. 22 of the Redundancy Payments Act 1965, and in the present case the position was treated before the tribunal on the basis that there was a D dismissal of the appellant by the respondent.

As to entitlement to a redundancy payment and as to when there is dismissal of an employee by reason of redundancy and as to change of ownership, see SUPPLEMENT to 38 HALSBURY'S LAWS (3rd Edn.), para. 808A and para. 808C.

For the Redundancy Payments Act 1965 s. 1, s. 13, see 45 HALSBURY'S STATUTES (2nd Edn.) 290, 301.]

E Case referred to:

*Bandey v. Penn*, [1968] 1 All E.R. 1187; [1968] 1 W.L.R. 670.

### Appeal.

This was an appeal by the appellant, Eric Lloyd, against a decision of the Industrial Tribunal at Manchester recorded on Jan. 23, 1968, consequent on F the hearing on Jan. 8, 1968; by their decision the tribunal rejected the appellant's application for a redundancy payment in respect of the termination of his employment with the respondent, Mr. Brassey.

In their reasons the tribunal found that the present appellant had started work for the respondent on Mar. 10, 1958, as a general farm worker, and had worked continuously until Mar. 11, 1967; that the farm land and buildings had G been sold by auction in 1966 to a Mr. Barlow, who had lived at and worked on the farm since Mar. 11, 1967, when at another public auction of the stock and farm equipment he had purchased some of the live and dead stock. The appellant had continued to work at the farm throughout without any break at all and was still working there for Mr. Barlow. The appellant's present terms of employment, so the tribunal found, had been agreed between himself and Mr. Barlow H a week before the auction sale of stock on Mar. 11, 1967, but the offer of continued employment had not been put into writing. The respondent did not give evidence before the tribunal. In evidence before the tribunal the present appellant stated that he had a written contract of employment with the respondent, who told him that he had sold the land and buildings in October, 1966, to Mr. Barlow, but didn't say what was to happen to the appellant, or that there would be a I job with Mr. Barlow or that the appellant's work would continue. Early in 1967, about February, the respondent had told the appellant, according to the appellant's evidence, that Mr. Barlow would be approaching the appellant to see whether he would like to stay on with Mr. Barlow or to go elsewhere. On Mar. 3, 1967, Mr. Barlow came to see the appellant and asked him what he was going to do. The appellant said that it depended on what sort of terms could be agreed. On the following morning the appellant and Mr. Barlow agreed terms

\* Section 13, so far as material, is set out at p. 1230, letter I, to p. 1231, letter A, post.

† Section 1 (2), so far as material, is set out at p. 1230, letter E, post.



and, as the appellant said in evidence, he continued working without a break in his employment, and there was "no break in my employment at all". There was a contract of employment of the appellant made on a blue form issued by the National Farmers' Union. A

The appellant appealed pursuant to notice of motion dated Mar. 8, 1968, seeking an order that the decision of the tribunal be set aside on the ground that the tribunal was wrong in law (a) in deciding that, because the tribunal held that farming was a business, s. 13 of the Redundancy Payments Act 1965 automatically applied; (b) in failing to consider whether Mr. Barlow was conducting a business and (c) in failing to consider whether, if Mr. Barlow was conducting a business, there had been a change of ownership of the respondent's business within the meaning of s. 13 (1) (a). B

The cases noted below\* were cited in argument in addition to the cases referred to in the judgments. C

*D. J. Turner-Samuels* for the appellant.

*J. T. Plume* for the respondent.

**LORD PARKER, C.J.:** The appellant is a general farm worker who, on Mar. 10, 1958, became employed by the respondent, Mr. Brassey of Bulkeley Grange Farm, Malpas, Cheshire. On Mar. 11, 1967, the respondent ceased to farm at Bulkeley Grange Farm, and, accordingly, the present appellant's contract of employment by the respondent terminated. Section 1 (2) of the Redundancy Payments Act 1965 provides that: D

"For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is attributable wholly or mainly to—(a) the fact that his employer has ceased, or intends to cease, to carry on the business for the purposes of which the employee was employed . . . in the place where the employee was so employed . . ."

E

Accordingly, on the facts that I have so far stated, it would seem clear that there was a dismissal by reason of redundancy, and the appellant would be entitled to a redundancy payment from the respondent. That, however, is not the whole story, because on Oct. 28, 1966, the respondent entered into a contract to sell the farm land and buildings comprising 150 acres of mixed farming for £49,500 to a Mr. Barlow; it was in fact a sale resulting from a public auction. The respondent stayed on, the date of completion not being until March, 1967, until Mar. 11, on which day a dispersal sale was held of the live and dead stock of the farm. Mr. Barlow on that date bought some £2,244 worth of the live and dead stock being some fourteen lots out of 129 lots of dead stock and about twenty lots out of forty-six lots of the live stock. Mr. Barlow approached the appellant to ask him if he would stay on: he readily agreed to do so and in fact Mr. Barlow paid him an extra £1 a week over what the respondent had paid him, and gave him free living accommodation, whereas the respondent had charged him 6s. for his cottage. F

It is in those circumstances that the respondent relies on s. 13 of the Act of 1965. So far as it is material, s. 13 provides that: G

"(1) The provisions of this section shall have effect where—(a) a change occurs (whether by virtue of a sale or other disposition or by operation of law) in the ownership of a business for the purposes of which a person is employed. H

"(2) If, by agreement with the employee, the person who immediately after the change occurs is the owner of the business or of the part of the business in question, as the case may be (in this section referred to as 'the new owner') renews the employee's contract of employment (with the substitution of the new owner for the previous owner) or re-engages him I

\* *Dallow Industrial Properties, Ltd. v. Else*, [1967] 2 All E.R. 30; [1967] 2 Q.B. 448; *Kenmir, Ltd. v. Frizzell*, [1968] 1 All E.R. 414.

- A under a new contract of employment, s. 3 (2) of this Act shall have effect as if the renewal or re-engagement had been a renewal or re-engagement by the previous owner (without any substitution of the new owner for the previous owner)."

I find it unnecessary to go back to s. 3 (2) of the Act of 1965, because the sole question here is whether sub-s. (2) came into force, in other words whether there had been a change in the ownership of the business (1) within s. 13 (1).

- B For myself I find this a difficult case: it at first sight strikes one as a matter of common-sense that here is a man, the present appellant, in exactly the same job as he had originally on the same premises, carrying on the same activity under Mr. Barlow as he had been carrying on under the respondent. Looked at from another point of view, it could be said with considerable force that
- C what Mr. Barlow is doing is exactly what the respondent was doing, using this farm for the purposes of general farming. There has been complete continuity, the farm being handed over to Mr. Barlow so that he carries on exactly the same activities as the respondent had been carrying on. However, the real question is whether what has occurred in this case does bring the case within s. 13 (1).

- D There has been a considerable number of cases on s. 13 (1) and on what I may call the obverse, under para. 10 of Sch. 1 to the Contracts of Employment Act 1963. I find it unnecessary to refer to those cases except one which deals with farming (2). It is quite clear from those cases that one has to look at the substance of the matter rather than the form, and secondly, that while there is no single test whether there has been a change in ownership of a business,
- E a mere transfer of assets and nothing more does not amount to a change in ownership of a business. Bearing that in mind one looks again at what happened in the present case. An asset in the farming activity, namely the farm itself, was undoubtedly transferred, and it can be said in favour of there being a transfer that unlike the ordinary case of a transfer of factory premises, it is the farm itself which combines not merely the premises but also some of the stock-in-trade: it includes all the growing crops. On the other hand, there has been no
- F transfer of goodwill; in this type of farming there is no goodwill to transfer; there is no question of contracts being taken over by the purchaser, and no question of liabilities in the sense of debts being taken over, and no question of a restrictive covenant being imposed on the seller. More important, as it seems to me, is the fact that it was not all the assets of the business, necessary for the
- G activity to be carried on, that were transferred. As I have said on Mar. 11 there was what was quite properly called an agricultural dispersal sale of all the live stock, the dead stock, and indeed the furniture of the farm. It was not all taken over, whether at a valuation or by purchase at auction, by Mr. Barlow; he merely took over such part of the live and dead stock and furniture as he required. Looked at broadly in those circumstances, it seems to me quite
- H impossible to say that there was here a transfer of the ownership of a business.

As I have said, it is not an easy point because it can well be said that the result looks as if it was in conflict with what one would think would be the intention of Parliament in such a case. It must be remembered, however, that

I if the appellant does not get and is not entitled to a redundancy payment from the respondent, he will in the future get a redundancy payment from Mr. Barlow, assuming that he remains in his employ for the relevant period and is later dismissed for redundancy.

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(1) The term "business" is defined in s. 25 of the Redundancy Payments Act 1965 as follows: "(1) In this Part of this Act 'business' includes a trade or profession and includes any activity carried on by a body of persons, whether corporate or unincorporate . . ."

(2) *Bandey v. Penn*, [1968] 1 All E.R. 1187.

Finally, as it seems to me, *Bandey v. Penn* (3), a decision of this court, is one which we should follow. That is the only case in regard to transfer of a business relating to farming that has so far been before the court. In that case the appellant, a stockman and general farm worker, was given notice by his employer, who in that case was a tenant farmer who was giving up his lease. In due course the farm was taken over by another tenant farmer who asked the appellant to work for him. The appellant refused, and if there had been a transfer of the business it was clear and was so held that it was an unreasonable refusal on behalf of the appellant. This court held that in those circumstances the respondent was not disposing of the ownership of a business, but merely terminating lease, an asset in the business. Though it can be said the present case is distinguishable on the facts, it seems to me that the principle involved is the same, and that in each case what was being given up by the alleged transferor was an asset in the business. Accordingly, in my judgment this tribunal came to a wrong decision in law and I would allow this appeal. It would follow that in default of agreement it should go back to the tribunal to assess the quantum of the payment.

**JAMES, J.:** I confess to having entertained considerable doubts in this matter during the course of the argument. In the end, since on the facts of this particular case the freehold was dealt with separately from the stock, and the sale of the stock was as described, a genuine agricultural dispersal sale by the respondent, I am persuaded that the tribunal were wrong in law in finding that there had been a change in the ownership of a business within the meaning of s. 13 of the Redundancy Payments Act 1965, and wrong in holding that the appellant's employment had remained continuous. I, too, am unable to find any effective distinction between this case and *Bandey v. Penn* (3) to which LORD PARKER, C.J., has referred. I agree that the appeal should succeed.

**BRIDGE, J.:** I agree and would only add this. LORD PARKER, C.J., has pointed out that the corollary to a decision that the appellant in this case is not entitled to a redundancy payment from the respondent, would be that, by the operation of s. 8 of the Redundancy Payments Act 1965 and Sch. 1 to the Contracts of Employment Act 1963, the appellant would in due course, if he should be dismissed on account of redundancy by Mr. Barlow, become entitled to a redundancy payment from Mr. Barlow calculated by reference not only to his period of service with Mr. Barlow, but also to his prior period of service as an employee of the respondent. Mr. Barlow is, of course, not before the court. It might well be said on his behalf, however, that it would be a surprising result that he, having purchased at one public auction 150 acres of farming land, and having purchased at a subsequent public auction substantially less than half the lots offered on a dispersal sale of agricultural live and dead stock, but not having, in any ordinary sense entered into a transaction in which he took over lock stock and barrel an existing business with its existing liabilities, should find himself in this one instance saddled with what in effect was a liability of the former employer, namely the liability to pay redundancy payment to this appellant in respect of this appellant's service with the respondent. I agree in the order proposed by my lords.

*Appeal allowed.*

Solicitors: *O. H. Parsons* (for the appellant); *Ellis & Fairbairn* (for the respondent).

[Reported by N. P. METCALFE, Esq., Barrister-at-Law.]



**CARL-ZEISS-STIFTUNG v. HERBERT SMITH & CO. (a firm)  
AND ANOTHER (No. 2).**

[CHANCERY DIVISION (Pennycuik, J.), June 19, 20, 21, 26, 1968.]

*Solicitor—Liability—Trustee—Constructive trustee—Moneys on account of costs come to the hands of defendant's solicitors for the conduct of the defence in an action—Claim by plaintiff in that action that defendant company was trustee of all its assets for the plaintiff—Separate action by plaintiff claiming that solicitors were accountable to it for moneys received on account of costs from the defendant in the main action—Whether claim was contrary to public policy as obstructing the course of justice.*

The plaintiff, a corporate entity carrying on business in East Germany, brought an action in England against another organisation of the same name carrying on business in West Germany, claiming, among other claims, that all the property and assets of the West German company belonged to the plaintiff. The plaintiff brought a separate action against the defendants, two firms of solicitors acting for the West German company in the main action, claiming that the defendants would be accountable as constructive trustees to the plaintiff for all moneys received from the West German company for fees, costs and disbursements. On a preliminary issue, whether the defendants would be so accountable, whatever the decision in the main action should be,

**Held:** a claim of the kind made in the plaintiff's separate action, against solicitors having conduct of a defence in an action and acting honestly therein, was contrary to public policy as obstructing the course of justice, and should not be entertained by the court; accordingly the action against the solicitors would be dismissed (see p. 1237, letter H, p. 1239, letter I, and p. 1241, letter A, post).

*La Roche v. Armstrong* ([1922] All E.R. Rep. 311) considered.

**Quaere** whether, when an agent's principal was denying the existence of a trust alleged against him, the agent would not be liable to the beneficiary for application of the trust moneys by the agent at the principal's instruction in a manner inconsistent with the trust, of which trust the agent had knowledge (see p. 1239, letter G, post).

Dictum of SIR JAMES BACON, V.-C., in *Lee v. Sankey* ((1873), L.R. 15 Eq. 204 at p. 211) considered.

[As to the liability of a solicitor to third parties, see 36 HALSBURY'S LAWS (3rd Edn.) 56, 57, para. 80.

As to constructive trusts by the acquisition of property with notice of a trust, see 38 HALSBURY'S LAWS (3rd Edn.) 858, 859, para. 1446; and for cases on the acquisition of trust property by agents, see 47 DIGEST (Repl.) 187-190, 1555-1583.]

Cases referred to:

*Barnes v. Addy*, (1874), 9 Ch. App. 244; 43 L.J.Ch. 513; 30 L.T. 4; 47 Digest (Repl.) 191, 1593.

*Blundell, Re, Blundell v. Blundell*, [1886-90] All E.R. Rep. 837; (1888), 40 Ch.D. 370; 57 L.J.Ch. 730; 58 L.T. 933; 47 Digest (Repl.) 187, 1561.

*La Roche v. Armstrong*, [1922] All E.R. Rep. 311; [1922] 1 K.B. 485; 91 L.J.K.B. 342; 126 L.T. 699; 22 Digest (Repl.) 80, 569.

*Lee v. Sankey*, (1873), L.R. 15 Eq. 204; sub nom. *Lee v. Sankey, Sinder v. Sankey*, 27 L.T. 809; 47 Digest (Repl.) 187, 1556.

*Nelson v. Larholt*, [1947] 2 All E.R. 751; [1948] 1 K.B. 339; [1948] L.J.R. 340; 47 Digest (Repl.) 187, 1554.

*Nickolson v. Knowles*, (1820), 5 Madd. 47; 56 E.R. 812; 29 Digest (Repl.) 575, 47.

*Rondel v. Worsley*, [1967] 3 All E.R. 993; [1967] 3 W.L.R. 1666; Digest A (Repl.) Supp.

*Williams-Ashman v. Price & Williams*, [1942] 1 All E.R. 310; [1942] Ch. 219; 166 L.T. 359; sub nom. *Ashman v. Price & Williams*, 111 L.J.Ch. 157; 47 Digest (Repl.) 393, 3524.

### Preliminary issue.

The plaintiff, Carl-Zeiss-Stiftung, a corporate body according to the law of the German Democratic Republic which carried on business there, issued a writ on Mar. 18, 1968, claiming an account of all moneys come to the hands of the defendants or either of them being the property of the plaintiff, and payment to the plaintiff of all sums found due on taking such account. The defendants were Herbert Smith & Co. and Dehn & Lauderdale, both firms of solicitors, who were acting or had acted for the defendants in a subsisting action, to which the title was 1955 C. No. 4445 *Carl-Zeiss-Stiftung v. Rayner & Keeler, Ltd. and Others*, brought by the plaintiff in the present action. By an order dated May 23, 1968, the Court of Appeal\* directed the trial of a preliminary issue in the following terms

"That irrespective of the decision upon any issue in the action 1955 C. No. 4445 . . . neither of the defendants herein would be accountable to the plaintiff in respect of any fees, costs or disbursements received by them from or on behalf of the defendants in that action so long as the defendants act honestly as solicitors on behalf of the said defendants and receive such fees, costs and disbursements in their capacity as solicitors."

The preliminary issue now comes before the court (PENNYCUICK, J.) for decision.

*J. A. Brightman, Q.C., D. W. Falconer, Q.C., and J. R. Reid* for the plaintiff.  
*Michael Kerr, Q.C., C. J. Slade, Q.C., and G. Slyn* for the defendants.

*Cur. adv. vult.*

June 26. PENNYCUICK, J.: I have before me a preliminary issue directed by the Court of Appeal\* to be determined before the trial of this action. The action stems from another action, of which the title is 1955 C. No. 4445 *Carl-Zeiss-Stiftung v. Rayner and Keeler, Ltd.* (1). I will refer to that as the main action.

By the pleading in the main action, as amended, the plaintiff corporation, a body now established in the German Democratic Republic (to which I will refer as "the East German company"), claims inter alia that it is the owner of the entire undertaking carried on by the third defendant, which equally bears the name Carl-Zeiss-Stiftung, a body established in the German Federal Republic (to which I will refer as the "West German company"), or alternatively that the West German company holds that undertaking in trust for the East German company. Those claims are formulated in these terms in the amended statement of claim:

"4F. The said business in West Germany is and always has been the property of the plaintiffs and all its trade marks, trade names, patents, goods and other assets of every kind including in particular such of them as have been or are in the United Kingdom are the property of the plaintiffs. . . . 4H. . . . In the premises all the West German assets originally and from time to time subsequently acquired by the third defendants including in particular such of the West German assets as are or may have been in the United Kingdom are or have or are deemed to be or have been the property of the plaintiffs or are or were held in trust for the plaintiffs."

\* See ante p. 1002.

(1) See [1964] 3 All E.R. 326; [1965] Ch. 525; and [1966] 2 All E.R. 536; [1967] 1 A.C. 853.

- A The West German company has employed solicitors in this country in connexion with the main action. It originally employed Messrs. Dehn & Lauderdale, who are the second defendants in the present action. Since 1964 it has employed Messrs. Herbert Smith & Co., who are the first defendants in the present action. In the course of this employment each firm of solicitors has already received considerable sums from the West German company to meet
- B disbursements and in respect of profit costs. As this extremely heavy action proceeds, Messrs. Herbert Smith & Co. will in the ordinary course receive further and much larger sums. The East German company now claims against each firm of solicitors that the firm is accountable to the East German company for all moneys received by it from the assets in the hands of the West German company. This claim is made on the footing either that the East German
- C company is the owner of these assets or, alternatively, that the West German company holds these assets as trustee for the East German company and, on either footing, that the solicitors have at all material times had notice of the interest of the East German company.

The writ in the present action was issued on Mar. 18, 1968. The statement of claim contains the following para. 5:

- D “The plaintiff will refer to and rely upon the pleadings and judgments in the said action. Each of the defendants by reason of their acting in the said action well knew all the facts and matters averred and proved or to be proved therein. Each of the defendants has received the said moneys with notice that such moneys are the property of the plaintiffs. Accordingly each of the defendants is liable to account to the plaintiff.”

- E The claim in the present action cannot from its nature be effectively determined until the main action itself has been determined, but its existence causes intense embarrassment to the West Germany company and Messrs. Herbert Smith & Co. in the prosecution of the main action. In those circumstances, the two defendant firms of solicitors applied by motion for the trial of a preliminary issue to
- F determine their liability, should the East German company succeed in the main action.

By an order dated May 23, 1968, the Court of Appeal (2) directed the trial of a preliminary issue in the following terms:

- G “That irrespective of the decision upon any issue in the action 1955 C. No. 4445 referred to in the pleadings herein, neither of the defendants herein would be accountable to the plaintiff in respect of any fees, costs or disbursements received by them from or on behalf of the defendants in that action so long as the defendants herein act honestly as solicitors on behalf of the said defendants, and receive such fees, costs and disbursements in their said capacity of solicitors.”

- H I will for convenience refer only to Messrs. Herbert Smith & Co. Whatever is said with regard to Messrs. Herbert Smith & Co. applies, so far as relevant, also to Messrs. Dehn & Lauderdale.

- I It is common ground that the words “irrespective of the decision upon any issue in the (main) action” cover the event that in the main action the East German company succeeds in its contention that the East German company owns the undertaking carried on by the West German company or, alternatively, that the West German company holds that undertaking in trust for the East German company. It is accepted on behalf of Messrs. Herbert Smith & Co. that they have at all material times had notice of the East German company's claim, but not of course that they accept or ought reasonably to accept its validity. On the contrary, they strenuously deny its validity.

It is accepted on behalf of the East German company that Messrs. Herbert Smith & Co. have throughout acted honestly as solicitors on behalf of the West



German company and received their fees in that capacity. I proceed on the assumption that this position will continue throughout the action. A

The issues in the main action are complicated, involving questions of foreign law and English law as well as issues of fact, but it is unnecessary for the purposes of the present issue to consider anything but the simplified question indicated by the wording to which I have referred.

The contention of the East German company is based on the well-established principle that a person who acquires or retains property subject to a trust, with notice of that trust, becomes a constructive trustee of that property for the beneficiaries: see 38 HALSBURY'S LAWS OF ENGLAND (3rd Edn.) 858, para. 1446. Counsel for the East German company contends that Messrs. Herbert Smith & Co. have notice of the trust and, if at the end of the day the trust is established in the main action, they will be accountable as constructive trustees for all moneys comprised in that trust which they have received from the West German company. B C

Counsel for the West German company resists this contention on two main grounds, namely: (i) a claim of this kind against solicitors having the conduct of an action is contrary to public policy in the sense that it obstructs the course of justice; (ii) the general principle stated above does not, with certain exceptions, apply to an agent in whose hands the property has been placed by his principal. I propose to consider these two grounds in that order. D

(i) I see the very greatest force in this contention. If such a claim can be maintained the result is that, whenever an action is brought for the recovery of assets alleged to be trust property and that action succeeds, the defendant's solicitors come under a personal liability to the plaintiff for moneys which have been knowingly received by them from their own clients out of the subject-matter of the action. Their liability attaches impartially in respect of profit costs retained by them and in respect of disbursements made by them, including counsel's fees, the expenses of obtaining evidence and so forth. The solicitors could no doubt generally recover counsel's fees, but the other disbursements would be irretrievably lost. E

The prospect of this personal liability would be a grave deterrent to a responsible solicitor undertaking the conduct of such an action at all, for, unless his client had enough resources apart from the subject matter of the action, the conduct of the action would represent a gamble on his client's success, a highly undesirable state of affairs. If he did undertake the defence, the fact that he was at risk in regard to this liability might, and in many circumstances almost inevitably would, tend to influence and hamper him at various stages in the action, for example, on the question whether expense should be incurred in obtaining evidence from a particular expert witness. He might even find that his interest was in conflict with his duty to his client, for example, in connexion with some suggested compromise. There can I think be no doubt that such a claim would represent a very serious obstruction in the course of justice. It is worth-while to notice that, if a right of action exists against a solicitor in such circumstances, a corresponding right of action must automatically exist against counsel, that is to say, counsel would be at risk of having to account to the other party for fees received by him from his own client if the defence of the action failed. This too would be a highly undesirable position. F G H

The contrary factor urged on behalf of the East German company is that, if such a claim is not available against the defendant's solicitor, then, should the action succeed, the unsuccessful defence will have been financed out of the plaintiff's money. This is a serious consideration, but it should be borne in mind (i) that in simple circumstances (unlike the present) the plaintiff, on making out a sufficient *prima facie* case, could obtain an injunction restraining the defendant from dealing with the subject matter of the action pending its determination; and (ii) that the defendant himself would, so far as I can see, certainly be accountable to the plaintiff for trust money applied by the defendant in the defence of the action. It is only where the former remedy is not available or has I

A not been sought, and further where the defendant is unable to meet his personal liability, that the claim against the defendant's solicitors would become of substantial importance.

There appears to be a lack of authority on the point. The only case in which the point appears to have been mentioned is that of *La Roche v. Armstrong* (3). The headnote in that case is as follows (4):

B "In a dispute between two parties, letters and negotiations between their respective solicitors, which are written or declared to be without prejudice, are inadmissible in evidence not only against the parties themselves but also against the solicitors.

C "In an action by A against B, in which the title to a chattel is in question, admissions by a person previously entitled which were made during the continuance of his or her interest, and which qualify or affect the title, may be given in evidence against B: but such evidence is not admissible where no question of title arises and where the question at issue is merely the right to a sum of money:—

D "Seemingly, a solicitor who receives from his client for the purpose of his or her defence a sum of money which A alleges was trust money in the client's hands is under no duty to preserve the money as such trust money or to refuse to apply it in accordance with the client's directions."

It will be seen that the action was decided on the grounds mentioned in the first two paragraphs in the headnote, and there appears to have been no argument on the question of liability. LUSH, J., concluded his judgment with this observation (5):

E "I would add this. Here the solicitor had received a sum of money from his client for the purpose of his resisting on her behalf a claim by the plaintiff, who says it is trust money, and that the client is under a duty to return it. In such circumstances, I should be very loath to say that the solicitor, who cannot know the real truth of the matter, inasmuch as he hears one story from his client and another from the plaintiff, is bound to hold the money not for his client, but for the plaintiff whose claim is not yet established. This is not an ordinary case of the misuse of trust money. The defendant has utilised the money for the purpose for which he received it. Even if the difficulty of the onus of proof were surmounted, it would be hard for the plaintiff to succeed and, in this case the judgment must be for the defendant."

I have not attached undue weight to the obiter observations of LUSH, J., but, so far as they go, they do afford support to the West German company's contentions.

I have reached the conclusion that a claim of this kind does indeed obstruct the course of justice and that the court ought not to entertain it.

H Counsel for the East German company has contended that the objection now advanced by the West German company would represent a new head of public policy and that the court should not lightly entertain new heads of public policy. In support of this contention he supplied a helpful list of claims which have been held to be contrary to public policy, and pointed out that the only instance at all resembling the present is the claim considered by the House of Lords in the recent case of *Rondel v. Worsley* (6), an action for negligence against a barrister. It seems to me that the East German company's claim here is a particular instance of the class of claims which obstruct the course of justice and is contrary to public policy in that sense. It is in this respect comparable to the claim in *Rondel v. Worsley* (6) and as such is not a new head of public

(3) [1922] All E.R. Rep. 311; [1922] 1 K.B. 985.

(4) [1922] 1 K.B. at p. 485.

(5) [1922] All E.R. Rep. at p. 313; [1922] 1 K.B. at p. 491.

(6) [1967] 3 All E.R. 993.

policy. The court has always had an inherent jurisdiction to deal with claims which obstruct the course of justice. I am not sure that the claim might not have been labelled vexatious and that an application might not have been made to strike it out under R.S.C., Ord. 18, r. 19, but I need not pursue that point. A

I should mention one other argument which was suggested on this point by counsel for the West German company. He contended that, if the defendant could not employ the subject matter of an action to finance his defence, he might otherwise have no resources with which to do so. I am not impressed with this argument. Whatever difficulty a defendant may have in financing his case, that cannot justify his financing it at the ultimate expense of the plaintiff should the action succeed. I do not feel bound to pursue an inquiry as to what steps are open to a defendant in such circumstances. I would merely emphasise that the present issue is concerned with the liability of the defendant's solicitors and not with the liability of the defendant himself. B C

To avoid misunderstanding, I should say expressly that nothing in this judgment is addressed to costs which may be outstanding but unpaid when an action of this kind is finally determined adversely to the defendant.

(ii) The conclusion which I have reached on the first ground is sufficient to dispose of the issue. By far the greater part of the argument was, however, addressed to the second ground. In case I am wrong on the first ground I ought at least to summarise the argument on the second ground. I propose to do so very briefly without detailed citation of authority. This is a point of considerable general importance and it would not be desirable for me to express obiter a decided view on it. D

Counsel for the West German company, while not challenging the general principle which I have cited from HALSBURY, contended that the principle does not in general apply to an agent in whose hands the trustee has placed trust property. The agent it is said, whether a solicitor or anyone else, owes no duty except to his principal, the trustee, and is not rendered a constructive trustee for the beneficiaries, merely by notice of their claim. It is accepted that the agent may render himself a constructive trustee by intermeddling in the trust or by co-operating in a breach of trust. In this connexion it is said that the agent co-operates in a breach of trust if he has certain knowledge that the claim is well-founded and disregards it, but mere notice of the claim is insufficient; nor of course is it his duty to investigate the claim. These contentions, if well-founded, produce the result that an agent being in possession of what is claimed to be trust property, of which his principal is a trustee, and having notice of that claim, unless he knows for certain that the claim is well-founded, is entitled and indeed bound, upon the direction of the trustee, and in complete disregard of the claim, to pay over the subject matter of the claim to the trustee himself or to a third party who might dissipate it. I should have thought that in such circumstances the claimant could in an ordinary case obtain an injunction to restrain the agent from so doing and that this injunction would be founded on the duty of the agent as constructive trustee. E F G H

In support of his contention counsel for the West German company relied on a number of text-book statements and on a line of cases which includes *Nickolson v. Knowles* (7), *Barnes v. Addy* (8), *Re Blundell*, *Blundell v. Blundell* (9) and *Williams-Ashman v. Price & Williams* (10). *Nickolson v. Knowles* (7) was a simple case of payment by a third party to an agent. The remaining cases and the text-book statements founded on them are concerned with a different state of affairs, namely, that in which the agent is employed by a trustee, acting or professedly acting in that capacity, but in relation to a situation which I

(7) (1820), 5 Madd. 417.

(8) (1874), 9 Ch. App. 244.

(9) [1886-90] All E.R. Rep. 837; (1888), 40 Ch.D. 370.

(10) [1942] 1 All E.R. 310; [1942] Ch. 219.



A involves a breach of trust. In *Barnes v. Addy* LORD SELBORNE, L.C., said (11):

"It is equally important to maintain the doctrine of trusts which is established in this court, and not to strain it by unreasonable construction beyond its due and proper limits. There would be no better mode of undermining the sound doctrine of equity than to make unreasonable and iniquitable applications of them.

B "Now in this case we may have to deal with certain persons who are trustees, and with certain other persons who are not trustees. That is a distinction to be borne in mind throughout the case. Those who create a trust clothe the trustee with a legal power and control over the trust property, imposing on him a corresponding responsibility. That responsibility may no doubt be extended in equity to others who are not properly trustees, if they

C are found either making themselves trustees de son tort, or actually participating in any fraudulent conduct of the trustee to the injury of the cestui que trust. But, on the other hand, strangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers, transactions perhaps of which a court of equity may disapprove, unless those agents receive and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees."

D

See also the full analysis made by STIRLING, J., in *Re Blundell* (12).

It seems to me that the principle underlying this line of cases is inapplicable where the principal is not acting or purporting to act in the capacity of trustee at all, but is denying the existence of the trust: see the distinction drawn by

E SIR JAMES BACON, V.-C., in *Lee v. Sankey* (13):

"It is well established by many decisions, that a mere agent of trustees is answerable only to his principal and not to cestuis que trust in respect of trust moneys coming to his hands merely in his character of agent. But it is also not less clearly established that a person who receives into his hands trust moneys, and who deals with them in a manner inconsistent with the performance of trusts of which he is cognisant, is personally liable for the consequences which may ensue upon his so dealing."

F

In a state of affairs such as the present, that is to say, where the principal is denying the existence of the trust, I do not see any reason in principle why the agent should be immune from proceedings by the beneficiary.

G A full discussion of the liability of an agent to third parties will be found in BOWSTEAD ON AGENCY (12th Edn.), pp. 278-283, where a great number of other authorities are collected. I do not think that in this obiter part of my judgment I ought to pursue that question further.

I have treated this matter on the footing that the East German company's claim is founded on trust. It appears that the position under the claim founded

H on ownership is in all relevant respects the same: see *Nelson v. Larholt* (14). It has not been contended otherwise.

I propose for the reasons given on the first ground to make a declaration in the negative, but inserting a few words, so that the declaration will run as follows:

I "That irrespective of the decision upon any issue in the action 1955 C. No. 4445 referred to in the pleadings herein, neither of the defendants herein would be accountable to the plaintiff in respect of any fees, costs or disbursements received by them from or on behalf of the defendants in the course of and before the final determination of that action so long as the

(11) (1874), 9 Ch. App. at pp. 251, 252.

(12) [1886-90] All E.R. Rep. 837; (1888), 40 Ch.D. 370.

(13) (1873), L.R. 15 Eq. 204 at p. 211.

(14) [1947] 2 All E.R. 751; [1948] 1 K.B. 339.

defendants herein act honestly as solicitors on behalf of the defendants, and receive such fees, costs and disbursements in their said capacity of solicitors.” A

The purpose of the added words is to leave open the position with regard to fees which may be outstanding at the conclusion of the action should the East German company succeed.

[*After argument.*] B

Counsel for the defendants in this action, that is, the two firms of solicitors, now invites me, having decided the preliminary issue in their favour, to make an order under R.S.C., Ord. 33, r. 7, which is in these terms:

“ If it appears to the court that the decision of any question or issue arising in a cause or matter and tried separately from the cause or matter substantially disposes of the cause or matter or renders the trial of the cause or matter unnecessary, it may dismiss the cause or matter or make such other order or give such judgment therein as may be just.” C

It seems to me that the decision which I have given on the preliminary issue, if it is right, does indeed substantially dispose of this whole action and renders the trial of the action unnecessary. That is evidently the view which the Court of Appeal took because they said (15): D

“ If the issue of law is decided in their favour [that is in the solicitors’ favour] it will dispose of the claim against them, irrespective of the main action.”

Counsel for the East German company, invites me merely to make an order on the preliminary issue and let the action stand. So far as I can see there would be nothing left in the action and I do not think that it would be right to take that course. E

There was a discussion on the scope of an allegation in para. 4 of the statement of claim in this action, which is in these terms: F

“ From May 20, 1964, the first defendants have acted and continue to act as solicitors for the defendants in the said action. The second defendants are also a firm of solicitors carrying on that profession in the United Kingdom. From at least Nov. 11, 1955, until May 20, 1964, the second defendants acted as solicitors for the defendants in the said action. In the course of so acting each of the defendants have received in the United Kingdom moneys (of which no particulars can be given until after discovery herein) from the said organisation being part of the assets employed in such organisation or moneys arising from the said trade or business.” G

It would seem quite clear that, read in the whole context, that allegation is confined to moneys received by the two firms of solicitors in the course of acting as solicitors to the West German company in the main action. If I have decided this preliminary issue right, they are not accountable in respect of those moneys. The suggestion was made, that that allegation in the statement of claim might cover moneys received by the solicitors from the West German company otherwise than in the performance of their functions as solicitors in the action. I do not think that the allegation does cover such moneys. Perhaps to avoid misunderstanding I should say that the striking out of this action would not debar the East German company from starting a new action with regard to any such moneys, i.e., if they wished to contend that the West German company had paid to the defendants moneys belonging to the East German company otherwise than in the course of the performance by the defendants of their duties as solicitors in the main action. H I

A I think that in the circumstances it would not be right to keep this action alive and I propose simply to make an order dismissing the action.

*Declaration accordingly; action dismissed with costs.*

Solicitors: *Courts & Co.* (for the plaintiffs); *Herbert Smith & Co.* (for the defendants).

[Reported by JENIFER SANDELL, Barrister-at-Law.]

## Re WEIR'S SETTLEMENT.

### MACPHERSON AND ANOTHER v. INLAND REVENUE COMMISSIONERS.

C [CHANCERY DIVISION (Cross, J.), May 24, 27, 28, 29, June 19, 1968.]

*Estate Duty—Discretionary trust—Exhaustive discretionary trust—Discretionary trust of income in favour of husband and wife continuing after death of husband in favour of wife alone—Wife recipient of all income throughout—Whether duty payable on whole fund on husband's death—Finance Act, 1894 (57 & 58 Vict. c. 30), s. 1, s. 2 (1) (b).*

D Under a settlement made by the wife's father on her marriage the income of the trust fund was held on discretionary trusts for the husband and wife and the issue of the marriage during a trust period that was not for the period of the life or lives of beneficiaries under the discretionary trust. There was no issue of the marriage. There was no trust for accumulation. The whole of the income was in fact paid to the wife from the time of the marriage. On the husband's death in the wife's lifetime estate duty was claimed\* on the whole of the trust fund as having passed on his death, the statutory provisions relevant to the claim being s. 1 and s. 2 (1) (b) of the Finance Act, 1894†.

F **Held:** in view of the decisions in *Burrell v. A.-G.* and *Scott v. Inland Revenue Comrs.* estate duty was payable on the trust fund as having passed on his death (see p. 1252, letter C, post).

*Burrell v. A.-G.* ([1936] 3 All E.R. 758) and *Scott v. Inland Revenue Comrs.* ([1936] 3 All E.R. 752) followed.

[ **Editorial Note.** In the light of the decision in *Public Trustee v. Inland Revenue Comrs.* ([1960] 1 All E.R. 1) the true view seemed to the court to be that s. 2 (1) of the Finance Act, 1894, constituted an exhaustive explanation of what was meant by the phrase "property . . . which passes on death" in s. 1, and in view of the decision in *Gartside v. Inland Revenue Comrs.* ([1968] 1 All E.R. 121) it seemed that s. 2 (1) (b), which was the only paragraph of s. 2 (1) relevant to the present case, did not apply so as to render estate duty exigible on the death of one of several objects of a discretionary trust, so that the truth appeared to be that Parliament in 1894, when passing the Finance Act of that year, had failed to take discretionary trusts into account (see p. 1248, letter I, p. 1249, letter D, and p. 1250, letter I, post). A court of first instance, however, was bound by the decisions of the House of Lords in *Burrell's* case and *Scott's* case, cited above, to make the determination as set out in the holding at letter F, above, although the construction of s. 1 and s. 2 (1) (b) was subsequently differently approached in the later decisions. It may be noted also that cl. 34 of the Finance Bill 1968, in its form as amended in committee (Bill No. 171) does not apply to discretionary trusts that are not determinable on death, though created after Mar. 19, 1968, but is confined to negating, in effect, *Gartside v. Inland Revenue Comrs.* ([1968] 1 All E. R. 121).

\* The contentions on behalf of the taxpayers and the Crown are stated at p. 1248, letters B to D, post.

† The relevant provisions of the Act of 1894 are printed at p. 1244, letters F to I, post.



As to the charge to estate duty in respect of discretionary trusts, see 15 HALSBURY'S LAWS (3rd Edn.) 11, para. 17. For cases on the subject, see 21 DIGEST (Repl.) 11, 12, 36-39.

For the Finance Act, 1894, s. 1 and s. 2 (1) (b), see 9 HALSBURY'S STATUTES (2nd Edn.) 348, 350.]

Cases referred to:

*A.-G. v. Burrell* (1935), 153 L.T. 393; *on appeal*, sub nom. *Burrell v. A.-G.*, [1936] 3 All E.R. 758; [1937] A.C. 286; 106 L.J.K.B. 134; 156 L.T. 36; 21 Digest (Repl.) 12, 39.

*Cowley (Earl) v. Inland Revenue Comrs.*, [1895-99] All E.R. Rep. 1181; [1899] A.C. 198; 68 L.J.Q.B. 435; 80 L.T. 361; 47 W.R. 525; 15 T.L.R. 270; 21 Digest (Repl.) 11, 36.

*Gartside v. Inland Revenue Comrs.*, [1968] 1 All E.R. 121; [1968] 2 W.L.R. 277. *Harris's Will Trusts, Re, Public Trustee v. Hurt*, [1966] 1 All E.R. 677; [1966] Ch. 475; [1966] 2 W.L.R. 608; Digest (Cont. Vol. B) 243, 29a.

*Public Trustee v. Inland Revenue Comrs.*, [1960] 1 All E.R. 1; [1960] A.C. 398; [1960] 2 W.L.R. 203; 38 A.T.C. 382; 21 Digest (Repl.) 18, 58.

*Public Trustee v. Inland Revenue Comrs.*, [1966] 1 All E.R. 76; [1966] A.C. 520; [1966] 2 W.L.R. 136; 44 A.T.C. 442; sub nom. *Re Kirkwood, Public Trustee v. Inland Revenue Comrs.*, [1964] 3 All E.R. 780; [1965] Ch. 286; [1964] 3 W.L.R. 1240; Digest (Cont. Vol. B) 243, 39a.

*Scott v. Inland Revenue Comrs.*, [1936] 3 All E.R. 752; [1937] A.C. 174; 106 L.J.Ch. 36; 156 L.T. 33; 21 Digest (Repl.) 12, 38.

### Adjourned Summons.

This was an application by originating summons dated May 24, 1967, issued by the plaintiffs Walter Dugald MacPherson, O.B.E., and the Right Honourable James Kenneth Viscount Weir, the present trustees of a settlement dated Nov. 26, 1957, and made between the Right Honourable William Douglas Viscount Weir of the first part, Eustace Benyon Hoare of the second part, Elspeth Marjory Cartwright of the third part and others of the fourth part, for the determination under s. 3 of the Administration of Justice (Miscellaneous Provisions) Act, 1933, of the question whether on the true construction of the settlement and of the Finance Act, 1894 and amending Acts, and in the events which had happened, estate duty became payable on the death of the said Eustace Benyon Hoare (who died on July 9, 1961) in respect of the property comprised in the said settlement at the date of his death or in respect of any and what part of the said property.

The cases noted below\* were cited during the argument in addition to those referred to in the judgment.

\* *Green v. Spicer*, (1830), 1 Russ. & M. 395; *Re Coleman, Henry v. Strong* (1888), 39 Ch.D. 443; *Re Johnston, Mills v. Johnston*, [1894] 3 Ch. 204; *A.-G. v. Milne*, [1914-15] All E.R. Rep. 1061; [1914] A.C. 765; *Re Cassel, Public Trustee v. Mountbatten*, [1927] All E.R. Rep. 739; [1927] 2 Ch. 275; *Re Smith, Public Trustee v. Aspinall*, [1928] Ch. 915; *Re Northcliffe, Arnholz v. Hudson*, [1928] All E.R. Rep. 310; [1929] 1 Ch. 327; *Adamson v. A.-G.*, [1932] All E.R. Rep. 159; [1933] A.C. 257; *A.-G. v. Lloyds Bank, Ltd.*, [1935] All E.R. Rep. 518; [1935] A.C. 382; *Christie v. The Lord Advocate*, [1936] 1 All E.R. 443; [1936] A.C. 569; *Re Hodson's Settlement, Brookes v. A.-G.*, [1939] 1 All E.R. 196; [1939] Ch. 343; *Re Duke of Norfolk, Public Trustee v. Inland Revenue Comrs.*, [1950] 1 All E.R. 664; [1950] Ch. 467; *Re Vestey's Settlement*, [1950] 2 All E.R. 891; *R. v. Bates*, [1952] 2 All E.R. 842; *Deeble v. Robinson*, [1954] 1 Q.B. 77; *Re Parkes' Settlement Trusts*, [1956] 1 All E.R. 833; *Re Weigall's Will Trusts*, [1956] 2 All E.R. 312; [1956] Ch. 424; *A.-G. of Ceylon v. Ar Arunachalam Chettiar*, [1957] A.C. 513; *Re Tapp, Gonville & Caius College, Cambridge v. Inland Revenue Comrs.*, [1959] 1 All E.R. 705; [1959] Ch. 443; *Green v. Russell*, [1959] 2 All E.R. 525; [1959] 1 Q.B. 28; *General Accident Fire & Life Assurance Corp., Ltd. v. Inland Revenue Comrs.*, [1963] 1 All E.R. 618; [1963] 3 All E.R. 259; *Re Doughty's Settlement, Doughty v. Inland Revenue Comrs.*, [1963] 3 All E.R. 848; [1964] Ch. 89; *Re Holmden's Settlement Trusts*, [1965] 1 All E.R. 744 (cf., [1966] 2 All E.R. 661); *Re Ralli's Settlements, Ralli Bros., Ltd. v. Inland Revenue Comrs.*, [1964] 1 All E.R. 962; [1964] 3 All E.R. 780; [1965] Ch. 265, 286; [1966] 1 All E.R. 65; [1966] A.C. 483; *Re Allen-Meyrick's Will Trusts*, [1966] 1 All E.R. 740; and *R. v. Special Railway Comrs.*, [1966] 2 All E.R. 760.

- A *Arthur Bagnall, Q.C., and H. Hillaby for the taxpayers (the plaintiff trustees).  
J. A. Brightman, Q.C., and P. W. E. Taylor for the Crown.*

*Cur. adv. vult.*

B June 19. **CROSS, J.**, read the following judgment: On Nov. 26, 1957, Lord Weir settled £50,000 in contemplation of the marriage of his daughter Elspeth Marjory Jessie, then the widow of a Mr. Cartwright, to Eustace Benyon Hoare. The parties to the settlement were Lord Weir, the settlor; Mr. Hoare (called "the husband"); Mrs. Cartwright (called "the wife"); and James Kenneth Weir and Henry Edmund Sargant as trustees. Clause 1 of the settlement declared that it was made in consideration of the intended marriage, and that it should become void unless the marriage be solemnised before Dec. 31, 1957. By C cl. 2, the expression "the Trustees" was defined as meaning "the original trustees or the survivor of them or other the trustees or trustee for the time being " of the settlement; "the Trust Fund" was defined as "the said sum of £50,000 . . . and the investments and property from time to time representing the same"; and "the Trust Period" was defined as meaning "which ever is the shorter of the following periods namely (i) the period commencing at the date of the solemnisation of the said marriage and continuing until the expiration of a period of eighty years, and (ii) the period commencing at the said date and continuing until the expiration of twenty-one years (less the last day) from the death of the last survivor of all the lineal descendants now living of His Late King George the Fifth". By cl. 3 the trustees were directed to invest the said sum of £50,000 as therein mentioned. Clause 4 read as follows:

E "From and after the solemnisation of the said intended marriage and subject as hereinafter provided the Trustees shall pay or apply the income of the Trust Fund during the Trust Period to or for the maintenance and support or otherwise for the benefit of all or such one or more to the exclusion of the others or other of the Husband and Wife and the children or remoter issue of the said marriage for the time being living as the Trustees (being at least two in number or a trust corporation) in their absolute discretion think fit with power for the Trustees to pay any income which they may decide should be applied for the maintenance or otherwise for the benefit of any child or remoter issue of the said marriage to the guardian or guardians of such child or remoter issue without being bound to see to the application thereof."

G Clause 5 provided that notwithstanding the trusts thereinbefore contained the trustees (being at least two in number or a trust corporation) might at any time or times during the trust period with the consent in writing of Mrs. Hoare during her life and thereafter at the discretion of the trustees transfer the whole or any part of the trust fund to her or to any child or remoter issue of the said intended marriage for his or her absolute use and benefit and might with such consent or at such discretion as aforesaid by deed or deeds revoke all or any of the trusts H and appoint such new trusts of the trust fund or any part or parts thereof in favour of the said Eustace Benyon Hoare, Mrs. Hoare or any child or children or remoter issue of the said intended marriage or in the event of Mrs. Hoare marrying again in favour of any after taken husband of hers and any child or remoter issue of such subsequent marriage subject to a proviso that so long as any child or remoter issue of the said intended marriage should be living the I power of revocation and new appointment in favour of any after taken husband of Mrs. Hoare or any child or remoter issue of any subsequent marriage conferred on the trustees should only extend to one moiety of the trust fund.

By cl. 6, subject to the trusts and powers thereinbefore contained, the trustees were directed to hold the trust fund on trust for such of the children of the said intended marriage as should be living at the expiration of the trust period if more than one in equal shares with a substitution of the issue then living of any child then dead in the place of such child and, if there should be no child or remoter issue of the said intended marriage then living, on the like trusts *mutatis mutandis*

for the children and remoter issue of any subsequent marriage of Mrs. Hoare. A

By cl. 7 it was provided that if the trusts thereinbefore declared should fail or determine then subject to the powers thereby or by law vested in the trustees and to every exercise of such powers the trustees should hold the trust fund on trust for Elizabeth Cartwright (Mrs. Hoare's daughter by her first marriage) and any husband child or remoter issue of Elizabeth as the trustees in their absolute discretion should at any time before the expiration of the trust period by deed or deeds appoint "and in default of and until and subject to any such appointment on trust for the said Elizabeth Armine Julia Cartwright absolutely". B

Mr. and Mrs. Hoare were married on Nov. 29, 1957; they had no children; and Mr. Hoare died on July 9, 1961. None of the powers contained in cl. 5 has been exercised. As the trustees were obliged to distribute the whole income, Mr. and Mrs. Hoare, acting together, could have directed them to deal with each accruing instalment in any way they wished; but subject to any such joint direction—and, so far as I know, none was ever given—it was the duty of the trustees to make up their minds within a reasonable time of the receipt of any income whether to pay it to Mr. Hoare or to Mrs. Hoare. In fact, in exercise of their discretion, they paid all the income to Mrs. Hoare during the joint lives. On Mr. Hoare's death, the trustees ceased to have any discretion to exercise, since Mrs. Hoare was the only surviving object of the trust, and since that date she has received the income as of right. The Commissioners of Inland Revenue claimed estate duty on the whole of the trust fund as passing on the death of Mr. Hoare. C D

The facts are simple enough, but it will not surprise anyone acquainted with this branch of the law to learn that the argument lasted for over four days—during which counsel at all events wasted no words—and that some thirty authorities, many of them in the House of Lords, were referred to. The law of estate duty has indeed now attained a degree of refinement which would have gladdened the heart of Lord St. Leonards. I will begin by setting out those parts of the Finance Act, 1894 (s. 1, s. 2 (1) and s. 7 (7)), which are immediately relevant to this problem. E

"1. In the case of every person dying after the commencement of this Part of this Act, there shall, save as hereinafter expressly provided, be levied and paid, upon the principal value ascertained as hereinafter provided of all property, real or personal, settled or not settled, which passes on the death of such person a duty called 'Estate duty' at the graduated rates hereinafter mentioned and the existing duties mentioned in the First Schedule to this Act shall not be levied in respect of property chargeable with such Estate duty. F G

"2 (1). Property passing on the death of the deceased shall be deemed to include the property following, that is to say: . . . (b) Property in which the deceased or any other person had an interest, ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest; but exclusive of property the interest in which of the deceased or other person was only an interest as holder of an office, or recipient of the benefits of a charity, or as a corporation sole. H

"7 (7). The value of the benefit accruing or arising from the cesser of an interest ceasing on the death of the deceased shall—(a) if the interest extended to the whole income of the property, be the principal value of that property; and (b) if the interest extended to less than the whole income of the property, be the principal value of an addition to the property equal to the income to which the interest extended." I

During the first sixty years of this century the theory of the relationship between s. 1 and s. 2 of this Act which was generally accepted by the courts was that propounded by LORD MACNAGHTEN in his speech in *Earl Cowley v. Inland Revenue Comrs.* (1). This was that the two sections were mutually exclusive; that any

(1) [1895-99] All E.R. Rep. 1181; [1899] A.C. 198.



A property which "passed on the death" in the ordinary sense of the word—a sense which it was left to the courts to determine—passed under s. 1; and that s. 2 (1) was not intended to explain what was meant by the expression "property passing on the death" but was a purely "deeming" section which brought into charge to duty various items of property which could not be said to "pass on the death" in the ordinary sense of the word.

B In *Public Trustee v. Inland Revenue Comrs.* (2), the "Arnholz case", the House of Lords rejected this theory. It held that the two sections were not mutually exclusive but that s. 2 (1) was explanatory of s. 1 at least to the extent that an item of property which was chargeable under s. 2 (1), if the words used in the relevant sub-para. were given their ordinary meaning, could not be chargeable under s. 1. But the House left open the question whether the explanation of the

C meaning of "passing on the death" given by s. 2 was exhaustive, or whether s. 1 might itself catch property which did not fall under any of the sub-paragraphs of s. 2 (1) but which the courts might think could nevertheless fairly be said to "pass on the death". I shall have to come back to this question later in this judgment, but in view of the decision in the *Arnholz* case (2) there can at least be no doubt that a judge should first address his mind to s. 2 (1) and ask himself

D whether the property with which he is concerned falls within any of its sub-paragraphs. In this case, of course, the only relevant sub-paragraph is s. 2 (1) (b),

The question of the application of s. 2 (1) (b) to discretionary trusts was considered by MAUGHAM, L.J., in the case of *A.-G. v. Burrell* (3). There, under the will of the testator, there was a discretionary trust during the life of "H", the primary beneficiary, for payment of so much of the income as the trustees

E thought fit to or for the benefit of "H" and his wife and children—a class, in the events which happened, of five persons—and after the death of "H" a similar trust during the life of the eldest son "W", the next primary beneficiary, for payment of so much of the income as the trustees should think fit to or for the benefit of another class which consisted immediately after the death of "H" of three persons—"W", his wife and his brother "M", two of whom (namely,

F "W" and "M") had been discretionary objects during the life of "H". So far as the trustees did not distribute the income to one or other of the discretionary objects, it was payable by operation of law to the heir at law or next-of-kin. MAUGHAM, L.J., asked himself first, as he thought LORD MACNAGHTEN's theory obliged him to, whether the trust fund "passed" under s. 1 on the death of "H". This he thought it could only have done if it "changed hands as a whole"

G on that event. Having regard to the fact that two of the discretionary objects were members of both the old class of five and the new class of three, he found it impossible to say that there had been a passing under s. 1, and so he turned to consider s. 2 (1) (b). His remarks on this point are (4):

H "I ask myself whether there has been a cesser of an interest within the meaning of s. 2, sub-s. (1) (b), in the circumstances of the case on the death of Harry. I observe in the forefront of that problem the fact that it is immaterial to determine anything in regard to the property as a whole, since s. 2 (1) (b) will apply to a cesser of an interest. All that is necessary, as I see it, in order that there should be a cesser within the subsection which I am considering is, first, that there should be property in which the deceased or

I any other person must have had an interest ceasing on the death, and, secondly, that there must be a benefit accruing to someone by reason of the cesser of that interest. The section in its first line says: 'Property in which the deceased or any other person had an interest'. 'Person' here, of course, would include a class, and I see no objection to regarding the class of persons who during the lifetime of Harry had a discretionary right to share in the

(2) [1960] 1 All E.R. 1; [1960] A.C. 398.

(3) (1935), 153 L.T. 393.

(4) (1935), 153 L.T. at p. 402.

income, plus the persons ascertained upon the death of the testator, as being the persons who were the heir and the next of kin, as a composite person.

"In my opinion, then, there was an interest in the whole of the income, belonging to the composite person or composite class, which ceased on the death of Harry, since under the will, as I read it, there is in effect provision that the income of the estate during the lifetime of Harry is to be distributed in the way in which I have mentioned, and on the death of Harry, in the events which have happened, ascertained at the death of Harry, there became a trust during the life of William Reginald to divide or distribute the income according to the discretion of the trustees between William Reginald, his wife and his children, if any (he has none at the present time), and the balance to the heir-at-law and the next of kin of the original testator.

"The next question which I have to ask myself is: Has a benefit accrued or arisen by reason of the cesser of such interest to someone? The section does not say to whom. In my opinion a benefit has accrued or arisen, by reason of the cesser of the interest to which I have referred, for the benefit of the new class, consisting of William Reginald, his wife, his children (if any), and possible other persons, and the balance again has to go to the heir-at-law and the next-of-kin of the testator. There is nothing in the subsection I am considering from which a conclusion can, I think, properly be drawn to show that the persons to whom the benefit accrues may not be to some extent persons who had an interest prior to the death of the deceased. The new class is a different class, the benefit which accrues to members of the new class, discretionary I agree, is yet a benefit which accrues to them by reason of a different trust and a different relationship to the original testator.

"These considerations would no doubt lead me to say that the property passed within s. 1 if it were not for the doubt I have whether it can fairly be said that the property as a whole changed hands. Under s. 2 (1) (b), I have not any trouble such as that which confronts me under s. 1, and I say, regarding the class of beneficiaries before the death of Harry as a single composite person, their interest has ceased and a benefit has accrued to the new class of beneficiaries as a whole, so that the case comes within the words of cl. (b) of sub-s. (1) of s. 2."

LORD HANWORTH, M.R., agreed with MAUGHAM, L.J., but ROMER, L.J., thought that the property passed under s. 1. His view of the matter was approved by the House of Lords (*Burrell v. A.-G.* (5)), and LORD RUSSELL OF KILLOWEN, who delivered the only speech, did not indicate whether, if he had not thought that s. 1 applied, he would have agreed with MAUGHAM, L.J., in thinking that s. 2 (1) (b) could be made to fit this case.

Since the decision in the *Arnholz* case (6), references in judgments to s. 2 (1) (b) have naturally become more frequent than they were previously, but until the recent decision of the House of Lords in *Gartside v. Inland Revenue Comrs.* (7) there was not, so far as I know, any dissent expressed from MAUGHAM, L.J.'s view that the subsection could be applied to discretionary trusts by treating all the objects as a composite class possessed of a single interest in the income of the fund which ceased on the death, which put an end to the current discretionary trust (see, for example, RUSSELL, L.J., in *Re Kirkwood* (8); and LORD GUEST in the same case in the House of Lords (9)).

(5) [1936] 3 All E.R. 758; [1937] A.C. 286.

(6) [1960] 1 All E.R. 1; [1960] A.C. 398.

(7) [1968] 1 All E.R. 121; [1968] 2 W.L.R. 277.

(8) [1964] 3 All E.R. at pp. 791, 792; [1965] Ch. at p. 328.

(9) [1966] 1 All E.R. at p. 82; [1966] A.C. at pp. 544, 545.

A The facts in the *Gartside* case (10) were that by his will a testator gave a share of his residuary estate to trustees upon trust:

B “ (i) to apply the income of the fund at their discretion for the maintenance or benefit of all or any of his son, his son’s wife or children (if any), and to accumulate surplus income as an addition to capital with power at any time to resort to the accumulations and to apply them as current income; (ii) after the son’s death, to hold the capital, income and accumulations upon trust for such of the son’s children who being male attained twenty-one or being female attained that age or married, and if more than one equally; and (iii) to advance at any time to the grandchildren of the testator sums of up to one-half of the presumptive or vested share of that grandchild in the fund.”

C The question for decision was whether the testator’s grandsons to whom advances had been made about a year before their father’s death had “interests in possession” in the fund within the meaning of s. 43 of the Finance Act, 1940 (11). In the course of discussing the nature of the rights of objects of a discretionary trust, LORD REID (12) commented on what I may call the “group” theory as follows:

E “There are in some of the cases indications of a view that, while each of the objects of a discretionary trust has an interest in the trust fund, this interest does not extend to the whole or any part of the interest accruing from the fund. But, on the other hand, all the objects together have a single class or group interest which does extend to the whole interest of the fund. Counsel for the respondents in the clear and well-reasoned argument expressly declined to adopt that view and I think he was well advised in taking that course. Where a number of persons are members of a company or other incorporation which has a separate legal personality, the incorporation can, of course, have a single right different from the rights of any of its members. But otherwise two or more persons cannot have a single right unless they hold it jointly or in common. But clearly objects of a discretionary trust do not have that: they each have individual rights: they are in competition with each other and what the trustees give to one is his alone.”

G LORD MORRIS OF BORTH-Y-GEST and LORD GUEST concurred in the speech of LORD REID. LORD WILBERFORCE, with whose speech LORD HODSON concurred, did not say anything about the “composite class” theory, but there is nothing in his speech to indicate that he dissented in any way from LORD REID’s view. I do not think that that view was part of the ratio decidendi of the *Gartside* case (10), but even if I disagreed with it I would hesitate to dissent from it. In fact, however, if I may say so, I agree with it entirely. The objects of a discretionary trust—together if there is a power of accumulation with those interested in capital—may no doubt be said to be collectively the persons interested in the income as it accrues before the trustees have decided how to deal with it. But they do not have concurrent interests in the income. They have separate interests in it which are individually unquantifiable, though added together they cover the whole. In the immediately following passage in his speech LORD REID pointed out that the considerations applying to discretionary trusts under which the trustees have to distribute all the income may not be in all respects the same as those applicable to discretionary trusts under which there is a power to add income to capital instead of distributing it. I shall have to come back to this distinction in a moment; but I do not think that LORD REID was intending to suggest that the distinction was relevant to his discussion of the “group” theory. Even if

(10) [1968] 1 All E.R. 121; [1968] 2 W.L.R. 277.

(11) For s. 43 of the Finance Act, 1940, as amended, see 29 HALSBURY’S STATUTES (2nd Edn.) p. 183.

(12) [1968] 1 All E.R. at p. 127; [1968] 2 W.L.R. at pp. 284, 285.



the trust is exhaustive and there is no power to withhold income the objects have individual competing interests, not concurrent interests in the income. A

Indeed, counsel on both sides accepted that in seeking to apply s. 2 (1) (b) of the Finance Act, 1894, to the facts of this case it could not be suggested that Mr. and Mrs. Hoare formed a group which had a single interest in the income ceasing on the death of Mr. Hoare, but that the argument must proceed on the footing that such interests as they may have had during their joint lives were separate competing interests. On that footing, counsel for the taxpayers submitted that Mr. Hoare had an interest in the income of the trust fund which ceased on his death, and that on his death a benefit accrued or arose to Mrs. Hoare by reason of its cesser. The property therefore passed to the extent of the benefit. As the value of the benefit could not be quantified, no duty was payable; but the fact that there was a claim—albeit a valueless claim—for duty under s. 2 (1) (b) precluded any separate claim under s. 1, assuming such a claim to be possible in any case. Counsel for the Crown, on the other hand, submitted that Mr. Hoare and Mrs. Hoare both had interests in the income of the fund which ceased on the death of Mr. Hoare; that the cesser of their two interests caused two benefits to accrue or arise; and that in applying s. 7 (7) to the case one could add the two interests ceasing together so as to arrive at a benefit extending to the whole income of the property. B C D

These arguments have to be considered in the light of the *Gartside* case (13). In that case, over and above what LORD REID said about the “group” theory, two points were decided. They were (a) that the discretionary objects in the case before the House had not anything which could fairly be described as an “interest”—and a fortiori not an “interest in possession”—in the income of the fund, and (b) that no interest can be an interest ceasing on death within the meaning of s. 2 (1) (b) unless it extends either to the whole income of the property or to a defined part of the income of the property (see on this latter point LORD REID (14) and LORD WILBERFORCE (15)). E

Now it is true that both LORD REID and LORD WILBERFORCE, who delivered the only speeches, stressed the fact that they were dealing with a discretionary trust under which the trustees were not bound to distribute all the income but could accumulate any or all of it, and expressly reserved the question whether their decision would apply to what one may call an exhaustive discretionary trust, such as this is, under which all the income has to be distributed as it accrues. I can well see that this distinction may have a bearing on point (a). If Mr. and Mrs. Hoare had assigned to a third party all the income of the trust fund to accrue during their joint lives and the life of the survivor or the earlier birth of a child of the marriage, the trustees would have been obliged to pay this income to the third party during that period. One might, I suppose, regard Mr. and Mrs. Hoare as having something analogous to a joint power over the income in question without any underlying property in the income; but it is certainly more natural to regard each of them as having an interest in an undefined portion of the income ceasing on the death of Mr. Hoare. F G H

In view of the reservations in the *Gartside* case (13) with regard to exhaustive discretionary trusts, I would be prepared to hold that Mr. Hoare had something which could sensibly be described as an interest ceasing on his death in the income of the fund. But the view expressed both by LORD REID and by LORD WILBERFORCE that s. 2 (1) (b) has no application to any interests ceasing on death which are not interests either in the whole or a measurable part of the income of the fund must, as I see it, exclude interests under exhaustive discretionary trusts from the ambit of s. 2 (1) (b) just as much as it excludes “non-exhaustive” discretionary trusts. The presence or absence of a power of or a trust for accumulation of undistributed income seems to be irrelevant to the question of construction I

(13) [1968] 1 All E.R. 121; [1968] 2 W.L.R. 277.

(14) [1968] 1 All E.R. 126; [1968] 2 W.L.R. at p. 283.

(15) [1968] 1 All E.R. at p. 133; [1968] 2 W.L.R. at pp. 293, 294.

A of the section. If this is so, then the argument for the taxpayer under s. 2 (1) (b) must fail because Mr. Hoare had no such interest ceasing on his death as is contemplated by the sub-paragraph.

The argument for the Crown on this branch of the case is open to various further objections. Assuming that Mrs. Hoare's interest under the discretionary trust during the joint lives can be described as an interest ceasing on the death of Mr. Hoare when it was enlarged into a pure life interest, I am unable to see how any benefit accrued in respect of the cesser of that interest over and above the benefit which accrued on the death of Mr. Hoare on the cesser of his own interest. That interest, taken by itself, was not within the sub-paragraph because the benefit arising on its cesser was not measurable.

Further, even if there were two benefits arising, I cannot see how one could amalgamate the two cessers and the two benefits so as to produce a single benefit extending to the whole income. To do so would be to introduce the exploded "group" theory by a back door. As I see it, the House of Lords, by rejecting the "group" theory and by holding that no interest is within s. 2 (1) (b) unless it is an interest in the whole or a defined part of the income, has in effect held that s. 2 (1) (b) is inapplicable to interests under discretionary trusts both on the death of a single object of a continuing trust and on the death of someone, whether an object or not, on which the trust is brought to an end.

I turn now to the claim under s. 1, assuming for the time being that a claim under s. 1 in circumstances which do not fall under any head in s. 2 is possible. On this aspect of the case the Crown relied on the *Burrell* case (16), to which I have referred, and also and more particularly on *Scott v. Inland Revenue Comrs.* (17). In the *Scott* case (17) the essential facts were that by the joint effect of a number of documents the Cadogan estates were held during the life of the sixth earl, who succeeded to the title in 1915, on discretionary trusts for the benefit of the sixth earl, his wife, his children and remoter issue, and subject thereto on trust to accumulate the income for the discharge of incumbrances, and after the death of the sixth earl, which occurred in 1933, for his son the seventh earl as tenant in tail in possession. There it was held that the whole property passed on the death of the sixth earl under s. 1 notwithstanding the fact that the seventh earl had been an object of the discretionary trust during his father's lifetime. Here, the commissioners argued, there was a discretionary trust during the joint lives of Mr. and Mrs. Hoare followed on the death of Mr. Hoare by a life interest to Mrs. Hoare, and the fact that Mrs. Hoare was an object of the discretionary trust during her husband's lifetime could not prevent the trust fund from passing on Mr. Hoare's death. In this case, of course, Mrs. Hoare was the primary object of the discretionary trust during the joint lives and was in fact the sole recipient of all the income, but the Crown contended that this could not make any difference in principle, and counsel for the taxpayer was, I think, disposed to agree that it did not.

The ground, or at all events the chief ground, on which counsel for the taxpayers sought to distinguish the *Scott* (17) and *Burrell* (16) cases was that in them there were two entirely separate trusts—one operating before the death, the other taking its place after the death—whereas here cl. 4 of the settlement declared a single discretionary trust. If there are three objects of a discretionary trust and one dies, admittedly no duty is payable. Why should duty become payable when one of two objects dies? To reinforce his argument, counsel relied strongly on a passage in the judgment of RUSSELL, L.J., in the *Kirkwood* case which reads as follows (18):

"I think in this connexion that while mere form may not be a deciding factor in the incidence of estate duty, methods adopted may be. If under a

(16) [1936] 3 All E.R. 758; [1937] A.C. 286.

(17) [1936] 3 All E.R. 752; [1937] A.C. 174.

(18) [1964] 3 All E.R. at p. 792; [1965] Ch. at p. 328.

settlement the settlor creates in terms during the life of A a discretionary trust of income for such of A, B, C, D and E as should from time to time be living and the issue of any who should be dead, and then proceeds to declare from and after the death of A a further discretionary trust of income until a further occasion for such of B, C, D and E as should from time to time be living and the issue of any who should be dead and the issue of A, estate duty would be chargeable on A's death. But if he had adopted ab initio the method of a discretionary trust until that further occasion for such of A, B, C, D and E as should from time to time be living and the issue of any who should be dead, estate duty would not be chargeable on A's death."

Here, said counsel, although the trust might have been framed in such a way as to cause a passing on the death of Mrs. Hoare, framed as it was there was no such passing. I cannot accept that argument. It is true that cl. 4 says that the discretion of the trustees as to the payment or application of the income is to extend throughout the trust period, but in fact it would necessarily end not only when there were no longer any objects in existence but also during such periods as there was only one object. On Mr. Hoare's death the trustees ceased to have any discretion but became bound to pay the income to Mrs. Hoare. To make sense of the clause one must really read in after the words "in their absolute discretion think fit" some such words as "so long as there are at least two objects and during such period or periods as there are only one pay the income to that one".

This consideration seems to me to distinguish this case from the type of case envisaged by RUSSELL, L.J. Here, one is not re-writing the clause in order to give a life interest to Mrs. Hoare as from the death of Mr. Hoare. The clause itself, properly construed, gives her such a life interest and by no ingenuity could it have been framed in a way which did not produce this result. Consequently, I think that this case is on all fours with the *Scott* case (19).

I turn now to consider whether there can in fact be a passing under s. 1 of the Act in circumstances not falling within any of the heads of s. 2 (1). In the *Arnholz* case (20), LORD SIMONDS and LORD RADCLIFFE, who gave the leading speeches, both pointed out how unlikely it was that Parliament, when it enacted the Finance Act, 1894, would have failed to explain what it meant by the novel expression "property passing on the death". They rejected LORD MACNAGHTEN'S view as to the limited scope of the word "deemed", pointing out that it could properly be used to include not only the impossible but also the obvious and the uncertain. Approaching s. 2 (1) in that way, they were able to give the words in paras. 1 (a) and (b) their natural wide meaning and not the forced narrow meaning given to them by LORD MACNAGHTEN. Thus para. (a) instead of being confined to the case of an unexercised general power of appointment, covered as well all property to which the deceased was absolutely entitled, and para. (b), instead of being confined to the cesser on death of charges on income, covered the cesser of all forms of life interest. Paragraph (c) brings into charge property which, having been given away before the death, does not "pass" on the death in any ordinary sense of the word at all. Paragraph (d) brings into charge types of property which some people might think did and others might think did not pass on the death in the ordinary sense of the word. Thus paras. (a) and (b) are examples of the obvious and cover all the ordinary cases; para. (c) is an example of the impossible, and para. (d) of the uncertain.

The natural conclusion to draw from this method of approach would be that s. 2 provided an exhaustive explanation, by inclusion and exclusion, of the property which was to be charged with the duty granted by s. 1, as indeed the marginal note says it does. Moreover, although he reserved the point, I think that LORD SIMONDS, at any rate, thought that the explanation was exhaustive. Thus he said (21):

(19) [1936] 3 All E.R. 752; [1937] A.C. 174.

(20) [1960] 1 All E.R. 1; [1960] A.C. 398.

(21) [1960] 1 All E.R. at p. 4; [1960] A.C. at p. 408.



A “My lords, if I were today looking at this Act for the first time, I should say that these sections were straightforward and clear, the first section imposing the charge in general terms and the second defining by inclusion and exclusion the precise area of that charge.”

B Indeed, to hold that s. 2 explains the meaning of “passing on the death” in s. 2 (1) but does not explain it exhaustively would be to attribute to Parliament a most unlikely intention—far more unlikely than that attributed to it by LORD MACNAGHTEN. If I may use homely language, Parliament on this view would be saying to the taxpayer and the revenue authorities: “You have never heard the words ‘passing on the death’ before. You will, of course, need help as to their meaning, and that help we are giving you in s. 2 (1). Paragraph (a) and (b) cover all the ordinary cases, and you might very likely have concluded that they were included even if we had given no explanation and had left s. 1 to stand alone. Paragraph (c) includes a case which you would certainly never have thought was included. Paragraph (d) covers cases which you might or might not have thought were included. No doubt there may be other borderline cases where some people might think the property ‘passed’ on the death while others might not. As we say nothing about any other borderline cases, you might naturally suppose that they are not in any event to be included, but you would be wrong. We wish the question—*ex hypothesi* it will be a difficult question—whether any other borderline case is or is not included to be decided by the courts in proceedings which will probably go up to the House of Lords without any help from us.” It would be ironic indeed if the endeavour made by the House of Lords in the *Arnholz* case (22) to put a rational construction on s. 1 and s. 2 of the Finance Act, 1894, were to end in their being construed in so totally irrational a fashion.

E I turn now to consider whether there is anything in the cases decided since the *Arnholz* case (22) which would preclude me from holding that there can be no passing under s. 1 in circumstances which do not fall under any head in s. 2 (1). I do not think that there is, for the point has never been argued. In some cases, judges have assumed that a separate claim under s. 1 was possible—LORD REID so assumed in the *Gartside* case (23)—but sometimes judges have expressly envisaged the possibility that no such claim could be made (see, for example, per RUSSELL, L.J., in the *Kirkwood* case (24)). There has apparently been only one case in which it made a difference to the result whether s. 1 or s. 2 (1) (b) applied. That was the case of *Re Harris* (25); but there counsel who was contending for the application of s. 2 (1) (b) did not argue that a passing under s. 1 alone was impossible.

G If, therefore, the matter rested there I would, I think, have been able to give effect to my own view of the matter and hold that any claim by the Commissioners of Inland Revenue under s. 1 alone must fail. But the matter does not rest there. Although the claim of the commissioners is far less meritorious in this case than it was in the *Burrell* (26) and *Scott* (27) cases, I cannot (as I have said) draw any distinction in principle between those cases and this case. Further, the decisions in those cases are clearly binding on me. It is no doubt true that in deciding those cases under s. 1 alone the House of Lords was taking a view of the relationship of s. 1 and s. 2 (1) which must now be considered to have been to some extent at least erroneous, and if I could see that the same result could have been achieved under s. 2 (1) (b) I might be prepared to view them as decisions in which the right result was reached for the wrong reason. But, as I have already said, the decision in the *Gartside* case (23) as I read it shows that s. 2 (1) (b) is not applicable to the cesser of a discretionary trust.

(22) [1960] 1 All E.R. 1; [1960] A.C. 398.

(23) [1968] 1 All E.R. 121; [1968] 2 W.L.R. 277.

(24) [1964] 3 All E.R. at p. 791; [1965] Ch. at p. 328.

(25) [1966] 1 All E.R. 677; [1966] Ch. 475.

(26) [1936] 3 All E.R. 758; [1937] A.C. 286.

(27) [1936] 3 All E.R. 752; [1937] A.C. 174.

The truth, as I see it, is that Parliament in 1894, in giving an exhaustive explanation of what it meant by "passing on the death", failed to take discretionary trusts into account at all, either from the point of view of the death of one object of a continuing trust or from the point of view of the cesser of the discretionary trust as a whole on some death. It is not in the least surprising that Parliament should have been guilty of this omission, for in 1894 it must have been rare for a testator or settlor to create an immediate discretionary trust of income. But though no doubt it would be open to the House of Lords to give effect to this view—if they shared it—and so force the authorities to undertake the task of recasting this part at least of the law of estate duty, it is certainly not open to me to give effect to it. All that I can do is to say that in view of the *Burrell* (28) and *Scott* (29) cases I am bound to hold that duty is payable, but that in view of the *Arnholz* (30) and *Gartside* (31) decisions I can find no satisfactory reason why duty should be payable.

*Declaration accordingly.*

Solicitors: *Currey & Co.* (for the plaintiffs); *Solicitor of Inland Revenue.*

[Reported by JACQUELINE METCALFE, Barrister-at-Law.]

## INLAND REVENUE COMMISSIONERS *v.* HAGUE (Married Woman). HAGUE *v.* INLAND REVENUE COMMISSIONERS.

[COURT OF APPEAL, CIVIL DIVISION (Danckwerts, Salmon and Fenton Atkinson, L.JJ.), May 13, 14, 15, 1968.]

*Surtax—Tax advantage—Counteracting—Conclusiveness of finding of main object by Special Commissioners—Return of capital and capitalisation of profits—Bona fide commercial transaction—One of main objects found to be tax advantages to stockholders generally—Not a finding which no reasonable man could reach—What fraction of payment to stockholder quantified to counteract tax advantage—Finance Act, 1960 (8 & 9 Eliz. 2 c. 44), s. 28 (1), (3).*

*Surtax—Tax advantage—Counteracting—Married woman not separately assessed—Return of capital and capitalisation of profits—Notice served on married woman—Whether she obtained tax advantage—Whether notice valid—Finance Act, 1960 (8 & 9 Eliz. 2 c. 44), s. 28 (1), (3), s. 43 (4) (g).*

Following the sale of two of its four mills under a Government scheme for reduction of capacity and modernisation in the cotton spinning industry, a cotton spinning company (to which s. 23 of the Finance Act, 1960, applied) had the right to compensation of £112,976 in respect of the mills and machinery disposed of, but became liable to a levy of £58,986. At that time the company's issued share capital consisted of £284,235 ordinary stock. It had assets, realisable on a liquidation, of £1 million or £3 10s. for each £1 of stock, revenue reserved (in the previous year) of £594,929, and an excess of cash, tax reserve certificates and a market value of investments over current liabilities, including taxation provision, of £228,696. The reduction in its production capacity and increasing use of man-made fibres (ordered monthly instead of six-monthly with cotton, resulting in a lower holding of stocks) had reduced the requirement for working capital, and the company had money surplus to requirements. It was decided to repay £284,235 to stockholders (equal to the amount of stock issued) as surplus to the company's requirements and by way of reduction of capital. To enable

(28) [1936] 3 All E.R. 758; [1937] A.C. 286.

(29) [1936] 3 All E.R. 752; [1937] A.C. 174.

(30) [1960] 1 All E.R. 1; [1960] A.C. 398.

(31) [1968] 1 All E.R. 121; [1968] 2 W.L.R. 277.

A that to be done it was decided to capitalise certain funds and issue bonus shares; the sole purpose of these was to put the company in a position to pay out the £284,235 by way of reduction of capital. Tax considerations were borne in mind in deciding on the method, and in particular the surtax liability which would have fallen on stockholders if the payment were made by way of dividend. Thus the company resolved in November, 1959, on

B sub-division of its shares into 5s. ordinary shares and—(i) to capitalise £189,490 made up of £129,490 part of the balance of profits (in the profit and loss account) and £60,000 (in a capital redemption reserve fund), and (ii) to distribute that sum as a bonus in the form of 757,960 ordinary shares of 5s. each to existing stockholders. In the result the issued share capital of the company became £473,725 ordinary stock.

C About a year later the company resolved on reduction and increase of capital—(a) to reduce the capital from £473,725 ordinary stock to £234,842 10s. by returning 12s. for every £1 of that stock and reducing the nominal amount of every £1 of it to 8s.; and (b) to increase the capital of the company again to £519,077 10s. by creating 1,136,940 new ordinary shares of 5s. each. Stockholders received £284,235 under the resolution. H., a stockholder,

D received £24,022 10s. and his wife (not separately assessed to tax) received £7,500. The Commissioners of Inland Revenue served notices on both stockholders under s. 28\* of the Finance Act, 1960, specifying in the case of the first stockholder certain adjustments of the computation of his liability to surtax as being requisite for counteracting tax advantages obtained by him, and in the case of his wife certain adjustments to the computation of

E the joint total income of her husband and herself as being requisite for counteracting tax advantages obtained by her. On appeal, the Special

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\* The relevant provisions of s. 28 were—

F “(1) Where—(a) in any such circumstances as are mentioned in the next following subsection, and (b) in consequence of a transaction in securities or of the combined effect of two or more such transactions, a person is in a position to obtain, or has obtained a tax advantage, then unless he shows that the transaction or transactions were carried out either for bona fide commercial reasons or in the ordinary course of making or managing investments, and that none of them has as their main object, or one of their main objects, to enable tax advantages to be obtained, this section shall apply to him in respect of that transaction or those transactions . . .

G “(2) The circumstances mentioned in the foregoing subsection are that— . . . (c) the person in question receives, in consequence of a transaction whereby any other person— (i) subsequently receives, or has received, an abnormal amount by way of dividend; or (ii) subsequently becomes entitled, or has become entitled, to a deduction as mentioned in para. (b) of this subsection, a consideration which either is, or represents the value of, assets which are (or apart from anything done by the company in question would have been) available for distribution by way of dividend, or is received in respect of future receipts of the company or is, or represents the value of, trading stock of the company, and the said person so receives the consideration that he does not pay or bear tax on it as income; or (d) in connection with the distribution of profits of a company to which this paragraph applies, the person in question so receives as is mentioned in para. (c) of this subsection such a consideration as is therein mentioned. In this subsection—(i) references to profits include references to income, reserves or other assets, (ii) references to distribution include references to transfer or realisation (including application in discharge of liabilities), and (iii) references to the receipt of consideration include references to the receipt of any money or money's worth, but the assets mentioned in para. (c) of this subsection do not include assets which (while of a description which under the law of the country in which the company is incorporated is available for distribution by way of dividend) are shown to represent a return of sums paid by

H subscribers on the issue of securities: . . .

I “(3) Where this section applies to a person in respect of any transaction or transactions, the tax advantage obtained or obtainable by him in consequence thereof shall be counteracted by such of the following adjustments, that is to say an assessment or additional assessment, the nullifying of a right to repayment or the requiring of the return of a repayment already made (the amount to be returned being chargeable under Case VI of Sch. D and recoverable accordingly), or the computation or recomputation of profits or gains, or liability to tax, on such basis as the Commissioners of Inland Revenue may specify by notice in writing served on him as being requisite for counteracting the tax advantage so obtainable or obtained.”



Commissioners found, among other findings, that enabling tax advantage to be obtained was one of the main objects of the transactions. They also found that Mrs. H. was not in a position to obtain and had not obtained a tax advantage.

**Held:** (i) under s. 28 (1) of the Finance Act, 1960, the onus was on the taxpayer to show that his case fell within exempting conditions stated in the subsection, and, as it was impossible to maintain that the commissioners could not reasonably have reached the conclusion that one of the main objects of the transactions was enabling tax advantage to be obtained, the notice served on the first taxpayer should stand (see p. 1260, letter I, p. 1262 letter F, and p. 1264, letter H, post).

(ii) the appropriate fraction of the repayment of capital by the company to H. which was attributable to the tax advantage obtained by H. was 129,490/284,235 and not 129,490/473,725 as determined in the court below, the denominator being the amount distributed and not the then capital of the company (see p. 1261, letter B, p. 1263, letter G, and p. 1264, letter H, post).

(iii) the second taxpayer, H.'s wife, had not received any tax advantage (as defined in s. 43 (4) (g)\*) for the purposes of s. 28 (3) of the Act of 1960, since she, being a married woman living with her husband, was not assessable to income tax, and the first taxpayer, her husband, could not be charged because there had been no receipt by him of the capital repayment in respect of his wife's shares, as that had been paid to her, so that the relevant requirement of s. 28 (2) was not satisfied and the notice served on her should be cancelled (see p. 1261, letter F, p. 1262, letter C, and p. 1264, letters C and H, post).

*Inland Revenue Comrs. v. Brook* ([1967] 3 All E.R. 620) not followed.

Decision of Cross, J. ([1968] 1 All E.R. 1096) affirmed on (i) and reversed on (ii) and (iii) above.

[As to the counteracting of tax advantages, see SUPPLEMENT TO 20 HALSBURY'S LAWS (3rd Edn.) para. 276A; and for cases on the subject, see DIGEST (Cont. Vol. B) 429, 1613g, 1613b.]

For the Finance Act, 1960, s. 28 and s. 43, see 40 HALSBURY'S STATUTES (3rd Edn.) 447, 465.]

Cases referred to:

*Inland Revenue Comrs. v. Brebner*, [1967] 1 All E.R. 779; [1967] 2 A.C. 18; [1967] 2 W.L.R. 1001; Digest (Repl.) Supp.

*Inland Revenue Comrs. v. Brook*, [1967] 3 All E.R. 620; [1968] Ch. 255; [1967] 3 W.L.R. 1320; Digest (Repl.) Supp.

### Appeal.

Notice under s. 28 of the Finance Act, 1960†, had been served by the Commissioners of Inland Revenue on the first taxpayer, Mr. W. T. Hague, and like notice had been so served on the second taxpayer, his wife. Each notice specified adjustments in the computation of the first taxpayer's total income (or the taxpayers' joint total income) for surtax purposes for the year 1960/61 as being requisite for counteracting tax advantage obtained by him or her. Each taxpayer had appealed separately to the Commissioners for Special Purposes of the Income Tax Acts under s. 28 (6). From their decision in the appeal of the first

\* Section 43 (4), so far as relevant, provided: "(f) 'securities' include shares, 'shares', except where the context otherwise requires, includes stock, and references to dividends include references to interest; (g) 'tax advantage' means a relief or increased relief from, or repayment or increased repayment of, income tax, or the avoidance or reduction of an assessment to income tax or the avoidance of a possible assessment thereto, whether the avoidance or reduction is effected by receipts accruing in such a way that the recipient does not pay or bear tax on them, or by a deduction in computing profits or gains."

† Section 28, so far as material, is set out at footnote \*, p. 1253, ante.

A taxpayer he appealed to the High Court, and from their decision in the appeal of the second taxpayer the Crown appealed to the High Court. The facts found in the Cases Stated were substantially similar. The following passages in the Case Stated in the appeal of the first taxpayer, Mr. Hague, were read by DANCKWERTS, L.J., in his judgment—

B “2. Shortly stated, the questions for our determination were: (i) whether certain transactions in securities by Hagues Textiles, Ltd. (hereinafter called ‘the company’) were carried out for bona fide commercial reasons and whether none of them had as their main object, or one of their main objects, to enable tax advantages to be obtained; (ii) whether certain distributions by the company represented a return of sums paid by subscribers on the issue of securities within s. 28 (2) (iii) [of the Finance Act, 1960].

C “4. (1) The company was incorporated in 1945 to purchase and acquire the businesses of three cotton spinning companies, and it has since carried on business as cotton and artificial fibre spinners. At all material times it was a company to which para. (d) of s. 28 (2) [of the Act of 1960] applied.

D “(2) Originally, the company operated five mills. One (Stockfield Mill) was sold in 1954, leaving the company with Orb Mill, Vale Mill, Hawthorn Mill and Ram Mill. During the 1950’s the company recognised that it needed to modernise and re-equip its mills; the necessary re-equipment would require large resources which the company could not command, and the directors had in contemplation cutting down capacity and concentrating on Ram Mill, which was the most modern.

E “(3) In May, 1959, a government White Paper was published containing proposals for a reduction of capacity in the industry generally, a plan for compensation for machinery scrapped, a subsidy for modernisation, and a levy. The directors of the company welcomed this and despite the opposition of some of the stockholders (see sub-para. (4) below) Orb Mill and Vale Mill were disposed of, part of their machinery being transferred to Ram Mill, which was re-equipped by scrapping mules and substituting ring spindles. Hawthorn Mill was kept in operation being considered to have some useful years of life left. The company received compensation under the Cotton Industry Act, 1959, amounting to £112,976 in respect of the mills and machinery disposed of; it also became liable to levies under the Act which, in the event, totalled £58,986.

G “(4) During the discussions concerning the re-organisation of the company’s business some of the stockholders (who numbered thirty-two in all) were in favour of putting the company into liquidation; it was estimated that the total amount realisable on a liquidation would be about £1m, which would represent nearly £3 10s. for each £1 of stock. The majority of the directors however considered that rationalisation would produce further profits.

H “(5) The company’s balance sheet as at Apr. 4, 1959, shows revenue reserves of £594,929. The total of its cash (in hand or at bank), tax reserve certificates and the market value of its investments exceeded its current liabilities (including taxation provision) by £252,885; the corresponding figure as at Apr. 2, 1960, was £228,696. In addition the company anticipated receiving about £112,000 compensation, against which it would have to set the levies becoming payable. The reduction in capacity, together with a gradually increasing use of man-made fibres (which it can order monthly instead of six monthly as is the case for cotton, resulting in lower holding of stocks) reduced the requirement for working capital. The company thus had money surplus to its requirements.

I “(6) It was decided that £284,235 should be paid out to stockholders, such money being surplus to the company’s requirements. This sum was equal to the amount of stock then issued (see para. 5 (2) below). It was

further decided that this payment should be made by a return of money to stockholders in a reduction of capital; to enable this to be done it was arranged first to capitalise certain funds and issue bonus shares (to be converted when issued into stock). The details of what was done are set out in para. 5 below.

"(7) At the time when this was arranged, there was no question of the company either requiring further capital, or being over-capitalised. The sole purpose of capitalisation and issue of bonus shares was to put the company into a position to pay out £284,235 by means of a reduction of capital, and the sole purpose of reducing the capital was to pay over to stockholders money which was considered surplus to the company's requirements. There was no question of paying out the money by way of dividend because that course would have attracted surtax in the hands of the stockholders, and for that reason it was rejected. It was not disputed that tax considerations were borne in mind when the decision as to how the matter should be arranged was made.

"(8) The decisions were communicated to the stockholders in two letters by the chairman\*.

"5. (1) Shortly after its incorporation, the issued capital of the company consisted of £60,000 redeemable preference stock and £378,980 ordinary stock. In 1950, £94,745 was repaid to the ordinary stockholders consequent upon a reduction of capital whereby 2s. 6d. in each 10s. of stock held by them was repaid, leaving £284,235 ordinary stock in issue.

"(2) Immediately prior to the meeting of the company referred to in sub-para. (3) below the authorised capital of the company consisted of £60,000 redeemable preference stock, £284,235 ordinary stock in units of 7s. 6d. each, £174,842 10s. in 349,685 10s. ordinary shares, which were unissued. This totals £519,077 10s. The £60,000 preference stock had been redeemed, and the issued capital therefore consisted of £284,235 ordinary stock. There was a capital redemption reserve fund of £60,000.

"(3) At an extraordinary general meeting of the company held on Nov. 25, 1959, the following resolutions were passed: 1. That each of the existing unissued ordinary shares of 10s. each in the capital of the company be sub-divided into two shares of 5s. each. 2. That the £60,000 unclassified capital (resulting from the redemption of £60,000 five per cent. uncumulative redeemable preference stock) be classified as 240,000 ordinary shares of 5s. each. 3. That it is desirable to capitalise the sum of £189,490 being as to £129,490 [that is an important sum] part of the undivided profits of the company standing to the credit of the company's profit and loss account and as to £60,000 the capital redemption reserve fund and accordingly that such sum of £189,490 made up as aforesaid be distributed as a bonus amongst the persons who on Nov. 2, 1959, were the holders of ordinary stock of the company, and that such bonus be not paid in cash, but be applied on behalf of such stockholders in payment in full for 757,960 ordinary shares of the company of 5s. each and that such ordinary shares credited as fully paid up be accordingly allotted to such stockholders respectively in the proportion of one of such shares for every 7s. 6d. of ordinary stock then held by such stockholders respectively, and such distribution shall be accepted by such stockholders in full satisfaction of their interest in the said capitalised sum. 4. That the said 757,960 ordinary shares in the capital of the company when issued fully paid up be converted into ordinary stock.

"As a result, the authorised capital of the company was left as: £473,725 ordinary stock (all issued), [and] £45,352 10s. in £181,410 5s. ordinary shares (none issued).

"(4) At an extraordinary general meeting of the company held on Nov. 9,

\* These two letters were exhibited to the Case Stated.



A 1960, the following special resolutions were passed: 1. That the capital of the company be reduced from £519,077 10s. divided into £473,725 ordinary stock and 181,410 ordinary shares of 5s. each to £234,842 10s. divided into £189,490 ordinary stock and 181,410 ordinary shares of 5s. each and that such reduction be effected by returning to the holders of the £473,725  
B ordinary stock capital paid up on such stock to the extent of 12s. for every £1 ordinary stock held by them (being capital in excess of the wants of the company) and by reducing the nominal amount of every £1 of ordinary stock from £1 to 8s. 2. That immediately and contingently upon such reduction of capital taking effect, the capital of the company be increased to its former amount of £519,077 10s. by the creation of the 1,136,940 new ordinary shares of 5s. each.

C "The reduction of capital was confirmed by the court on Nov. 28, 1960.

"(5) The amount returned to stockholders pursuant to this resolution was £284,235.

"6. (1) Prior to the resolution of November, 1959, [the first taxpayer] held £24,022 10s. stock, and consequent thereto there was allotted to him 64,060 shares, which were converted into £16,015 stock (bringing his holding  
D to £40,037 10s. stock). Upon the reduction of capital in November, 1960, he received £24,022 10s., being 12s. for every £1 of stock held by him.

"(3) The method of calculation of the adjustments to [the first taxpayer's] liability to surtax for 1960-61 set out in the notice was not in issue between the parties."

E In the appeal to the commissioners by the second taxpayer, Mrs. Hague, the commissioners found (para. 6 (1), (2)) that she was at all relevant times a married woman living with her husband, and was not separately assessed to surtax. Prior to the resolution of November, 1959, she held £7,500 stock, and consequent thereto there was allotted to her twenty thousand shares, which were converted into £5,000 stock (bringing her holding to £12,500 stock). On the reduction of capital in November, 1960, she received £7,500, being 12s. for every £1 of stock held by her.

F The commissioners further found that the method of calculation of the adjustments to the computation of joint total income set out in the notice under s. 28 of the Act of 1960 was not in issue between the parties.

The contention of the taxpayers before the commissioners were as follows—

G "7. It was contended on behalf of [the first taxpayer] (i) that the £284,235 paid to stockholders pursuant to the resolution of November, 1960, represented a return of sums paid by subscribers on the issue of securities within s. 28 (2) (iii), in as much as prior to the resolution of November 1959, £284,235 stock was issued, and that accordingly the notice should be cancelled; (ii) that the transactions detailed in the notice were carried out for bona fide commercial reasons and that none of them had, as their main object or one  
H of their main objects, to enable tax advantages to be obtained and that accordingly the notice should be cancelled."

The same contentions, *mutatis mutandis*, were advanced before the commissioners on behalf of the second taxpayer, Mrs. Hague, and in addition —

I "that [the second taxpayer] had not obtained any tax advantage in consequence of the transactions in question; and s. 28 [of the Finance Act, 1960] accordingly had no application to her and that the notice should be cancelled."

It was contended before the commissioners on behalf of the Crown:

"8. (1) That the transactions were not carried out for bona fide commercial reasons; (2) that the main object, or one of the main objects, of the transactions was to enable tax advantages to be obtained; (3) that it had not been shown that, in the case of [the first taxpayer] the money paid to him . . . represented a return of sums paid by them on the issue of securities; (4) that such part of the £284,235 paid out to stockholders as

did not exceed the sum capitalised pursuant to the resolution of November, 1959, did not represent a return of sums paid by subscribers on the issue of securities; and (5) that the notice should be confirmed."

The contentions of the Crown before the commissioners in the appeal of the second taxpayer were the same except for (3) above, which did not apply, and in addition the Crown contended that the second taxpayer had obtained a tax advantage in consequence of the transactions.

The findings of the commissioners in the appeal of the first taxpayer were as follows:

"9. We found that the occasion which gave rise to the transactions in question was the reorganisation of the company's business, which would result in the company having assets surplus to its requirements; a further consideration influencing the company's directors was the preference expressed by some stockholders for a liquidation, it being expected that a payment out would satisfy them. Looking at the transactions broadly, their main purpose was to pay out surplus money to stockholders and this was achieved by a bonus issue followed by a return of capital. Section 28, however, required us (in our opinion) to ask ourselves whether it had been shown that none of the transactions detailed in the notice had as their main object, or one of their main objects, to enable tax advantages to be obtained. We concluded that this had not been shown. It was not disputed that a tax advantage was obtained, and looking at all the evidence we found that enabling such advantages to be obtained was one of the main objects of the transactions. We held that so much of the money paid to stockholders as did not exceed the sum capitalised pursuant to the resolution of November, 1959, did not represent a return of sums paid by subscribers on the issue of securities. We confirmed the notice."

In the appeal of the second taxpayer the commissioners found also as follows—

"We held, however, that Mrs. Hague [the second taxpayer] was not a person who was in a position to obtain or had obtained a tax advantage within the meaning of s. 28. In our view the reference in the section to a person who 'has obtained' a tax advantage must, in the context, mean a person who has obtained it for himself or herself, and [the second taxpayer] was not such a person by reason of a tax advantage having accrued not to her but to her husband. We accordingly cancelled the notice\*."

On Dec. 21, 1967, Cross, J., as reported at [1968] 1 All E.R. 1096, upheld the commissioners' finding that the first taxpayer had obtained a tax advantage and that the notice served on him was valid, but quantified his tax advantage at the fraction of the capital repayment to him expressed by the figures 129,490/473,725. Cross, J., further held that the second taxpayer, Mrs. Hague, was liable to be served with a notice under s. 28 of the Finance Act, 1960.

Mrs. Hague, the first taxpayer, appealed for an order that the order of Cross, J., be set aside or varied with effect that the determination of the commissioners be set aside and the notice served on him under the Finance Act, 1960, s. 28, be cancelled. The order of Cross, J., had allowed the appeal by the first taxpayer from the determination of the commissioners and remitted the case to them to vary the notice. The Crown appealed for the affirmation of the determination of the commissioners and the restoration of the notice in the form in which it was served on the first taxpayer.

Mrs. Hague, the second taxpayer, appealed for an order that the order of Cross, J., be reversed or varied. The order had allowed an appeal by the Crown from the determination of the commissioners and remitted the case to the commissioners to restore and vary the notice served on the second taxpayer

\* The power to cancel is conferred by s. 28 (9) of the Finance Act, 1960.

A under the Finance Act, 1960, s. 28 (which the commissioners by their determination had cancelled). The Crown appealed for the variation of the order of Cross, J., and for an order that the notice be restored in the form in which it was served and be not varied.

*Arthur Bagnall, Q.C., and J. R. Phillips Q.C., for the Crown.*

*H. Major Allen, Q.C., and B. Pinson for the taxpayers.*

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DANCKWERTS, L.J.: These are appeals from a judgment of Cross, J. (1), dated Dec. 21, 1967, which affirmed in part and reversed in part the determinations of the Special Commissioners. A Case was stated by the commissioners in each of the two hearings before them which were in respect of notices served by the Commissioners of Inland Revenue pursuant to s. 28 of the Finance Act, 1960. The facts are largely common to the two cases because both the first taxpayer, Mr. William T. Hague, and the second taxpayer, his wife, were shareholders in Hague's Textiles, Ltd., which was not only a prosperous company but also one which received a large sum (about £113,000) in respect of the disposition of redundant cotton mills in 1959. The matter concerns the distribution of large sums by the company to the shareholders, and the questions to be decided arise out of notices served by the Commissioners of Inland Revenue for the purpose of "counteracting the tax advantages", as the phrase goes in the Act of 1960, obtained by the two shareholders by the manner of the distributions. Section 28 is a very remarkable piece of legislation and far from easy to construe.

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[HIS LORDSHIP then referred to s. 28 and s. 43 of the Finance Act, 1960, relevant provisions of which are set out at footnote \*, pp. 1253, 1254, ante, intimating that s. 28 (3) had particular importance in the appeal of the second taxpayer (Mrs. Hague) and, turning to the Case Stated in the appeal of the first taxpayer (Mr. W. T. Hague), read the paragraphs therefrom which are set out at p. 1255, letter A, to p. 1258, letter F, ante. HIS LORDSHIP stated that the findings of the commissioners (set out at p. 1258, letters B to G, ante) were of great importance, and continued:] The conclusions of the Special Commissioners include findings of fact, which have to be accepted for the purpose of the appeal, unless the finding is one which no reasonable tribunal could reach. The findings of the commissioners therefore, form an awkward obstacle to be overcome by the taxpayers. Reliance, however, was strongly placed on the observations of the House of Lords in *Inland Revenue Comrs. v. Brebner* (2). In that case the commissioners held that the notice should be discharged because the transactions were entered into for bona fide commercial reasons and that the freedom from tax obtained was not one of their main objects. LORD PEARCE said (3):

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"Admittedly, an object of the carrying out of the broad scheme by way of the resolutions was a tax advantage; but that which had to be ascertained was the object (not the effect) of each inter-related transaction in its actual context, and not the isolated object of each part regardless of the others. The subsection would be robbed of all practical meaning if one had to isolate one part of the carrying out of the arrangement, namely, the actual resolutions which resulted in the tax advantage, and divorce it from the object of the whole arrangement. The method of carrying it out was intended as one part of a whole which was dominated by other considerations.

"As the Lord President (LORD CLYDE) said (4) 'The material question is not what was the effect of each or all of the inter-related transactions, the question is what was the main object or objects for which any of them was adopted. Section 28 (1) of the Finance Act, 1960 draws a clear distinction between effect and object. It was to this latter question that the Special

(1) [1968] 1 All E.R. 1096.

(2) [1967] 1 All E.R. 779; [1967] 2 A.C. 18.

(3) [1967] 1 All E.R. at p. 781; [1967] 2 A.C. at pp. 27, 28.

(4) The reference is to the judgment of the Lord President in the case when before the Court of Session, sitting as the Court of Exchequer in Scotland.



Commissioners rightly directed their attention. To do so they had to consider each particular transaction in the series in its proper setting'. For those reasons, I am of opinion that the Special Commissioners came to a reasonable conclusion on the evidence before them. They could have reached a contrary conclusion, which would have been equally unassailable, had they taken a different view of the evidence; but it was they who heard the witnesses, and I see no reason to suppose that their decision was not just and sensible. I entirely agree with the judgment of the Lord President."

Accordingly, LORD PEARCE said that he would dismiss the appeal. LORD UTHORP said (5):

"My lords, in the First Division the Lord President, delivering the first judgment, with which the other Lords of Session agreed, put it in a nutshell when he said: 'The issue raised in the case is a pure question of fact and from the facts found proved by the Special Commissioners there was ample evidence on which they could find as they did. The question which the Special Commissioners had to determine was what was the object in the mind of the respondent in entering into the transactions in question, and this is essentially a matter of fact and of inference for the commissioners.' With this I wholly agree. My lords, I would only conclude my speech by saying only that, when the question of carrying out a genuine commercial transaction, as this was, is considered, the fact that there are two ways of carrying it out—one by paying the maximum amount of tax, the other by paying no, or much less, tax—it would be quite wrong, as a necessary consequence, to draw the inference that, in adopting the latter course, one of the main objects is, for the purposes of the section, avoidance of tax. No commercial man in his senses is going to carry out commercial transactions except on the footing of paying the smallest amount of tax involved. The question whether in fact one of the main objects was to avoid tax is one for the Special Commissioners to decide on a consideration of all the relevant evidence before them and the proper inferences to be drawn from that evidence."

Counsel for the taxpayers, in seeking to apply those observations, argued that in the present case the commissioners really misdirected themselves in drawing an inference that one of the main objects of the company's operations was to avoid taxation, and he pointed to the inconsistency between their final findings in para. 9 of the Case and their statement in para. 4 (7):

"At the time when this was arranged, there was no question of the company either requiring further capital, or being over-capitalised. The sole purpose of capitalisation and issue of bonus shares was to put the company into a position to pay out £284,235 by means of a reduction of capital, and the sole purpose of reducing the capital was to pay over to stockholders money which was considered surplus to the company's requirements."

The concluding words of the same paragraph, however, contain an observation that tax considerations were borne in mind (see p. 1256, letter C, ante). It is, in my view, impossible to say that the commissioners could not reasonably have reached the conclusions which they expressed para. 9 of the Case; and it must be borne in mind that the terms of s. 28 (1) plainly place on the taxpayer the onus of showing that his case falls within the conditions requisite for escape from the section. I think that (Cross, J., (6) reached the correct result on this first point.

On the second point the question is one of quantification. The judge correctly stated (7) that the problem appears to be to discover how much of the sum received by the first taxpayer, which was obviously "the consideration" referred

(5) [1967] 1 All E.R. at p. 784; [1967] A.C. at p. 30.

(6) [1968] 1 All E.R. at p. 1103, letter D.

(7) [1968] 1 All E.R. at p. 1103, letters H, I.

A to in the section, was attributable to the £129,490 which prior to the capitalisation was available for distribution by way of dividend. The judge rejected the submission on behalf of the taxpayer that none of it was so attributable, but he also rejected the contention on behalf of the Crown that the proportion of the sum received by the first taxpayer which was to be attributable to the £129,490 was the fraction 129,490 over 284,235, and adopted as the denominator for the fraction the figure of 473,725, which was the figure (in pounds) of the company's increased capital. The problem is not a simple one, but I have come to the conclusion that the fraction stated by Cross, J., (8) is not the correct one and the denominator of 284,235 is the correct figure, being the amount (in pounds) that was distributed to the shareholders. Accordingly, I would allow the appeal on this point in favour of the Inland Revenue Commissioners.

C The remaining point relates to the second taxpayer, Mrs. Hague, whom, by the other notice under s. 28, it is sought to assess on the amount paid in respect of the shares which she held in the company. This question is far from simple. Cross, J., decided (8) the question against the taxpayer, really applying the decision of UNGOED-THOMAS, J., in *Inland Revenue Comrs. v. Brook* (9). It is evident that Cross, J., (8) felt considerable doubt about the correctness of that decision.

D Now under the scheme of the Income Tax Acts dating back, I think, to the Income Tax Act, 1842, before the development of the married woman's separate property and its recognition in the Married Women's Property Acts, the income of a married woman, living with her husband, was treated as part of the income of the husband, and not as her income, and the tax on it was assessed on the husband. The income was "deemed to be the income of the woman's husband". That is a quotation from the section. Nowadays, either husband or wife by an appropriate notice can secure separate assessments but secure no advantage as regards the total amount of taxation. The husband, otherwise, is the person liable to pay, though there is a secondary provision enabling the tax to be collected from the wife, if the husband fails to pay it: see s. 354, s. 355, s. 356 and s. 359 of the Income Tax Act, 1952. So the wife is not assessed to tax if she is living with her husband and no notice requiring separate assessment has been served, and no notice requiring separate assessment has been served in the present case. The second taxpayer, Mrs. Hague, is in this position for the purposes of this appeal. She obtains no tax advantage in respect of tax on her income because she is not assessed to any tax. Her husband may obtain an advantage no doubt in respect of the tax which he might have to pay on her income.

G Now, it is necessary to examine the provisions of s. 43 (4), para. (g), and s. 28 (3) of the Finance Act, 1960, which I will read again. I will read s. 43 first. The material part is, of course, para. (g), as I have said.

H " 'Tax advantage' means a relief or increased relief from, or repayment or increased repayment of, income tax, or the avoidance or reduction of an assessment to income tax or the avoidance of a possible assessment thereto, whether the avoidance or reduction is effected by receipts accruing in such a way that the recipient does not pay or bear tax on them, or by a deduction in computing profits or gains."

I I should say here that a strenuous argument was put forward on behalf of the Crown in regard to the words "possible assessment". It was suggested that, as the second taxpayer or her husband might at any time give a notice requiring separate assessments, it was possible, therefore, that the assessment might arise and that the second taxpayer might thereby become taxable and might therefore possibly become assessable for the purpose of this paragraph. I do not accept that argument. It seems to me that "possible assessment" was not directed to future and what might be improbable events, certainly future events which may or may not happen. That is not, I think, the context in which the paragraph has been expressed.

Now I turn to s. 28 (3). I will read it again:

"Where this section applies to a person in respect of any transaction or transactions, the tax advantage obtained or obtainable by him in consequence thereof shall be counteracted by such of the following adjustments, that is to say an assessment or additional assessment, the nullifying of a right to repayment or the requiring of the return of a repayment already made (the amount to be returned being chargeable under Case VI . . .",

and so on. I need not read, I think, the rest of the subsection. The words seem to me to be directed to a person who is assessable to tax and have no relevance to a person who is not assessable to tax.

In my view, the second taxpayer has not obtained any tax advantage, in the situation that I have stated, within the definition of "tax advantage" contained in s. 43 (4), para. (g), of the Act of 1960. This is clinched by the provisions of s. 28 (3), which I have just read, which refers, as I have said, to "assessment, additional assessment, right to repayment", and so on, which might be appropriate to the husband but are quite inappropriate to a married woman who is not assessable to the tax. As regards the husband, the provisions of sub-s. (2) refer to a person who receives something, and the husband has not received the money, because it has been paid to his wife.

Accordingly, in my opinion the second taxpayer's appeal succeeds and the notice served on her should be discharged.

**SALMON, L.J.:** I agree, and add a word only because we are differing from the judge (10) on two points. As far as the first point is concerned, the onus is on the first taxpayer to prove that the transactions to which DANCKWERTS, L.J., has referred had not, as one of their main objects, the avoidance of tax. This issue is really entirely an issue of fact. The commissioners found against the first taxpayer on this point, and I am not at all surprised. The judge (11) felt that he was bound by the commissioners' finding, and indeed expressed the view that on the facts in the case it is difficult to see how they could have properly come to any other finding on this point. I entirely agree with the judge.

The second point is very much more difficult. It concerns what is the appropriate fraction, for the purpose of assessing tax, to be applied to the dividends paid. Leaving out the hundreds and merely referring to the nearest thousand, is it 129,000 as an numerator over 284,000 as a denominator, as the Crown contends, or 129,000 over 473,000 as the taxpayer now contends and as the judge decided (12)? I, like DANCKWERTS, L.J., differ from the judge. I think that the correct fraction is 129,000 over 284,000.

Counsel for the taxpayers said that as the original scheme was to return £284,000 odd which was then the capital of the company we ought to reach a different conclusion. He said that in effect the whole scheme was to reduce capital. That was the sole purpose of the scheme. Since, however, the company could not very well be left without any capital, the capital was first of all increased by capitalising £129,000 of the undistributed profits and £60,000 that was available in respect of the redemption preference shares, so that the capital came to £473,000, and it was then reduced—the whole scheme was to reduce capital—by £284,000.

I cannot accept that contention. I can see the force of it if it were possible in the light of the facts found, to look on the prime purpose of the transaction as being reduction of capital; but nothing seems to me to be further from reality. This company had very nearly £600,000 of undistributed profits. I quote two short passages from the Case which seem to me to reveal that the sole purpose of the transaction was to get surplus cash into the hands of the shareholders. "The company thus had money surplus to its requirements" (see para. 4, (5) p. 1255, letter I, ante). "It was decided that £284,235 should be paid out to stockholders, such money being surplus to the company's requirements" (see para. 4 (6),

(10) [1968] 1 All E.R. 1096.

(11) [1968] 1 All E.R. at p. 1103.

(12) [1967] 3 All E.R. at p. 1104, letter B.



- A p. 1255, letter I, ante). Pausing, there they hit on £284,000 which happened to be the capital of the company at that time) for the obvious reason, I think, that they reasonably considered that the best way of achieving their object was by a reduction of capital, and the only capital at that stage was £284,000. So that was a sum of money that they decided should be returned to the stockholders. If they had paid out surplus cash as a dividend from undistributed profits, it
- B would have been assessable for surtax in the hands of the stockholders.

Then in para. 4 (7) of the Case Stated (see p. 1256, letter B, ante) it is said: "At the time when this was arranged, there was no question of the company either requiring further capital, or being over-capitalised." If the real object of the exercise was to reduce capital, it seems very odd that the company was not over-capitalised, because it is only when a company is over capitalised that

- C commercially you reduce the capital. The Case goes on:

"The sole purpose of capitalisation and issue of bonus shares was to put the company into a position to pay out £284,235 by means of a reduction of capital, and the sole purpose of reducing the capital was to pay over to stockholders money which was considered surplus to the company's requirements."

- D I think that perhaps this question can be tested in this way: supposing that, instead of hitting on the magic figure of £284,000 to pay out to the shareholders, the company, for exactly the same reasons as those expressed in the Case, had decided to pay out £129,000 to the stockholders: £129,000 is taken from the undistributed profits and capitalised, together with the £60,000 to which I have
- E already referred; then those capitalised profits and that capitalised £60,000 is issued in the form of bonus shares to stockholders, so that the total issued paid-up capital is £473,000, and then the capital is reduced by £129,000; that is very satisfactory from the point of view of the stockholders. Instead of £129,000 being distributed, as it could have been, as a dividend out of the accumulated profits, which would have had the uncomfortable result of making them liable
- F to surtax, it comes to them as a reduction in capital. Now, could they say: "Oh, well, really you must look on this transaction as nothing more than an ordinary reduction in capital, and although I happen to have received the £129,000 which came into the capital from the undistributed profits, you can tax me only on £129,000  $\times$  129 over 473"?

- G I think that this would be ridiculous, because it is quite obvious that the £129,000 of undistributed profits was put into the pockets of the stockholders. I do not think it makes the slightest difference that £284,000 was paid out instead of £129,000; instead of the fraction being 129 over 129 (viz., the whole) as it would have been if £129,000, had been paid out, the right fraction is 129,000 over 284,000, since only £129,000 came out of undistributed profits.

- H The third point affects the second taxpayer. No application had been made by her or her husband to be assessed separately, and accordingly her income under the sections to which my lord has referred is deemed to be her husband's income, and he is assessed to tax not only in respect of his own personal income but also in respect of what, but for the Finance Act, 1960, would have been his wife's income. The second taxpayer is not liable to be assessed for tax. She has no personal tax liability, although provisions are made under s. 359 of the Income
- I Tax Act, 1952, that in the event of her husband not paying in respect of that part of his assessable income which derives from her it can be collected from her. However, she is not assessable and is not liable for tax; and the simple point, which I am bound to say appeals to my simple mind, made on her behalf is: "as I never was liable to tax, this transaction cannot have conferred any tax advantage on me".

Counsel for the Crown says that this is a most anomalous and indeed absurd state of affairs; and so it is. I think it has arisen because s. 28 was quite obviously designed primarily to strike at what are called dividend-stripping operations and

the like, and para. (d) of sub-s. (2) was grafted on to deal with transactions such as those with which we are concerned; and it seems to me that it was grafted on to the section without sufficient thought being given to the consequences. I believe that the position that would arise in respect of a wife's income deemed to be the husband's income and on which she could not be separately assessed was entirely overlooked. No provision was made to deal with it. If there is no such provision in the Act we certainly have no power to call it into existence by assuming it, as indeed it seems to me we have been invited to do.

The argument on behalf of the Crown (and I hope that I am not doing it an injustice) is that the second taxpayer, in effect obtained a tax advantage for her husband. She avoided an assessment being made on him. To my mind this argument is wholly untenable, because s. 28 and s. 43 (4) (g) do not, in my view, contemplate anything being done by the taxpayer. The taxpayer obtains the advantage. The assessment is avoided not because of any action of the taxpayer's but because of the transaction of which he receives the fruits. Looked at in that way, it seems to me quite impossible to support the contention of the Crown.

A most ingenious argument was addressed to us which was founded on the use of the word "possible" assessment in the definition of "tax advantage"; but it puts an unbearable strain on the ordinary construction of the words of the Act of 1960. I entirely agree with DANCKWERTS, L.J., that it is an impossible construction.

It is fairly plain, I think, from the judge's judgment that, if the matter had been *res integra*, he would probably have decided the case the other way. The point, however, had been specifically covered in *Inland Revenue Comrs. v. Brook* (13), and the judge felt that, although he had grave doubts about the correctness of that decision, on the whole he ought to follow it. We, fortunately, are not so inhibited in this court. One of the things that struck the judge (14), and strikes me, as very odd about the Crown's case was the results that would follow from s. 28 (3), if the Crown's case were right. The second taxpayer would then be assessed to tax on something which according to the legislature was not her income at all. It really comes to this: the Crown is saying that s. 28 (3) in cases such as the present (which perhaps one can be certain it never contemplated for a moment) was intending to impose a money penalty on the wife equal to the tax for which she would have been liable had the income not been deemed to have been her husband's. This contention does not commend itself to me. It is quite plain, in my view, that s. 28 (3) applies to people in the position of the first taxpayer in respect of that part of his income which is his own personal income. Because of a lacuna in the Act of 1960, he escapes here in respect of that part of his income which was his wife's personal income and is deemed to be his. There is this lacuna in the Act of 1960 and we cannot intervene to fill the gap. Parliament has certainly attempted to do so (maybe successfully) by s. 25 of the Finance Act, 1962; but that has no reference to the facts of this case. I would accordingly allow the appeal in relation to what I call the second and third points.

**FENTON ATKINSON, L.J.:** I agree with both judgments, and I do not think that there is anything which I can usefully add.

*First taxpayer's appeal dismissed, and cross-appeal of the Crown allowed. Second taxpayer's appeal allowed. Leave to appeal to the House of Lords refused (to the Crown).*

Solicitors: *Solicitors of Inland Revenue: Pritchard, Englefield, Leader & Henderson, agents for Knott & Castle, Manchester (for the taxpayer).*

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

[END OF VOLUME TWO.]

(13) [1967] 3 All E.R. 620; [1968] Ch. 255.

(14) [1968] 1 All E.R. at p. 1104, letters D, E.